No. 13-10

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

FRIENDS OF THE EVERGLADES, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under 33 U.S.C. 1369(b)(1) over a petition for review challenging the Environmental Protection Agency's Water Transfers Rule, 40 C.F.R. 122.3(i).

PARTIES TO THE PROCEEDING

Petitioners, who were respondents to the petitions for review in the court of appeals, are the United States Environmental Protection Agency and its Acting Administrator.

Respondents are Friends of the Everglades, Miccosukee Tribe of Indians of Florida, Florida Wildlife Federation, Inc., Sierra Club, Inc., Environmental Confederation of Southwest Florida, and the States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington and the Government of the Province of Manitoba, Canada (petitioners in the court of appeals) as well as South Florida Water Management District, Ernie Barnett, and United States Sugar Corporation (intervenors in the court of appeals).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA) and the Acting Administrator of the EPA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 699 F.3d 1280.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2012. Petitions for rehearing were denied on February 28, 2013 (App., *infra*, 17a-20a). On May 21, 2013, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including

June 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this petition. App., *infra*, 21a-22a.

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to respond comprehensively to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits "the discharge of any pollutant" except in compliance with other specified sections of the Act, including (as pertinent here) Section 402. 33 U.S.C. 1311(a), 1342. The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The term "navigable waters," in turn, is defined to mean "the waters of the United States." 33 U.S.C. 1362(7). The Act does not define the term "addition."

Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) permit program, under which the EPA or a qualifying State "may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the Act]." 33 U.S.C. 1342(a)(1) and (b). NPDES permits generally control point-source discharges to waters of the United States by establishing permissible rates, concentrations, quantities of specified constituents, or other limitations as appropriate. See 33 U.S.C. 1342(a)(1) and (2); see generally 40 C.F.R. Pts. 122, 125; see also, *e.g., Friends*

of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).

b. Promulgated in 2008, the EPA's Water Transfers Rule provides that a "water transfer" as defined in the Rule—*i.e.*, "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"—does not require an NPDES permit. 40 C.F.R. 122.3(i); see 73 Fed. Reg. 33,697 (June 13, 2008). The Water Transfers Rule "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. 122.3(i). The Rule's preamble provides additional examples of activities that are subject to NPDES permitting requirements (such as the discharge of water that had been withdrawn for an industrial or commercial use before the discharge) and those that generally are not (such as hydroelectric operations and movements of water through dams or reservoir systems). 73 Fed. Reg. at 33,704-33,705.

The Rule codifies the EPA's view that a water transfer does not constitute a "discharge of a pollutant" because it does not result in the "addition of any pollutant to navigable waters." 33 U.S.C. 1362(12)(A); see 73 Fed. Reg. at 33,699 ("Through today's rule, the Agency concludes that water transfers, as defined by the rule, do not require NPDES permits because they do not result in the 'addition' of a pollutant."). In *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (*Miccosukee*), the Court referred to that interpretation as the "unitary waters" theory, see *id*. at 104, 106, while noting the absence (at that time) of "any administrative documents in which EPA has espoused that position," *id.* at 107. The Rule fills

that gap by providing an express EPA endorsement of the interpretation of the CWA term "addition of any pollutant to navigable waters" that the government had previously advocated in its amicus brief in *Miccosukee*.

c. To "establish a clear and orderly process for judicial review," the CWA vests federal courts of appeals with exclusive, original jurisdiction to review certain categories of EPA decisions implementing the Act. See H.R. Rep. No. 911, 92d Cong., 2d Sess. 136 (1972) (House Report). As relevant here, EPA actions originally reviewable in the courts of appeals include

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

33 U.S.C. 1369(b)(1)(E) and (F).

Petitions for review generally must be filed within 120 days after the challenged EPA action. 33 U.S.C. 1369(b)(1).[1] When multiple petitions for review are filed to challenge a single EPA action, those petitions are consolidated before one court of appeals. 28 U.S.C. 2112(a)(3). EPA actions "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2); see *Decker* v. *NEDC*, 133 S. Ct. 1326, 1334 (2013). Section 1369(b) thereby promotes, *inter alia*, the ability of regulators, the regulated community, and

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[1] The Act establishes an exception to that requirement when a petition for review is based solely on grounds arising after the 120th day. 33 U.S.C. 1369(b)(1). That exception is not implicated here.

the public to rely on the validity of EPA regulations that are not promptly challenged or that are upheld by a court of appeals.

Civil suits to enforce the CWA may be brought by the EPA pursuant to 33 U.S.C. 1319(b). The Act also establishes criminal penalties for negligent and knowing violations. See 33 U.S.C. 1319(c). In addition, subject to various conditions, the CWA authorizes private enforcement of the Act through citizen suits. 33 U.S.C. 1365. If a regulation or other EPA action is subject to direct court of appeals review under Section 1369(b)(1), the action is not subject to collateral attack in a CWA citizen suit. See *Decker*, 133 S. Ct. at 1334.

When the EPA engages in final agency action (including the promulgation of regulations) that is reviewable under general principles of administrative law, but that falls outside the categories enumerated in Section 1369(b)(1), the EPA action may generally be challenged in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704. An APA suit may be brought at any time within six years from the date of the challenged agency action. 28 U.S.C. 2401(a). Section 1369(b)(2), which precludes collateral attack on EPA actions "with respect to which review could have been obtained under [Section 1369(b)(1)]" in civil and criminal enforcement proceedings (including citizen suits), would not insulate from such attack regulations falling outside Section 1369(b)(1). The susceptibility of those EPA regulations to challenge in enforcement proceedings would depend on, *inter alia*, the statutory provision under which the proceeding is brought and general principles of administrative law.

2. a. After the Court's decision in *Miccosukee*, *supra*, several environmental organizations brought a citizen suit in federal district court against a Florida water management district. Plaintiffs asserted that, in pumping water from one body of navigable waters to another (from canals to Lake Okeechobee) without an NPDES permit, the water district was making unauthorized discharges of pollutants in violation of the CWA. The United States intervened and, in a motion for summary judgment, argued that the court should defer to an August 2005 EPA memorandum interpreting the CWA as not requiring NPDES permits for a transfer of water from one body of navigable waters to another. See 73 Fed. Reg. at 33,699 (summarizing interpretive memorandum). The motion was denied. *Friends of the Everglades, Inc.* v. *South Fla. Water Mgmt. Dist.*, No. 02-80309, 2006 WL 3635465, at *2 (S.D. Fla. Dec. 11, 2006).

In June 2006, in the rulemaking that later culminated in the promulgation of the Water Transfers Rule, the EPA proposed to codify its prior interpretive memorandum as a regulation. 71 Fed. Reg. 32,887 (June 7, 2006). In December 2006, the district court concluded that the water transfers at issue in the citizen suit violated the CWA because they had not been authorized by any NPDES permit. *Friends of the Everglades*, 2006 WL 3635465, at *48. The court held that the CWA "unambiguous[ly]" requires an NPDES permit for a transfer of water from one body of navigable waters to another, even if the pump or other transfer facility does not alter the water or put it to an intervening use. *Id.* at *42-*43, *47-*48. The United States and other parties appealed.

b. Shortly after Federal Register publication of the final Water Transfers Rule in June 2008, multiple peti-

tions for review of the Rule were filed pursuant to Section 1369(b)(1) and consolidated in the Eleventh Circuit. Those challenges were stayed pending resolution of the appeal in the citizen suit from the 2006 district court decision requiring an NPDES permit. In that appeal, the Eleventh Circuit reversed the district court's judgment. *Friends of the Everglades* v. *South Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (2009) (*Friends I*), cert. denied, 131 S. Ct. 643 and 131 S. Ct. 645 (2010). Applying the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984), the court of appeals found that the Act was ambiguous. It therefore deferred to the EPA's view, as reflected in the intervening Water Transfers Rule, that the CWA does not require an NPDES permit for a transfer of water from one body of navigable waters to another. *Friends I*, 570 F.3d at 1218-1220, 1227-1228.

c. Following the decision in *Friends I*, the Eleventh Circuit lifted the stay of the petitions for review of the Water Transfers Rule. The EPA filed a motion for summary denial of the petitions on the ground that the Water Transfers Rule was valid as a matter of law under *Friends I*. One of the challengers filed a motion to remand the matter to district court, while other challengers moved to dismiss their own petitions for lack of jurisdiction. A motions panel denied all those motions. The panel identified a "jurisdictional issue," on which "other circuits have taken somewhat different approaches," regarding the court of appeals' authority to review NPDES-related regulations under Section 1369(b)(1). 5/6/11 Order 4 (citing *National Cotton Council of Am.* v. *EPA*, 553 F.3d 927, 932-933 (6th Cir. 2009), cert. denied, 559 U.S. 936 (2010); and *Northwest Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1015-1018 (9th Cir. 2008)).

After the submission of briefs and oral argument, the Eleventh Circuit dismissed the petitions for lack of jurisdiction. App., *infra*, 1a-16a. The court held that direct court of appeals review of the Water Transfers Rule was not authorized by either Section 1369(b)(1)(E) or (F). *Id.* at 8a-14a.

First, the court of appeals concluded that 33 U.S.C. 1369(b)(1)(E) did not authorize it to review the Water Transfers Rule because the Rule could not be considered an "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" of Title 33. App., *infra*, 9a-12a. The court determined that the Rule does not create an "effluent limitation" because it "explicitly allows entities to introduce pollutants into navigable bodies of water." *Id.* at 10a. The court also held that the Rule is not a "limitation under section 1311, 1312, 1316, or 1345" because the EPA had stated that the Rule was promulgated pursuant to Sections 1342 and 1361. *Id.* at 10a-11a. Although the government had argued that the Rule was promulgated under Section 1311 because Section 1311 references Section 1342, the court stated that Section 1311 does not authorize the EPA to exempt activities from the NPDES program. *Id.* at 11a. The court further disagreed with the EPA's view that the Rule, like the consolidated permit regulations before the D.C. Circuit in *NRDC, Inc.* v. *EPA,* 673 F.2d 400, cert. denied, 459 U.S. 879 (1982), operated as a limitation on permit issuers and was therefore reviewable under Section 1369(b)(1)(E). App., *infra*, 11a-12a. The Eleventh Circuit distinguished *NRDC* on the ground that the limitations held to be reviewable in that case had operated as "restriction[s] on the untrammeled discretion of the industry." *Id.* at 12a (quoting *NRDC*, 673 F.2d at 404-405) (citations omitted).

Second, the court of appeals concluded that the Water Transfers Rule was not reviewable under Section 1369(b)(1)(F) because it does not constitute an EPA action in "issuing or denying any permit under Section 1342." App., *infra*, 12a-14a. The Eleventh Circuit acknowledged this Court's holding in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (per curiam), that Section 1369(b)(1)(F) vests the courts of appeals with jurisdiction to review an EPA veto of an NPDES permit. The court found *Crown Simpson* distinguishable, however, on the ground that the EPA veto at issue there had the "precise effect" of a permit denial. App., *infra*, 13a-14a (quoting *Crown Simpson*, 445 U.S. at 196). The Eleventh Circuit disagreed with the EPA's contention that Section 1369(b)(1)(F) should be read to encompass regulations governing or relating to NPDES permitting, and it disagreed with the Sixth Circuit's decision to that effect in *National Cotton Council*. *Id.* at 14a.

The EPA and other intervenors filed petitions for rehearing en banc, which the Eleventh Circuit summarily denied. App., *infra*, 20a.

REASONS FOR GRANTING THE PETITION

This case presents a question of exceptional importance concerning the proper time and manner of judicial challenges to the Water Transfers Rule and similar NPDES-related regulations. See *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980) ("We granted certiorari * * * because of the importance of determining the locus of judicial review of the actions of EPA [under the Clean Air Act]."). Whether original judicial review lies in the court of appeals pursuant to Section 1369(b)(1) has significant consequences for the applicable statute of limitations and mode of litigation. Taken together, Section 1369(b)(1) and (2) require that any

challenges to specified categories of EPA action must be brought promptly, and that all challenges to a particular covered action will be resolved together in a single forum. That mode of review ensures that the validity of any covered EPA action that is upheld on direct judicial review (or that is not challenged within the applicable 120-day period) can thereafter be taken as given. Section 1369(b) also ensures that, if a reviewing court finds a covered EPA action to be legally deficient, the agency can address the defect promptly, before substantial reliance interests have formed.

Under the Eleventh Circuit's decision, by contrast, NPDES permitting regulations such as the Water Transfers Rule would potentially be subject to judicial challenge over a much longer period of time and in a variety of fora. That approach would create a risk both of prolonged uncertainty, and of conflicting judicial decisions, regarding the validity of a single EPA action. Such a regime would disserve the interests not only of the EPA, but also of regulated parties and the public. The Rule at issue in this case, for example, declares that water transfers as defined in the Rule do not require NPDES permits. Under the Eleventh Circuit's approach, however, persons who engage in water transfers will have no assurance, even years after the period for direct court of appeals review of the Rule has expired, that their conduct will be treated as lawful.

The decision below is in tension with this Court's rejection of "the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [CWA Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont de Nemours & Co.* v. *Train*, 430

U.S. 112, 136 (1977). It is also in conflict with the Sixth Circuit's decision in *National Cotton Council of America* v. *EPA*, 553 F.3d 927, 933 (2009) (recognizing Section 1369(b)(1)(F) jurisdiction to review "regulations governing the issuance of permits under Section 402") (citation omitted), cert. denied, 559 U.S. 936 (2010), and with the D.C. Circuit's decision in *NRDC, Inc.* v. *EPA*, 673 F.2d 400, 402-405 (recognizing Section 1369(b)(1)(E) jurisdiction over NPDES regulations as "limitations" on "permit issuers") (citation omitted), cert. denied, 459 U.S. 879 (1982). Further review is warranted to resolve those conflicts and, consistent with the Court's precedents and the Act's purpose, to accord Section 1369(b)(1) a "practical rather than a cramped construction." *Id.* at 405.

A. EPA Has Standing To Seek Certiorari

This Court is authorized to grant a petition for a writ of certiorari "upon the petition of any party." 28 U.S.C. 1254(1). By its terms, that provision "covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011). Although the governing statute allows "any party" to a case in a federal court of appeals to seek a writ of certiorari, the petitioner must also have Article III standing. In addition, "[a]s a matter of practice and prudence, [this Court] ha[s] generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed [the Court] to do so." *Id.* at 2030. "As a general rule," therefore, "a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." *Mathias* v. *Worldcom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam) (citing *New York Tel. Co.* v. *Maltbie*, 291 U.S. 645 (1934) (per curiam)). That rule does not apply, however, when there are "policy reasons * * * of suffi-

cient importance to allow an appeal" by the prevailing party. *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 335 n.7 (1980).

Because the petitions for review of the Water Transfers Rule were dismissed (albeit for lack of jurisdiction rather than on the merits), the EPA is nominally a prevailing party. Nevertheless, review by this Court would be consistent with the constitutional and prudential considerations that this Court has identified as potential obstacles to review at the behest of a prevailing party. The EPA satisfies Article III's case-or-controversy requirement because the decision below will have a continuing impact on the manner in which the Water Transfers Rule and analogous EPA regulations will be implemented and challenged. See *Camreta*, 131 S. Ct. at 2028-2029 (requiring "personal stake" and "ongoing interest" in litigation for prevailing petitioner to satisfy Article III). The challengers below sought dismissal of their own petitions for lack of jurisdiction, while the EPA opposed that motion on the ground that courts of appeals have exclusive, original jurisdiction to review NPDES permitting regulations such as the Water Transfers Rule. The challengers' evident purpose in seeking that jurisdictional ruling from the court of appeals (rather than simply withdrawing their own petitions for review) was to preserve their ability to challenge the Water Transfers Rule in fora other than the Eleventh Circuit. The judgment below rejecting the EPA's interpretation of Section 1369(b)(1)(E) and (F) will have an adverse "prospective effect" (*id.* at 2029) on the agency, both in future challenges to the validity of the Water Transfers Rule and in future challenges to similar EPA rules.

The EPA is thus a prevailing party here in an even more limited sense than were the government officials in *Camreta*, who had standing to seek this Court's review of the court of appeals' determination that they had acted unconstitutionally, and who obtained vacatur of that determination on the ground of mootness, even though the court of appeals' separate holding that the officers had qualified immunity protected them from any risk of damages liability. See *Camreta*, 131 S. Ct. at 2028-2036. There is also no concern about a lack of adversarial presentation here in light of the vigorous litigation of the question presented by the parties below and their "ongoing interest in the dispute." *Id.* at 2028. This case thus "features 'that concrete adverseness which sharpens the presentation of issues.'" *Ibid.* (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983)).

Nor do prudential considerations bar this Court's review. The Eleventh Circuit's jurisdictional holding, with which the EPA disagrees, is both "essential to the judgment" and "binding" on the EPA "in future litigation" within that circuit. *Mathias*, 535 U.S. at 684. And the policy implications of that holding are "of sufficient importance to allow an appeal" by the EPA notwithstanding its nominally prevailing status. *Camreta*, 131 S. Ct. at 2030 (quoting *Deposit Guar.*, 445 U.S. at 335 n.7). Resolution of the question presented will "have a significant future effect on" the operation of NPDES permitting rules. *Ibid.* As noted above, the judgment below will affect the ongoing litigation brought to challenge the Water Transfers Rule. If the Eleventh Circuit's decision below is reversed, review will proceed in that court, informed by its prior decision in *Friends I* deferring to the Water Transfers Rule. But if the deci-

sion below stands, review will likely proceed in a pending case within the Second Circuit,[2] which, prior to the Rule's promulgation, ordered a water transfer operator to obtain an NPDES permit.[3] The judgment below will also affect future challenges to similar NPDES regulations—creating significant uncertainty for the EPA as a regulator, and for regulated parties with respect to the legality of their own water transfers. The EPA therefore satisfies all statutory, constitutional, and prudential requirements to obtain this Court's review of the question presented here.

B. The Decision Below Is In Tension With Decisions Of This Court And With The Purposes Of Section 1369(b)

The decision below disserves Congress's intent by creating protracted uncertainty for the EPA, the regulated community, and the public as to the validity of NPDES permitting regulations. The court of appeals' parsimonious reading of Section 1369(b)(1)(E) and (F), in derogation of Congress's purposes in authorizing direct court of appeals review, is in significant tension with this Court's decisions in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (per curiam), and *E.I. du Pont*, *supra*. In both of those decisions, the Court reasoned, based on the CWA's structure and objectives, that Section 1369(b)(1) should be read broadly to authorize direct review in the courts of appeals of EPA actions that affect CWA permitting decisions. The same consid-

[2] *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 08-Civ-5606 Docket entry No. 1 (S.D.N.Y. June 20, 2008); *States* v. *EPA*, 08-Civ-8430 Docket entry No. 1 (S.D.N.Y. Oct. 2, 2008).

[3] See *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of N.Y.*, 273 F.3d 481, 489-494 (2d Cir. 2001), and 451 F.3d 77, 80-87 (2d Cir. 2006), cert. denied, 549 U.S. 1252 (2007).

erations support court of appeals review of the Water Transfers Rule here.

1. In *Crown Simpson*, the Court held that the EPA's veto of an NPDES permit proposed by the state permitting authority was directly reviewable in the court of appeals under Section 1369(b)(1)(F), which authorizes review of EPA actions "in issuing or denying any [NPDES] permit." 445 U.S. at 195 (citation omitted). The Court explained that, if Section 1369(b)(1)(F) were read not to encompass the EPA's veto of a State-issued permit, "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-197. The Court concluded that, "[a]bsent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system." *Id.* at 197.

Under the pragmatic approach used by this Court in *Crown Simpson*, the Water Transfers Rule is fairly characterized as "the Administrator's action * * * in issuing or denying any permit." 33 U.S.C. 1369(b)(1)(F). Although the Rule is formally an interpretive denial of NPDES regulatory jurisdiction, the Rule has substantially the same practical effect as the blanket grant of a general NPDES permit for covered water transfers. The primary functional difference between the two is that a discharger of pollutants must generally comply with specified terms and conditions in order to invoke the protections of an NPDES general permit. Issued NPDES permits are often challenged in court, however, by petitioners who argue that the permit conditions are insufficiently stringent, and/or that the discharges should not be allowed to occur at all. The gravamen of

such challenges is that the terms and conditions contained in the permit do not constrain the permittee's discretion *enough*, not that the terms and conditions impose unwarranted burdens. Like the respondents who initially sought court of appeals review of the Water Transfers Rule in this case, such challengers contend that the EPA has inappropriately exempted from CWA liability conduct that ought to be treated as unlawful. Given the similarities between the two types of agency actions, and between the corresponding private challenges to those actions, it would be perverse to treat the absence of analogous terms and conditions in the Water Transfers Rule as a ground for holding the Rule not to be reviewable under Section 1369(b)(1)(F).

If the EPA viewed water transfers (as defined in the Rule) as pollutant discharges subject to NPDES permitting requirements, Section 1369(b)(1)(F) would unambiguously authorize direct court of appeals review of any general NPDES permits the agency might issue for specified categories of water transfers, and of the EPA's individual permitting decisions for particular water transfers. Section 1369(b)(2) in turn would unambiguously preclude judicial review of those permitting decisions in district court or outside the 120-day window prescribed by Section 1369(b)(1). It would be wholly inconsistent with the logic of the statutory scheme to allow the Water Transfers Rule to be challenged in multiple courts over a potentially indefinite period of time. See *Crown Simpson*, 445 U.S. at 197; *E.I. du Pont*, 430 U.S. at 136-137 (favoring Section 1369(b)(1) review of NPDES permitting regulations). The Eleventh Circuit provided no reason why Congress would have chosen to streamline and centralize judicial review of individual permitting decisions, while allowing piece-

meal review of an EPA regulation that categorically declares water transfers to be exempt from NPDES permitting requirements. That, however, is precisely the result of the decision below.

2. In *E.I. du Pont*, this Court held that the EPA's effluent limitations guideline regulations were directly reviewable in the courts of appeals under Section 1369(b)(1)(E), which provides for review of EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." Rejecting the industry challengers' contrary argument on the merits, the Court held that Section 1311 authorized the EPA "to issue regulations setting forth uniform effluent limitations for categories of plants." *E.I. du Pont*, 430 U.S. at 136; see *id.* at 122-136. The Court then observed: "Our holding that [Section 1311] does authorize the Administrator to promulgate effluent limitations for classes and categories of existing point sources necessarily resolves the jurisdictional issue as well." *Id.* at 136. The Court rejected the argument "that the reference to [Section 1311] [in Section 1369(b)(1)(E)] was intended only to provide for review of the grant or denial of an individual variance pursuant to [Section 1311(c)]." *Ibid.* That narrow construction, the Court explained, would "produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [CWA Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.* Similarly here, although the Water Transfers Rule is not an "effluent limitation," it serves as an "other limitation" under the CWA, 33 U.S.C. 1369(b)(1)(E), *i.e.*, a limitation on a permit issuer's authority. See pp. 20-22, *infra*.

3. The decision below thus disregards the Court's functional constructions of Section 1369(b)(1), made in furtherance of Congress's objective of streamlining judicial review over NPDES permitting actions. Contrary to Congress's intent to "establish a clear and orderly process for judicial review" under the CWA (House Report 136), both the EPA and regulated entities that rely on the Water Transfers Rule, or on other EPA regulations clarifying the scope of the NPDES permitting program, will encounter extended uncertainty about the legality of their conduct and face the risk of inconsistent judicial decisions. As the D.C. Circuit has observed, "[n]ational uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals." *NRDC*, 673 F.2d at 405 n.15. Without the prompt and consolidated court of appeals review provided by Section 1369(b)(1), "several different district courts would proceed to review the NPDES-related [regulations], with the attendant risk of inconsistent decisions initially and on appeal." *Ibid.* Indeed, even after both the post-*Miccosukee* Florida district court case and the multiple petitions for review challenging the Water Transfers Rule (see pp. 5-6, *supra*), a case challenging the validity of the Rule remains pending in a district court in New York (see pp. 13-14 & n.2, *supra*).

C. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

1. The decision below conflicts with the Sixth Circuit's decision in *National Cotton Council*, *supra*. That case involved consolidated petitions for review of a final EPA rule (40 C.F.R. 122.3(h)) providing that the direct application of pesticides to waters of the United States in accordance with the Federal Insecticide, Fungicide,

and Rodenticide Act, 7 U.S.C. 136 *et seq.*, was exempt from NPDES permitting requirements. *National Cotton Council*, 553 F.3d at 929. The Sixth Circuit held that Section 1369(b)(1)(F) authorized courts of appeals "to review the regulations governing the issuance of permits under [S]ection 402 * * * as well as the issuance or denial of a particular permit." *Id.* at 933 (quoting *American Mining Cong.* v. *EPA*, 965 F.2d 759, 763 (9th Cir. 1992)). Under the Sixth Circuit's holding, Section 1369(b)(1)(F) would undisputedly authorize direct court of appeals review of the Water Transfers Rule. Indeed, the Eleventh Circuit acknowledged the conflict between its decision and that in *National Cotton Council*. See App., *infra*, 14a.

Like the Sixth Circuit in *National Cotton Council*, the Ninth Circuit has repeatedly exercised jurisdiction pursuant to Section 1369(b)(1)(F) to review NPDES permitting regulations. In *American Mining Congress*, for example, the Ninth Circuit adjudicated a petition for review of an EPA stormwater rule specifying that discharges from certain inactive mines were not subject to NPDES permitting. 965 F.2d at 763 (citing *NRDC, Inc.* v. *EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981)); see, *e.g.*, *NRDC* v. *EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (holding rule that exempted discharges of oil and gas construction activities from NPDES permitting to be reviewable under Section 1369(b)(1)(F), which "authorizes appellate review of EPA rules governing underlying permit procedures") (citation omitted); *Environmental Def. Ctr., Inc.* v. *EPA*, 344 F.3d 832, 842-843 (9th Cir. 2003) (holding rule that specified which municipal separate storm sewer systems and stormwater discharges are and are not subject to NPDES permitting to be reviewable under Section 1369(b)(1)), cert. denied, 541 U.S. 1085

(2004); *NRDC, Inc.* v. *EPA*, 966 F.2d 1292, 1296-1297, 1304-1307 (9th Cir. 1992) (holding rule that exempted from NPDES permit requirements various types of "light industry" to be reviewable under Section 1369(b)(1)(F), based on the court's "power to review rules that regulate the underlying permit procedures").[4]

2. The decision below also conflicts with the decisions of other courts of appeals that have exercised original jurisdiction under Section 1369(b)(1)(E) to review actions that, like the Water Transfers Rule, are closely related to the promulgation of an "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." Although the CWA defines "effluent limitation," 33 U.S.C. 1362(11), it does not define "other limitation." Within the phrase "effluent limitation or other limitation," 33 U.S.C. 1369(b)(1)(E), however, the term "other limitation" can only refer to "limitations" that are *not* effluent limitations. See *Virginia Elec. & Power Co.* v. *Costle*, 566 F.2d 446, 449 (4th Cir. 1977) ("[W]e cannot assume that [Section 1369(b)(1)(E)'s] inclusion [of the

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[4] In *Northwest Environmental Advocates* v. *EPA*, 537 F.3d 1006 (2008), the Ninth Circuit applied Section 1369(b)(1)(F) more narrowly, concluding that the court lacked original jurisdiction over a challenge to an EPA rule that exempted certain vessel discharges from NPDES permitting. The court in *Northwest Environmental Advocates* distinguished between EPA regulations that interpret express exemptions contained in the CWA (which the court recognized were reviewable under Section 1369(b)(1)(F)), and exemptions from NPDES permitting that are not tethered to specific CWA provisions. See *id.* at 1016-1018. The Eleventh Circuit's decision in this case, however, conflicts with even that more limited view of reviewability under Section 1369(b)(1)(F). Unlike the regulatory exemption at issue in *Northwest Environmental Advocates*, the Water Transfers Rule reflects the EPA's interpretation of specific language in the CWA, namely the Act's definition of "discharge of a pollutant."

phrase 'other limitation'] was meaningless or inadvertent."); see also, *e.g.*, *ConocoPhillips Co.* v. *EPA*, 612 F.3d 822, 831 (5th Cir. 2010) ("We have jurisdiction over challenges to an agency's action that result in 'other limitations' under the CWA, and coolant water intake regulations are deemed 'other limitations.'").

In *NRDC*, *supra*, for example, the D.C. Circuit exercised original jurisdiction to review the EPA's Consolidated Permit Regulations. Those regulations do "not set any numerical limitations on pollutant discharge," but consist of a "set of procedures for issuing or denying NPDES permits." 673 F.2d at 402. The D.C. Circuit reasoned in pertinent part that the regulations qualified as "other limitation[s]" within the meaning of Section 1369(b)(1)(E) because the regulatory procedures for issuing or denying permits provided "a limitation on point sources and *permit issuers*." *Id.* at 405 (emphasis added) (citation omitted).

In the decision below, the Eleventh Circuit attempted to distinguish both the D.C. Circuit's decision in *NRDC* and the Fourth Circuit's similar decision in *Virginia Electric*, *supra*, in which the Fourth Circuit exercised original jurisdiction to review EPA regulations that established controls representing determinations of best available technology for minimizing adverse environmental impact from cooling water intake structures. See App., *infra*, 12a ("[T]he Fourth Circuit and the D.C. Circuit both emphasized that the limitations on permit issuers in those regulations operated as 'restriction[s] on the untrammeled discretion of the industry.'") (citing *NRDC*, 673 F.2d at 404-405, and quoting *Virginia Elec.*, 566 F.2d at 450). But the Water Transfers Rule, like the regulations at issue in *NRDC* and *Virginia Electric*, serves as a limitation on permit issuers (whether the

EPA or a state permitting authority) by distinguishing between those activities that do and those that do not require an NPDES permit.

The decision below, moreover, disregards the determination of the D.C. and Fourth Circuits, based on *Crown Simpson* and *E.I. du Pont*, to apply a "practical rather than a cramped construction" of Section 1369(b)(1). *NRDC*, 673 F.2d at 405; *Virginia Elec.*, 566 F.2d at 449-450. As the D.C. Circuit in *NRDC* concluded, "[i]f anything, the case for first-instance judicial review in a court of appeals is stronger for broad, policy-oriented rules." 673 F.2d at 405; see *id.* at 405 n.15 (citing *Virginia Elec.,* 566 F.2d at 451)). The Eleventh Circuit's conflicting decision turns that sound reasoning on its head.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13652

AGENCY NO. 40 CFR PART 122

FRIENDS OF THE EVERGLADES, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, INTERVENORS

No. 08-13653

AGENCY NO. 40 CFR PART 122

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, INTERVENORS

No. 08-13657

AGENCY NO. 40 CFR PART 122

FLORIDA WILDLIFE FEDERATION, INC., PETITIONERS
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, INTERVENORS

NO. 08-14921

AGENCY NO. 40 CFR PART

SIERRA CLUB, INC., ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, PETITIONERS
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

UNITED STATES SUGAR CORPORATION, INTERVENOR

NO. 08-16283

AGENCY NO. EPA-HQ-OW22

STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON, GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, STEPHEN L. JOHNSON, RESPONDENTS

[Filed: Oct. 26, 2012]

PETITIONS FOR REVIEW OF A DECISION OF THE ENVIRONMENTAL PROTECTION AGENCY

Before: BARKETT and PRYOR, Circuit Judges, and BATTEN,* District Judge.

PRYOR, Circuit Judge:

In this matter, we must decide whether we have original subject matter jurisdiction over several petitions for review of an administrative rule that exempts transfers of waters of the United States from the requirements for a permit under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, or whether we may avoid deciding that question and instead exercise hypothetical jurisdiction to decide the merits of the petitions. Friends of the Everglades, several other environmental organizations, nine states, the province of Manitoba, Canada, and the Miccosukee Tribe argue that original jurisdiction belongs in a district court, but they filed protective petitions for review of the water-transfer rule in this and another circuit after the Ad-

* Honorable Timothy C. Batten, Sr., United States District Court for the Northern District of Georgia, sitting by designation.

ministrator of the Environmental Protection Agency stated her position that the initial judicial review of the rule could be had only in the circuit courts of appeals. The Judicial Panel on Multidistrict Litigation consolidated the petitions in this Court. The South Florida Water Management District and the United States Sugar Corporation intervened to defend the rule alongside the Administrator. United States Sugar urges us to exercise hypothetical jurisdiction and deny the petitions. But we hold that, under the plain language of the governing statute, *id.* § 1369(b)(1), we lack original subject matter jurisdiction to review the petitions and we may not exercise hypothetical jurisdiction over them. We dismiss the petitions.

I. BACKGROUND

In 1972, Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). As part of this effort, the Act prohibited "the discharge of any pollutant by any person" except when permitted by law. *Id.* § 1311(a). The Act empowered the Administrator of the Environmental Protection Agency to issue permits for discharges of pollutants. *Id.* § 1342(a)(1). The Act granted broad authority to the Administrator "to prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters." *Id.* § 1252(a). The Act also granted the Administrator the authority to prescribe regulations to administer the Act. *Id.* § 1361(a). The Administrator interpreted this authority to allow her to grant permanent exemptions from the requirements for a permit. *See* 40 C.F.R. § 122.3.

In 2002, the Friends of the Everglades and the Fishermen Against the Destruction of the Environment sought an injunction to force the South Florida Water Management District to obtain a permit to transfer water from the polluted canals of the Everglades Agricultural Area into Lake Okeechobee. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009). The district court allowed several parties to intervene in the lawsuit, including the Environmental Protection Agency, the Miccosukee Tribe, and the United States Sugar Corporation. *Id.* The environmental groups argued that the water transfer introduced pollutants into the lake and was a discharge subject to the requirements for a permit. *Id.* at 1216. The Act defined "discharge" as "any addition of any pollutant to navigable waters from any point source." *Id.* (quoting 33 U.S.C. § 1362(12)). The Water District argued that, when it transferred pollutants from the canals to the lake, it did not alter the existing level of pollutants in United States waters. *Id.* at 1217. For that reason, the Water District argued that its activities did not fall within the definition of "discharge." *Id.*

After a two-month bench trial, the district court enjoined the Water District to apply for a permit from the Administrator. *Id.* at 1214-15. The district court interpreted the Clean Water Act to require a permit for "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 02-80309, 2006 WL 3635465, at *48 (S.D. Fla. Dec. 11, 2006), *rev'd*, 570 F.3d 1210 (11th Cir. 2009). The Water District appealed the judgment. 570 F.3d at 1215.

Before the district court entered its injunction, the Administrator issued a notice of proposed rulemaking to create an exemption for water transfers from the permit requirements of the Act. National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887, 32,891 (proposed June 7, 2006). After receiving public comments, the Administrator issued a notice of final rule. 73 Fed. Reg. 33,697, 33,708 (June 13, 2008) (codified at 40 C.F.R. § 122.3). The rule created a permanent exemption from the permit program for pollutants discharged from water transfers:

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

40 C.F.R. § 122.3(i). In the notice of final rule, the Administrator stated the position that "judicial review of the Administrator's action c[ould] only be had by filing a petition for review in the United States Court of Appeals within 120 days after the decision [wa]s considered issued for purposes of judicial review." 73 Fed. Reg. at 33,697.

Litigation ensued in two district courts. Several environmental organizations filed petitions to challenge the rule in the Southern District of New York. Nine states and the province of Manitoba, Canada, filed a parallel suit in that court, which consolidated

the actions. The Miccosukee Tribe and several other environmental organizations filed suit in the Southern District of Florida.

At the same time, the petitioners in those actions filed protective petitions for review in the Second Circuit and in this Circuit. The Judicial Panel on Multidistrict Litigation consolidated those petitions in this Court. *See* 28 U.S.C. § 2112(a)(3). We stayed the petitions during consideration of the appeal in *Friends of the Everglades v. South Florida Water Management District*. The Southern District of New York also stayed the actions in its court pending resolution of that appeal and of the consolidated protective petitions. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 630 F. Supp. 2d 295, 308 (S.D.N.Y. 2009).

In 2009, we reviewed the injunction issued by the district court in the light of the Administrator's new water-transfer rule. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d at 1218. We explained that, even though "all of the existing precedent" would have supported the decision of the district court, we had to accord the newly issued water-transfer rule deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 103 S. Ct. 2778 (1984). *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d at 1218, 1227-28. After applying the two-part test for *Chevron* deference, *see* 467 U.S. at 842-43, 103 S. Ct. at 2781-82, we concluded that the water-transfer rule was a reasonable interpretation of an ambiguous provision of the Clean Water Act and reversed the decision of the district court, *Friends of the Everglades v. S. Fla. Water*

Mgmt. Dist., 570 F.3d at 1228. When the mandate issued in that appeal, the stay of these petitions expired.

II. STANDARD OF REVIEW

"[W]e determine our subject matter jurisdiction *de novo*." *Alexis v. U.S. Att'y Gen.*, 431 F.3d 1291, 1293 (11th Cir. 2005). "[T]he Court owes no deference to an agency's interpretation of a statute that defines this Court's subject matter jurisdiction." *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 548 (D.D.C. 2005) (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002)); *see Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650, 110 S. Ct. 1384, 1391 (1990) (explaining that the delegation of power to an agency to administer a statute does not empower that agency to "regulate the scope of the judicial power vested by the statute").

III. DISCUSSION

"[T]he Courts of Appeals have jurisdiction for direct review only of those [Agency] actions specifically enumerated in 33 U.S.C. § 1369(b)(1)," *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1980), and the Administrator invokes the following two provisions of that section as providing jurisdiction over this matter:

> (1) Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States . . . ,

33 U.S.C. § 1369(b)(1). The Administrator argues that we have jurisdiction under section 1369(b)(1)(E) because the water-transfer rule is "related to" a limitation on movements of water and establishes limitations on permit issuers. The Administrator also argues that we have jurisdiction under section 1369(b)(1)(F) because the effect of a permanent exemption from the requirements of a permit is "functionally similar" to the issuance of a permit.

United States Sugar urges us to exercise hypothetical jurisdiction over this matter and deny the petitions on the merits. United States Sugar argues that a court must satisfy itself of its jurisdiction before addressing the merits of a case only when the issue involves jurisdiction under Article III of the Constitution. United States Sugar also argues that, when the issue involves statutory jurisdiction and the decision on the merits is foreordained, we have the discretion to conserve judicial resources and address the merits.

We divide our discussion in three parts. First, we explain why we lack jurisdiction under section 1369(b)(1)(E). Second, we explain why we also lack jurisdiction under section 1369(b)(1)(F). Third, we explain why we must reject the invitation of intervenor United States Sugar to exercise hypothetical jurisdiction.

A. We Lack Jurisdiction Under Section 1369(b)(1)(E).

Section 1369(b)(1)(E) grants original jurisdiction to the courts of appeals over "any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title." *Id.* § 1369(b)(1)(E). "It is well estab-

lished that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030 (2004) (internal quotation marks omitted). Because the water-transfer rule is neither an effluent limitation nor a limitation promulgated under section 1311, 1312, 1316, or 1345, section 1369(b)(1)(E) cannot be the basis for our jurisdiction in this action.

The water-transfer rule is not an effluent limitation. 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, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). Not only does the water-transfer rule not restrict pollutants, it explicitly allows entities to introduce pollutants into navigable bodies of water. *See* 40 C.F.R. § 122.3.

The water-transfer rule is also not a "limitation under section 1311, 1312, 1316, or 1345." Black's Law Dictionary defines a "limitation" as a "restriction." Black's Law Dictionary 1012 (9th ed. 2009). The water-transfer rule imposes no restrictions on entities engaged in water transfers. The effect is the opposite: the rule exempts governments and private parties engaged in water transfers from the procedural and substantive requirements of the Administrator's permit program.

And even if the water-transfer rule could be classified as a limitation, it was not promulgated under section 1311, 1312, 1316, or 1345. According to the notice of final rule, the Administrator promulgated the rule under sections 1342 and 1361. 73 Fed. Reg. at 33,698. The Administrator now argues that the water-transfer rule was promulgated under section 1311 because section 1311 refers to section 1342, but nothing in the text of section 1311 grants authority to the Administrator to exempt activities from the permit program. *See* 33 U.S.C. § 1311. Section 1311 instead grants the Administrator authority to issue and terminate permits. *Id.*

The analysis of the Ninth Circuit in *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), is instructive. In an appeal from a district court, the Ninth Circuit was asked to review a different, but analogous, exemption from the permit program. *Id.* at 1010. Although the district court had exercised federal question jurisdiction, 28 U.S.C. § 1331, the Ninth Circuit considered whether the matter should have been brought directly to the court of appeals under section 1369(b)(1). *Nw. Envtl. Advocates*, 537 F.3d at 1015. The Ninth Circuit held that section 1369(b)(1)(E) did not permit it to exercise original subject matter jurisdiction because the challenged provision "provide[d] no limitation whatsoever... but rather create[d] the categorical and permanent exemptions of three types of discharge from any limit imposed by a permitting requirement." *Id.* at 1016.

The Administrator argues that we have jurisdiction because the water-transfer rule places limitations on

permit issuers, and the Administrator relies on *Natural Resources Defense Council, Inc. v. EPA*, 673 F.2d 400 (D.C. Cir. 1982), for the proposition that such limitations fall within section 1369(b)(1)(E). In that case, the D.C. Circuit held that it had original subject matter jurisdiction under section 1369(b)(1)(E) to review the consolidated permit regulations of 1979. *Id.* at 401-02. The D.C. Circuit explained that the consolidated permit regulations were "a limitation on point sources and permit issuers," much like regulations that the Fourth Circuit had previously held to support original jurisdiction under section 1369(b)(1)(E). *Id.* at 405 (quoting *Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977)). But the Fourth Circuit and the D.C. Circuit both emphasized that the limitations on permit issuers in those regulations operated as "restriction[s] on the untrammeled discretion of the industry." *See id.* at 404-05 (quoting *Va. Elec*, 556 F.2d at 450).

We reject the Administrator's reading of section 1369(b)(1)(E). The water-transfer rule does the exact opposite of the regulations reviewed by the D.C. and Fourth Circuits. The rule frees the industry from the constraints of the permit process and allows the discharge of pollutants from water transfers. Section 1369(b)(1)(E) cannot be read to grant us original subject matter jurisdiction over this matter.

B. We Lack Jurisdiction Under Section 1369(b)(1)(F).

The arguments advanced by the Administrator for jurisdiction under section 1369(b)(1)(F) fare no better. Section 1369(b)(1)(F) grants original subject matter jurisdiction over a petition to review an action "issuing

or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). The water-transfer rule neither issues nor denies a permit. The rule instead exempts a category of activities from the requirements of a permit and ensures that no permit will ever be issued or denied for discharge from a water transfer. *See* 40 C.F.R. § 122.3(i).

The Supreme Court has interpreted section 1369(b)(1)(F) to extend jurisdiction to those actions that have "the precise effect" of an action to issue or deny a permit, *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196, 100 S. Ct. 1093, 1095 (1980), but the water-transfer rule has no such effect. In *Crown Simpson*, the Administrator had denied several variances from effluent limitations that had been approved by the California State Water Resources Control Board. *Id.* at 195, 100 S. Ct. at 1094. Because California administered its own permit program, the Administrator had vetoed a proposed state permit, not denied a federal permit. *Id.* The Supreme Court was unwilling to create a bifurcated system for review that depended on whether a state administered the permit program, and the Court held that, when the action of the Administrator is functionally similar to the denial or issuance of a permit, the courts of appeals have original subject matter jurisdiction under section 1369(b)(1)(F). *Id.* at 196, 100 S. Ct. at 1094. But a permanent exemption is meaningfully different from the action that the Supreme Court held in *Crown Simpson* to be functionally similar to the denial of a permit. The exemption is a general rule, as opposed to a decision about the activities of a specific entity, and a permanent exemption from the permit program

frees the discharging entities from further monitoring, compliance, or renewal procedures.

The Administrator argues that we should read section 1369(b)(1)(F) to apply to any "regulations relating to permitting itself," but this interpretation is contrary to the statutory text and was persuasively rejected in *Northwest Environmental Advocates*. The Ninth Circuit held that it did not have jurisdiction under section 1369(b)(1)(F) to review a regulation creating new exemptions from the permit program. *Nw. Envtl. Advocates*, 537 F.3d at 1018. The Ninth Circuit explained that a new exemption will never produce a permit decision to be reviewed under section 1369(b)(1)(F) before the court of appeals is able to review the underlying regulation, so there is no reason to read the section as providing original subject matter jurisdiction to review the exemption. *Id.* Although the Sixth Circuit later adopted the interpretation advanced by the Administrator, *Nat'l Cotton Council of Am. v. EPA,* 553 F.3d 927, 933 (6th Cir. 2009), it did so in an opinion that provided no analysis of the provision and that cited two decisions of the Ninth Circuit that the Ninth Circuit had distinguished in *Northwest Environmental Advocates, see id.* We lack original jurisdiction to review a permanent exemption from the permit program.

C. We Cannot Exercise Hypothetical Jurisdiction.

The argument of United States Sugar that we may exercise hypothetical jurisdiction fails. Even if the resolution of the merits were foreordained—an issue we do not decide—the Supreme Court has explicitly rejected the theory of "hypothetical jurisdiction." *In*

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101-02, 118 S. Ct. 1003, 1016 (1997), the Court reaffirmed that an inferior court must have both statutory and constitutional jurisdiction before it may decide a case on the merits:

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Id. The Court recognized one exception to this requirement: when there is substantial overlap between interpreting a statute to resolve the merits of a case and determining an issue of statutory standing, a federal court has the power to decide whether a statute creates a cause of action before deciding whether the plaintiff has statutory standing to sue. *Id.* at 97 n.2, 118 S. Ct. at 1013 n.2. But here the statutory issue involves subject matter jurisdiction, not standing, and that issue is distinct from the merits.

We cannot exercise hypothetical jurisdiction any more than we can issue a hypothetical judgment. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitu-

tion and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994) (internal citations omitted). Because we conclude that section 1369(b)(1) does not grant original subject matter jurisdiction over these petitions, we may not address the merits of this controversy.

IV. CONCLUSION

We **DISMISS** the petitions for review for lack of subject matter jurisdiction.

APPENDIX B

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of the Court

For rules and forms visit
www.ca11.uscourts.gov

February 28, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 08-13562-CC
Case Style: Friends of the Everglades v. U.S.E.P.A.
Agency Number: 40 CFR PART 122

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Court Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

John Ley, Clerk of Court

Reply To: Joe Caruso (404)

335-6177

Encl.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13652-CC

FRIENDS OF THE EVERGLADES, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, INTERVENORS

No. 08-13653-CC

MICCOSUKEE TRIBE OF THE INDIANS OF FLORIDA, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, INTERVENORS

No. 08-13657-CC

FLORIDA WILDLIFE FEDERATION, INC., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, CAROL WEHLE, INTERVENORS

No. 08-14921-CC

SIERRA CLUB, INC.,

ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

UNITED STATES SUGAR CORPORATION, INTERVENOR

No. 08-16283-CC

STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON, GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, STEPHEN L. JOHNSON, RESPONDENTS

[Filed: Feb. 28, 2013]

PETITIONS FOR REVIEW OF A DECISION OF THE ENVIRONMENTAL PROTECTION AGENCY

BEFORE: BARKETT and PRYOR, Circuit Judges, and BATTEN,* District Judge.

PER CURIAM:

The Petitions for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ WILLIAM H. PYROR, JR.
UNITED STATES CIRCUIT JUDGE

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* Honorable Timothy C. Batten, Sr., United States District Court of the Northern District of Georgia; sitting by designation.

APPENDIX C

1. 33 U.S.C. 1369(b) provides:

Administrative procedure and judicial review

* * * * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to

judicial review in any civil or criminal proceeding for enforcement.

* * * * *

2. 40 C.F.R. 122.3(i) provides:

Exclusions.

* * * * *

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