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IN THE SUPREME COURT OF THE UNITED STATES

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SOUTH FLORIDA WATER :  
MANAGEMENT DISTRICT, :  
Petitioner :

v. : No. 02-626

MICCOSUKEE TRIBE OF INDIANS, :  
ET AL. :

- - - - -X

Washington, D. C.  
Wednesday, January 14, 2004

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:14 a.m.

APPEARANCES:

TIMOTHY S. BISHOP, ESQ., Chicago, Illinois; on behalf of  
the Petitioner.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D. C.; on  
behalf of the United States, as amicus curiae,  
supporting the Petitioner.

DEXTER W. LEHTINEN, ESQ., Miami, Florida; on behalf of the  
Respondents.

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P R O C E E D I N G S

(11:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-626, the South Florida Water Management District v. the Miccosukee Tribe of Indians.

Mr. Bishop.

ORAL ARGUMENT OF TIMOTHY S. BISHOP  
ON BEHALF OF THE PETITIONER

MR. BISHOP: Mr. Chief Justice, and may it please the Court:

Congress in the Clean Water Act provided that a section 402 permit is required for an addition of pollutants from a point source to navigable waters.

Now, the South Florida Water Management District concedes that the S-9 pump, through which it conveys navigable waters from a canal to a water conservation area, is a confined, discrete, discernible conveyance, and we agree that the water in the C-11 canal contains pollution which enters that water from a wide variety of point and non-point sources.

What we do say is that our pumps do not add pollutants to navigable waters. There is no addition of pollutants to navigable waters when navigable waters are simply moved around, which occurs all the time every day all around the country as public water management agencies

1 allocate and transfer the navigable waters to serve  
2 beneficial public purposes.

3 QUESTION: The obvious question on your thing is  
4 you have one of these rivers that's so filthy that you can  
5 set fire to it, and next to it is the most pristine,  
6 beautiful trout lake ever. And so what we build is a  
7 little pipe and the pipe takes these filthy, absolutely  
8 disgusting water and pours it into this beautiful,  
9 pristine trout pond. All right?

10 Now, you're saying that that doesn't fall within  
11 the statute, and --

12 MR. BISHOP: No. It does fall within the  
13 statute.

14 QUESTION: I mean it doesn't require a permit.

15 MR. BISHOP: It -- it would not require a  
16 section 402 permit. There are all sorts of layers of  
17 protection from that occurring. That would never --

18 QUESTION: Well, as far as this statute is  
19 concerned, EPA, it wouldn't. And -- and, of course, the  
20 obvious thing is that --

21 MR. BISHOP: No. That -- that's not true  
22 either, Justice Breyer.

23 QUESTION: I mean, EPA through the permit.  
24 Through the permit.

25 MR. BISHOP: Through the 402, but this -- this

1 is a complex statute with many, many layers of protections  
2 for the Nation's waters.

3 QUESTION: And it would protect --

4 MR. BISHOP: To begin with, there is always a  
5 layer of State protection. The statute requires that  
6 water quality standards be established for portions of the  
7 navigable waters. Those water quality standards are  
8 implemented through total maximum daily load requirements  
9 that the States are -- are required under the statute to  
10 -- to design. The States implement the TMDL's and the  
11 water quality standards through non-point source pollution  
12 programs that include land use restrictions, that include  
13 advice to and requirements on landowners as to best  
14 management practices.

15 QUESTION: I -- I suppose it's beyond the  
16 purview of this case. Do we know whether or not the  
17 transfer of waters in this case would violate those other  
18 regulations?

19 MR. BISHOP: No, it does not. The -- the --  
20 there are exceedances. Understand that the S-9 pump,  
21 while not permitted under 402, is permitted by the State  
22 under The Everglades Forever Act. But there are water  
23 quality standards for the canal and for the water  
24 conservation area. The -- there is compliance with both  
25 of those. There are exceedances, phosphorus exceedances,

1 from time to time, but those are built into the permit.

2           The -- the cleaning up of the Everglades, which  
3 is something that everyone is committed to and the  
4 district is deeply committed to, is not an overnight  
5 process. And so there are plans through the Comprehensive  
6 Everglades Restoration statute and also under The  
7 Everglades Forever Act to address these exceedances in the  
8 long term, but --

9           QUESTION: Mr. Bishop, the Eleventh Circuit said  
10 that moving water within a single, distinct body of water  
11 could never result in the addition of pollutants to that  
12 body of water. Now, I assume you agree with that  
13 statement?

14           MR. BISHOP: Well, I agree with that, but we and  
15 the United States go further here in arguing that the  
16 statute -- what the statute prohibits is the addition of  
17 pollutants to navigable waters. Navigable waters are  
18 defined in the statute as the waters of the United States.  
19 It's our position and the position of the United States,  
20 if I read their brief correctly, that an addition of  
21 pollutants from a point source occurs when the pollutant  
22 is introduced to the navigable waters for the first time.  
23 And that is what the --

24           QUESTION: So in -- in Justice Breyer's example,  
25 if the pristine trout pond is waters of the United States,

1 then there would not be an addition of the pollutant to  
2 waters of the United States when the filthy river was  
3 pumped into the pond.

4 MR. BISHOP: No. That would violate State water  
5 quality standards which are --

6 QUESTION: No. I -- maybe it would violate the  
7 standards, but I'm -- I'm just talking about the provision  
8 required here.

9 MR. BISHOP: It would not require a section 402  
10 permit, Justice Souter.

11 QUESTION: And -- and it would not do so because  
12 it would not be the addition of a pollutant to waters of  
13 the United States.

14 MR. BISHOP: That is right.

15 QUESTION: Assuming the river is navigable, the  
16 filthy river. Right?

17 MR. BISHOP: Assuming that it's a navigable  
18 water under the Clean Water Act --

19 QUESTION: Right.

20 MR. BISHOP: -- and that -- which is a broader  
21 concept than waters that one can run --

22 QUESTION: Well, what I'm driving at here is --  
23 is the following. You have ambiguous language. I think  
24 it's a very difficult question. If I accept your side of  
25 it, it seems to me I live -- leave the EPA without any

1 power to deal with what I just called the filthy river  
2 problem, or at least not the -- I'm not trying to be  
3 tricky in my words. I -- I understand they have other  
4 authority and so forth. But there is a filthy river  
5 problem if I take your side of it.

6 And if I take their -- if I take your side of  
7 it, that is some kind of a problem. You can explain to me  
8 in 1 second why it's no problem whatsoever. I'd like to  
9 hear that. I want to say the opposite thing.

10 Your problem that you raise, if I take their  
11 side, is suddenly everybody in the California water  
12 project, which is huge, central valley irrigation, has to  
13 run off and get permits, and that too is a big problem.

14 So it sounds to me that that second problem  
15 could be dealt with by EPA through rules that would, in  
16 effect, not make them come in because they'd automatically  
17 get permits in certain circumstances. But if I take your  
18 side of it, the opposite filthy river problem, there's  
19 nothing to be done.

20 MR. BISHOP: Your premise --

21 QUESTION: So that's what I say moves me at the  
22 second for hypothetical purposes towards their side, but  
23 I'm asking you to move me back.

24 MR. BISHOP: Your premise is incorrect, Justice  
25 Breyer. Of course, moving filthy water to a pristine



1 water is a problem I've already explained that it's  
2 addressed and addressed comprehensively and rigorously at  
3 the State level, as Congress contemplated in the statute  
4 through the water quality standards and TMDL's.

5 But beyond that, it is simply wrong to say that  
6 the Federal Government lacks power in these cases.

7 First of all, it has broad power under section  
8 10 of the Rivers and Harbors Act to protect navigability,  
9 and that -- that provision also includes power for the  
10 Corps to engage in a broad public interest review whenever  
11 the course of a waterway is changed.

12 Second, there are other provisions that deal  
13 with emergency type situations. If public health or  
14 welfare, for example, is implicated, then section 504 of  
15 the statute gives EPA broad powers to go into court and  
16 get a restraining order not just for the discharge of  
17 pollutants, but much more broadly than that.

18 QUESTION: Mr. Bishop, can we see -- take this  
19 concrete case? I mean, this is a case about phosphorus  
20 being dumped into a relatively unpolluted body of water.  
21 What is the State of Florida or anybody doing to reduce  
22 the level of phosphorus that comes from this pump and gets  
23 dumped into the pure water?

24 MR. BISHOP: Well, this has -- this has been the  
25 focus of not only our attention but of the Corps and EPA's

1 attention for a long time through the -- the Comprehensive  
2 Everglades Restoration Project. If I can -- and there are  
3 a lot of things that are happening to -- to reduce the  
4 phosphorus level, some of which are sort of purely State  
5 water quality standard implementation projects, such as  
6 prohibiting the sale of certain types of fertilizers,  
7 restricting the use of fertilizers that contain  
8 phosphorus. But the long-term CERP plans here have  
9 essentially two components.

10 The first one is that much of the water in the  
11 C-11 basin, in the canal, actually comes from the  
12 conservation area through seepage. There's an enormous  
13 amount of --

14 QUESTION: Yes. May I ask you a question right  
15 -- I know some seeps through, but what is the principal  
16 source of the water in the C-11 basin?

17 MR. BISHOP: Well, my understanding is that it  
18 is seepage. I mean, obviously there are --

19 QUESTION: You think that's the principal  
20 source? It seeps in. You're just pumping it back into  
21 the Everglades?

22 MR. BISHOP: That is my -- that is my  
23 understanding. There is an enormous amount of seepage,  
24 and the seepage involved --

25 QUESTION: But where does the water that the

1 people in the western part of Broward County use to water  
2 their lawns and bathe and so -- where does that water come  
3 from?

4 MR. BISHOP: From -- from the aquifer. I mean,  
5 obviously, in -- in --

6 QUESTION: There's an aquifer to the east of the  
7 -- of the levees?

8 MR. BISHOP: There is an aquifer that -- an  
9 unconfined aquifer that is really indistinguishable from  
10 the surface water that underlies the levee. But it's --  
11 it is not divided by the levee. It underlies the water,  
12 the surface water, on both sides --

13 QUESTION: Are you telling me there's an aquifer  
14 to the east of the levee?

15 MR. BISHOP: To the east of the levees and to  
16 the -- it's --

17 QUESTION: Which is a separate source of water  
18 than the source that feeds the large -- the WCA-3 --

19 MR. BISHOP: No, no. This is an aquifer that  
20 underlies both sides of the levee, the WCA and the basin.

21 But if I can get back to -- I mean, your -- your  
22 question. Obviously, the seepage is an enormous source.  
23 What I am told is that seepage alone will be enough to  
24 flood out towns like --

25 QUESTION: But the seepage can't --

1 MR. BISHOP: There is other --

2 QUESTION: But the seepage can't contain any of  
3 the pollution --

4 MR. BISHOP: No.

5 QUESTION: -- because the water on the west side  
6 of the levee is -- is clean.

7 MR. BISHOP: Well, it's not clean. I mean, it  
8 does contain pollutants under the definition of the Clean  
9 Water Act because that's a broad definition.

10 QUESTION: Well, it's certainly cleaner than the  
11 water on the east side or you wouldn't have a lawsuit.

12 MR. BISHOP: There is a substantial amount of  
13 water in the C-11 canal that comes from a -- a wide array  
14 of sources within the basin.

15 QUESTION: But the water -- the seepage clearly  
16 is not what causes the problem

17 MR. BISHOP: And that is -- just to go back to  
18 Justice Ginsburg's question, one way that we are  
19 addressing the phosphorus here is with the Corps. The  
20 Corps has built a new set of pumps right next to the S-9  
21 that is intended to intercept that cleaner seepage water,  
22 and it will pump that seepage water right back into the  
23 WCA before it is mixed with the more polluted waters from  
24 the C-11 basin. So that is one part of the effort. It is  
25 to get the seepage water back into the water conservation

1 area before it mixes with more polluted water.

2 QUESTION: Which -- which means --

3 MR. BISHOP: Those pumps are --

4 QUESTION: Which means that the water to the  
5 east will be even more polluted and when you pump that  
6 back in, you'll be pumping more polluted water back in.

7 MR. BISHOP: And the solution to that problem is  
8 that with the Corps and the task force and the EPA, a  
9 number of huge storage basins are being built. These  
10 require, obviously, buying a lot of land, putting together  
11 the land necessary for these STA's. But the -- the  
12 purpose of the plans under CERP is to stop as much water  
13 as possible getting from the C-11 to the water  
14 conservation area. And so storing as much water as  
15 possible in these basins will allow the phosphorus and  
16 other pollutants to settle out, and so water that is --  
17 and will also reduce the total amount of water that needs  
18 to be sent back into the conservation area.

19 The combination of these new pumps getting the  
20 -- the cleaner water back into the -- into the  
21 conservation area and the storage basins, which will  
22 reduce the amount of flow and allow the pollutants to --  
23 to seep down, is -- is the essential way in which under  
24 CERP the problem of the phosphorus will be addressed.

25 No one disputes -- and the district least of all

1 disputes -- that cleaning up the Everglades and reducing  
2 the amount of phosphorus that gets into the water  
3 conservation area which, in turn, feeds the Everglades is  
4 a very important consideration.

5 But you also have to understand that our  
6 purposes -- we are not -- we are not just dumping this  
7 water in -- in the water conservation area. This water  
8 could be sent to the ocean. In fact, on the eastern  
9 portion of the canal, the water is sent to the ocean. But  
10 the -- there are other functions, important functions,  
11 that are served by the water conservation area,  
12 maintaining water in there. One is the ability to --

13 QUESTION: This is all very important, but on  
14 the legal question that we have, do you take the position  
15 that it's a single body of water --

16 MR. BISHOP: We take --

17 QUESTION: -- and therefore no permit is  
18 required?

19 MR. BISHOP: We take the position, first of all,  
20 that all of the navigable waters of the United States are  
21 unitary for purposes of determining whether they are --

22 QUESTION: That's an extreme position, and you  
23 probably have a fall-back position.

24 MR. BISHOP: And the alternative --

25 (Laughter.)

1 QUESTION: You -- you go --

2 MR. BISHOP: We do argue --

3 QUESTION: What -- what's the fall-back?

4 MR. BISHOP: The fall-back is precisely the one  
5 that you have described, Justice O'Connor, which is that  
6 these were -- these were unitary waters. They are divided  
7 solely by manmade structures that are changeable and are  
8 changing.

9 QUESTION: Well, they have been altered by  
10 manmade structures so that they perhaps are no longer a  
11 single body. Is that what the Eleventh Circuit concluded  
12 in effect?

13 MR. BISHOP: Yes, I think the --

14 QUESTION: That the manmade structures have  
15 separated them and they're no longer unitary.

16 MR. BISHOP: It -- it did, but in doing that, it  
17 ignored a number of important considerations. One is the  
18 unitary aquifer that I have talked about. The second is  
19 the constant circulation --

20 QUESTION: Does the record describe that  
21 aquifer? Does the record describe that aquifer?

22 MR. BISHOP: The -- yes. I -- I believe it's  
23 J. A. 177.

24 QUESTION: While you're looking for that, I -- I  
25 find it hard to understand how you can interpret -- I can

1 understand how you can interpret the phrase, navigable  
2 waters, to mean all navigable waters. I can't understand  
3 how you can interpret the phrase, navigable waters, to  
4 mean only those navigable waters that are within a single  
5 aquifer or within a single drainage district. How -- how  
6 can you possibly derive that interpretation from the text?

7 MR. BISHOP: No, I agree, Justice Scalia.

8 QUESTION: Which is -- which is why you took the  
9 extreme position, that is really textually not very  
10 extreme at all.

11 MR. BISHOP: No. I agree with that, Justice  
12 Scalia, obviously. But I -- but I do think that if there  
13 were a level of discomfort with that argument, which I  
14 think is -- you know, it's fully justified by the statute.  
15 And I'd like to come back to that, Justice O'Connor, and  
16 explain the other textual basis for -- for that argument.  
17 Nevertheless --

18 QUESTION: Mr. Bishop, as I --

19 MR. BISHOP: -- the concept of an addition --

20 QUESTION: -- as I understand, that was the  
21 Government's brief and it was spelled out very clearly. I  
22 didn't understand your brief to be taking the position  
23 that all we have to worry about is the term, navigable  
24 water, then that's the end of it.

25 MR. BISHOP: Well, we think that there is more



1 to it than just the term, navigable water. We think that  
2 -- that we do -- we have argued throughout this case,  
3 including in the lower courts, that the navigable waters  
4 are a unitary concept for purposes of section 402.

5 QUESTION: Mr. Bishop, isn't the problem with  
6 the unitary concept idea that given the purposes of the  
7 Clean Water Act, it makes great sense if there is a way of  
8 distinguishing between bodies of water to distinguish them  
9 in terms of their -- their pollution? And the -- in -- in  
10 effect, the -- the function of the kind of unitary  
11 definition is a function that -- that works against the  
12 protection of clean water as against to dirty water that  
13 can be added to it. And -- and shouldn't the -- shouldn't  
14 the purposes of the act be taken into consideration in  
15 defining what is a body or a unified body of water?

16 MR. BISHOP: The act does distinguish. Congress  
17 distinguished, when it wanted to, between the waters of  
18 the United States and specific portions of the navigable  
19 water. And there's an example of that at the bottom of 7a  
20 in the addendum

21 QUESTION: Are -- are you talking about a -- a  
22 distinction based on the -- the quality of the water as  
23 polluted or clean or relatively polluted/relatively clean?

24 MR. BISHOP: The statute specifies that water  
25 quality standards which identify what the goal is for the

1 level of pollutants in the water and the TMDL's, the total  
2 maximum daily loads, that are used to achieve those water  
3 quality standards are set for specific portions or parts  
4 of the navigable water. That is, the State -- a State  
5 role is to identify, implement, and to enforce those water  
6 quality standards which do apply to separate bodies of  
7 water. The regulations talk about bodies of water.

8 QUESTION: So you're saying -- you're saying  
9 that the problem that I'm raising is a problem that is  
10 dealt with solely by water quality standards and cannot be  
11 dealt with by -- by point source emission regulation.

12 MR. BISHOP: Well, I mean, that's -- that's -- I  
13 mean, because of the complexities of the act, that's not  
14 quite right. As a definitional matter, the Congress  
15 clearly distinguished between the navigable waters and  
16 those portions as to which water quality standards were to  
17 be set. In implementing water quality standards, a State  
18 may take account of the -- of effluence reaching the water  
19 through point sources. And in fact, there is a separate  
20 provision of the statute --

21 QUESTION: All right, but assuming a State may  
22 do that, why does it follow that in defining bodies of  
23 water for point source purposes, we may not do that?

24 MR. BISHOP: Well, just let me run through, if I  
25 may. I mean, first of all, there --

1           QUESTION: No, but answer my question before you  
2 run through because I -- I tend to lose the answers in the  
3 -- in the run-throughs.

4           You're -- you're saying, look, when we're  
5 talking about water quality standards, there are  
6 distinctions made within a given body of water or within  
7 navigable water. And I think you're saying that for a  
8 point source emission issues, we don't make that kind of  
9 distinction. My question was, if the distinction can be  
10 made and in fact is made, with respect to water quality  
11 standards, why should it follow that the same distinction  
12 cannot be made for purposes of definition in point source  
13 problems?

14           MR. BISHOP: Because Congress recognized that  
15 this is a cooperative federalism statute where the Federal  
16 Government and the State government has their role --

17           QUESTION: As I understood you --

18           MR. BISHOP: -- and in the plain language --

19           QUESTION: -- you didn't say it cannot be made.

20 You said it has not been made --

21           MR. BISHOP: Well, it hasn't --

22           QUESTION: -- in the statute.

23           MR. BISHOP: It has been made in the statute.

24           QUESTION: It has not been made and you're  
25 saying it would be illegitimate to make it as a matter of

1 interpretation. And my question is, why would it be  
2 illegitimate as a matter of interpretation?

3 MR. BISHOP: Well, that's my run-through. The  
4 plain language of the statute is navigable waters defined  
5 as the waters of the United States. That is backed up by  
6 the use of the broad term discharge in section 401(a)  
7 where Congress meant to reach much more and which isn't  
8 limited by this language of an addition to the navigable  
9 waters.

10 It is backed up by 304(f) (2) (F) where Congress  
11 described as non-point source pollution pollution  
12 resulting from the changes in the flow and circulation of  
13 navigable waters or ground waters caused by flow diversion  
14 devices like the pump.

15 And it's backed up by the fact that neither  
16 Congress nor EPA has ever at any time since 1972 suggested  
17 that these sorts of movements of water should be governed  
18 by section 402.

19 If I may reserve the balance of my time.

20 QUESTION: Then what did -- what did the tribe  
21 mean when it said that there are, I think -- major  
22 components of the Everglades construction project are  
23 already under NPDES programs?

24 MR. BISHOP: Those are the STA's. The  
25 regulation 122.2, the definitional regulation, defines

1 treatment areas as not being navigable waters. So when  
2 you move water from a treatment area to a navigable water,  
3 that requires 402 permitting.

4 If I may reserve the balance of my time.

5 QUESTION: Very well, Mr. Bishop.

6 Mr. Minear, we'll hear from you.

7 ORAL ARGUMENT OF JEFFREY P. MINEAR

8 ON BEHALF OF THE UNITED STATES,

9 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

10 QUESTION: Mr. Minear, before you start, if I  
11 may just -- could you tell me if you think the record  
12 explains where the water in the eastern -- east of the  
13 C-11 basin originates?

14 MR. MINEAR: I'm not sure the record is clear on  
15 this, Your Honor.

16 QUESTION: Because the part that Mr. Bishop  
17 brought my attention to does not answer the question.

18 MR. MINEAR: I'm -- I cannot give you assurance.

19 QUESTION: You don't -- you don't know the  
20 answer.

21 MR. MINEAR: I do not know the answer to that,  
22 Your Honor.

23 Mr. Chief Justice, and may it please the Court:

24 The United States submits that the Clean Water  
25 Act does not require the South Florida Water Management

1 District to obtain a section 402 permit for the operation  
2 of water control facilities like the S-9 pump which simply  
3 move water from one location to another. We believe that  
4 position is correct on the basis of both the text of the  
5 statute, the overarching purposes of the statute and its  
6 structure, and also EPA's actual practices.

7 I'd like to turn first to the text of the  
8 statute. Section 402 states that a NPDES permit is  
9 required when there is an addition of a pollutant to  
10 navigable waters from a point source, and section 5027  
11 goes on to state that a -- the waters -- the navigable  
12 waters are the waters of the United States.

13 Under that definition and those statutory  
14 provisions, when an industrial out-fall introduces  
15 pollutants for the first time into the waters of the  
16 United States, an NPDES permit is required. However, when  
17 a water control facility like the S-9 pump simply moves  
18 water from one place to another, together with any  
19 pollutants that might be contained therein, that  
20 regulatory regime is not called into play.

21 QUESTION: But if in fact an industrialist adds  
22 quite -- something quite filthy out of a pipe into a clean  
23 body of water, there is no addition if, at the same time,  
24 in some other body of water, he's taking out an equivalent  
25 amount.

1           MR. MINEAR: I think that the -- the text  
2 precludes that understanding because it states any  
3 addition of any pollutant. And we think the use -- these  
4 definitions are written quite carefully, and we think that  
5 those -- the term any --

6           QUESTION: So a single body of water is --

7           MR. MINEAR: -- indicates you can't rule it out.

8           QUESTION: A single body of water, which seems  
9 to have been a concept that the EPA has used for years and  
10 years -- that's irrelevant.

11          MR. MINEAR: That is -- that's not the case that  
12 EPA has used a single body of water.

13          QUESTION: They haven't. They've never said --

14          MR. MINEAR: No. I think that in fact the --  
15 the approach that EPA has taken in this is -- can be seen  
16 from a number of sources. First of all, EPA has never  
17 attempted to regulate water control facilities like the  
18 S-9 pump in the 30 years that the NPDES program has been  
19 in place. And what's more, in cases, the closely  
20 analogous cases, of dams where water is simply being  
21 passed through a dam, EPA has taken the position that an  
22 NPDES permit is not required.

23                 Part of the reason for this is there are other  
24 regulatory programs that deal with these problems.  
25 Justice Breyer mentioned the problem of taking a polluted

1 river and combining it with a pristine river. That  
2 actually implicates a number of different programs. First  
3 of all, in the case of the polluted river, that river is  
4 subject to 402 requirements, and so there will be steps  
5 taken to prevent the discharge of pollutants into the  
6 polluted river.

7           The States also are required, or at least  
8 strongly urged by the Government and with strong carrot  
9 and stick type incentives, to adopt non-point source  
10 pollution programs to reduce any non-point pollution that  
11 might be going into that polluted river.

12           If there's an attempt to connect that river to  
13 another river, it does implicate, as Mr. Bishop indicated,  
14 the section 10 of the Rivers and Harbors Act, which deals  
15 with regulations that result in the change in the flow  
16 of --

17           QUESTION: What about -- C-11 doesn't come  
18 within that because it's not polluted enough?

19           MR. MINEAR: C-11, when it was first constructed  
20 at that -- at the time that the C-11 canal was built back  
21 in the 1950's, most likely -- well, it was in fact  
22 constructed by the Corps of Engineers. So it was subject  
23 to the public interest review provisions that the Rivers  
24 and Harbors Act envisions. When the -- the Corps  
25 investigates private connections of this type, it conducts



1 what's called a public interest review, and this is  
2 described in your case, United States v. Alaska at 503  
3 U. S. 569.

4 QUESTION: What about the other half of what I  
5 said, that I'm thinking if you were to be wrong on that,  
6 if I thought you were wrong on what you've said --  
7 assumption -- then it's not so bad for you because EPA can  
8 handle what I call the California central river valley  
9 project by the Costle -- you know what I'm thinking of.  
10 Leventhal's opinion in Costle. Does that ring a bell?  
11 NRDC v. Costle. Does that ring a bell to you?

12 MR. MINEAR: I'm afraid I'm not familiar with  
13 that. That's --

14 QUESTION: He lists -- in that opinion there, he  
15 lists -- he lists a set of things that EPA could do under  
16 the permit requirement that would, in fact, alleviate the  
17 administrative burden and would make sure that all these  
18 pipes and things in California don't really have an  
19 administrative problem or other problem by having to go to  
20 EPA to get the permit.

21 MR. MINEAR: EPA has substantial discretion to  
22 minimize the types of regulatory burdens that might be  
23 imposed here. Nevertheless, they're likely to be  
24 substantial. And what they amount to in this case is  
25 really a belt and suspenders approach, and you know, the

1 additional haberdashery is fine except for the cost that  
2 it does entail. In this case it could be very substantial  
3 for projects throughout the Nation.

4 QUESTION: Don't you think there would be  
5 another lawsuit quite promptly if -- if EPA simply said  
6 you automatically get a permit for this type of operation?

7 MR. MINEAR: I think that's correct. And in  
8 addition, I think we have to consider what would a permit  
9 accomplish in this case that the CERP project that the  
10 Corps of Engineers has -- is implementing is not already  
11 doing. That project is designed to deal with these  
12 problems.

13 The permitting program is really designed to  
14 deal with the specific problem of introducing pollutants  
15 into waterways for the first time. It's really not  
16 capable of dealing with this problem of water transfers  
17 that move from one place to another. Rather, there are  
18 other programs that deal with this. If it's a Federal  
19 program, it would be subject to NEPA, for instance, and  
20 there would be an environmental analysis before any action  
21 was taken.

22 In the case of the Rivers and Harbors Act that I  
23 described before, that would also implicate section 401 of  
24 the Clean Water Act, which requires a water quality  
25 certification, a determination from the State that in fact

1 waters would be -- would not violate water quality  
2 standards.

3 I'd like to make the point also that our  
4 position is not an extreme one in saying that the -- the  
5 text requires that we only look at the pollution when it  
6 first enters the water. Rather, it's a -- it's a approach  
7 that recognizes that cleaning up polluted water requires a  
8 number of different control strategies. The NPDES  
9 permitting program is only one.

10 QUESTION: Well, what do we make of information  
11 such as that provided by the State of Pennsylvania,  
12 talking about the application of the permit system to  
13 interbasin transfers in that State and saying how  
14 beneficial it has been?

15 MR. MINEAR: Well, the State of -- the  
16 Commonwealth of Pennsylvania can, of course, adopt that  
17 type of program on its own under its State law to deal  
18 with those types of programs. Any State can.

19 QUESTION: It tells us that it's been getting  
20 permits under this Federal scheme and that it's been  
21 helpful.

22 MR. MINEAR: That might very well be, and it is  
23 allowed to supplement the Federal scheme with its own  
24 State additions. But other States, such as California,  
25 have found --

1           QUESTION: I don't understand that. You  
2 conceded that in Pennsylvania EPA permits are obtained?

3           MR. MINEAR: No. These -- the -- EPA has  
4 delegated authority to implement the permitting program to  
5 a number of States, including Pennsylvania. So  
6 Pennsylvania is issuing the 402 permits in lieu of the  
7 Federal Government. My point is --

8           QUESTION: It's done the same thing in Florida.  
9 EPA has delegated to the State agency, hasn't it?

10          MR. MINEAR: That's true. In fact, it has in  
11 most States. So in fact, in most States the States are  
12 issuing these permits with substantial guidance from the  
13 Federal Government. The Federal Government is setting the  
14 floor for what the permit requirements are, but the States  
15 are free to supplement their permitting programs with  
16 additional State requirements and many do so. Many States  
17 like California actually operate with additional programs  
18 apart from the Clean Water Act. I think that Judge  
19 Kennedy when he was -- or Justice Kennedy -- excuse me --  
20 when he was a judge on the Ninth Circuit, wrote an opinion  
21 concerning the New Malones project where he talked about  
22 the imposition of water quality standards at -- at the  
23 State level on Federal projects and indicated that the  
24 States, in fact, do have that authority as well.

25          My -- my point here is that there are a number

1 of different mechanisms here in which these problems can  
2 be addressed, and the important point is to choose the  
3 right one. In this context, the NPDES permitting program  
4 is not the correct mechanism for dealing with the problems  
5 that the Florida Everglades faces. Instead, that problem  
6 is being addressed comprehensively through Federal and  
7 State programs.

8 QUESTION: Is that the view that EPA takes?

9 MR. MINEAR: Yes, that is the view. The brief  
10 of the United States here is it reflects a consensus of a  
11 number of agencies, not only EPA but the Department of the  
12 Interior, the Corps of Engineers, and the Department of  
13 Army.

14 And I'd like to mention there's been some  
15 suggestion that this Court should draw inferences from the  
16 names that are on the cover of the brief, and those  
17 inferences should not be drawn. The names on the brief  
18 have no relationship to whether or not -- the absence of  
19 the names of an agency does not indicate the brief does --  
20 does not represent the views of a particular agency. That  
21 can be seen in a number of briefs, including the Swank  
22 brief from two terms ago in which Administrator Browner  
23 was a party in that case, a party to the proceeding, and  
24 yet there are no EPA counsel names on the brief.

25 QUESTION: But I notice that there's a brief

1 filed by former administrators and general counsel which  
2 says that the position of the EPA back in '75 was that of  
3 your opponent.

4 MR. MINEAR: They're relying on a 1975 general  
5 counsel opinion that addressed the question of irrigation  
6 return flows. Congress repudiated the position that was  
7 taken there 2 years later in the 1977 amendments. It  
8 mentions this point only tangentially. It's not even  
9 among the 17 questions presented that are listed in that  
10 opinion.

11 And I think what's more telling is the practice  
12 of EPA since that time. EPA has not required permits from  
13 water control facilities to do no more than move water.

14 QUESTION: Can I make one thing clear? You do  
15 not endorse the position of the petitioner that it has to  
16 be the point source itself that -- that causes the  
17 pollution.

18 MR. MINEAR: That is correct. We do not endorse  
19 that addition.

20 Thank you, Your Honor.

21 QUESTION: Thank you, Mr. Minear.

22 Mr. Lehtinen, we'll hear from you.

23 ORAL ARGUMENT OF DEXTER W. LEHTINEN

24 ON BEHALF OF THE RESPONDENTS

25 MR. LEHTINEN: Mr. Chief Justice, and may it

1 please the Court:

2           The Miccosukee Tribe and Friends of the  
3 Everglades contend that a pollutant is added to navigable  
4 waters whenever it's put into navigable waters where it  
5 would not otherwise be, whenever it's put somewhere where  
6 it's not already there or would not naturally flow.

7           The receiving navigable water body is the point  
8 of focus under the Clean Water Act because the act  
9 specifically provides for designating different water  
10 bodies with specific designated uses and with associated  
11 water quality standards that will protect those uses. And  
12 the associated permitting system of the act 402 rests on  
13 the assumption that the propriety of the --  
14 proprietariness of the proposed addition of a pollutant  
15 will be measured against the receiving navigable water  
16 body's designated use and against the receiving navigable  
17 water body's water quality standards.

18           QUESTION: What -- what says that? I mean, the  
19 -- the text we're dealing with here talks about adding  
20 pollutants to the navigable waters of the United States if  
21 you read the two definitions together. And as I see  
22 what's happened here, no pollutants have been added to the  
23 navigable waters of the United States. The total amount  
24 of pollutants is the same.

25           MR. LEHTINEN: Yes. Justice Scalia, it says any

1 addition of any pollutant to -- to navigable waters. The  
2 reason navigable waters need not have and would be  
3 confusing to have any adjective is because the location of  
4 the point source inherently dictates the receiving  
5 navigable water.

6 QUESTION: You -- it could -- it could say to a  
7 particular navigable water. It could have said that very  
8 easily. It doesn't -- it doesn't say that. It says to  
9 navigable waters.

10 MR. LEHTINEN: It could, Your Honor, but since  
11 the permitting system is from a point source, it would not  
12 make sense to say to any other navigable water that the  
13 point source is not discharging to. The point source  
14 itself makes the location of the navigable waters  
15 specified by the fact that the point source can only  
16 discharge --

17 QUESTION: No, it doesn't. It doesn't -- it  
18 doesn't do what you say the provision does, that -- that  
19 is, to make it unlawful without a permit to add to a  
20 particular navigable water a pollutant that is not already  
21 there but that is elsewhere in the navigable waters. As  
22 it's written, all it says is you shall not add pollutants  
23 to the navigable waters of the United States. That's how  
24 those definitions work out. And that has not happened  
25 here.



1                   MR. LEHTINEN: Yes, Justice Scalia, but if that  
2 were the meaning of that text and the lack of an  
3 adjective, any navigable waters were to mean that once in  
4 navigable waters, that pollutant could be spread to any  
5 navigable water with any different designated use or any  
6 different water quality --

7                   QUESTION: As far as this provision is  
8 concerned.

9                   MR. LEHTINEN: That's correct, Your Honor. And  
10 this provision has been recognized as being the main  
11 method by which the Clean Water Act cleans up water.

12                   The -- the problem of the polluted river or  
13 dirty river is one problem with the interpretation that  
14 there's a singular navigable waters. An example -- a  
15 specific example is the Dubois case, in which the  
16 Pemigewasset River was, in fact, so bad that the First  
17 Circuit said it peeled paint off of the adjoining  
18 buildings on the bank. That river, under this  
19 interpretation, would have been put into Loon Pond  
20 strictly for the purpose of resupplying Loon Pond. It  
21 didn't always go through snow-making equipment. The First  
22 Circuit made it clear that sometimes it is directly from  
23 the east branch to Loon Pond.

24                   Furthermore, it would make it impossible to  
25 actually administer the permitting system because a permit

1 writer is told to evaluate the propriety of the proposed  
2 addition of a pollutant based on the designated use and  
3 the water quality standards of the receiving navigable  
4 water. It wouldn't be effective if thereafter that permit  
5 were deemed, as a matter of law, to have authorized the  
6 addition of that pollutant throughout the entire United  
7 States to any navigable water no matter what its  
8 designated use and no matter what its water quality  
9 standard.

10 QUESTION: Is it just the First Circuit case or  
11 is there any history in the EPA over the years, I guess 30  
12 years, where they did make clear that the navigable waters  
13 of the United States -- the discharge is not just like one  
14 big water where the Sacramento River and Hudson are part  
15 of the same big water?

16 MR. LEHTINEN: Yes, the United States, Justice  
17 Breyer, on many occasions -- starting in 1975 EPA general  
18 counsel issued the opinion that surface water runoff and  
19 return flows from irrigation, even when in navigable  
20 waters, that is to say an agricultural canal, when then  
21 discharged to other navigable waters, would require a  
22 permit. Congress did not repudiate that because what --  
23 Congress, if it had repudiated it, would have said that  
24 was not an addition. In fact, Congress --

25 QUESTION: Return flow from -- from irrigation

1 seems to me quite different. I mean, that is taking  
2 something out of the navigable waters, adding something to  
3 it, and then returning it to the navigable waters. It's  
4 -- it's the fertilizer and -- and other pollutants that  
5 are picked up in the irrigation process that -- that is  
6 the problem

7 MR. LEHTINEN: But the question --

8 QUESTION: That's quite different from just  
9 transferring from one navigable water to another.

10 MR. LEHTINEN: Well, those elements of it are,  
11 Justice Scalia, but what the EPA opinion --

12 QUESTION: But why are they different? They go  
13 along and the water is pure and it sort of picks up some  
14 drainage from Tallahassee or someplace, and now it's not  
15 quite the same, and by the time they get it next to the  
16 big lake there, it's filled with stuff, just like the --  
17 just like the stuff that drains off the land.

18 MR. LEHTINEN: Well, it is not different when it  
19 gets into the canal. The C-11 canal, which is a drainage  
20 canal that receives surface water runoff, like an -- a  
21 agricultural canal that receives irrigation return flow,  
22 is itself a jurisdictional navigable waters under this  
23 Court's decisions in Riverside Bayview simply because it's  
24 connected to, in this case, the Atlantic. In other words,  
25 it's not navigable in fact itself.

1 QUESTION: Well, apart from the -- what --  
2 1972 --

3 MR. LEHTINEN: Yes.

4 QUESTION: -- general counsel opinion, which --  
5 which applied to -- to return from -- from cultivated  
6 land, do you -- do you deny that -- that the EPA has never  
7 sought to require permitting of this kind of a facility  
8 for 30 years? Is -- is that inaccurate?

9 MR. LEHTINEN: Yes. Well, it is inaccurate in  
10 the sense that in 1993 EPA told the South Florida Water  
11 Management District, to its chagrin, that it would have to  
12 have NPDES permits for all of these Everglades  
13 construction project features that were motivated by the  
14 United States v. South Florida Water --

15 QUESTION: So that States have been violating  
16 the Federal law for 30 years and nobody knew about it?

17 MR. LEHTINEN: I'm sorry, Your Honor?

18 QUESTION: The States have been violating the  
19 Federal law for 30 years.

20 MR. LEHTINEN: Well, in most cases --

21 QUESTION: That's kind of an extraordinary  
22 interpretation.

23 MR. LEHTINEN: In most cases, Your Honor, the  
24 simple movement of water does not end up, even under  
25 Miccosukee -- this case, requiring a permit. Most of them

1 are -- are not covered. They return to the same water  
2 body. The dam cases make it clear that that's a return to  
3 the same water body. If they're --

4 QUESTION: You don't -- you think the dam cases  
5 are correctly decided and you don't need to distinguish  
6 them?

7 MR. LEHTINEN: We distinguish them, Your Honor,  
8 because the dam cases dealt with the condition -- the D. C.  
9 Circuit made it clear in the Gorsuch case in '82 that dam-  
10 induced changes in condition such as super-saturation and  
11 so forth, and that that was not a pollutant. They didn't  
12 say dams weren't point sources. They said that was not a  
13 pollutant.

14 QUESTION: I thought same water body made no  
15 difference to you. I thought neither side thought that  
16 the answer to this case depended upon whether it was the  
17 same water body or not. If -- do you think that if it --  
18 if -- if it is established that -- that this is the same  
19 water body, these pumps would be okay without permitting.

20 MR. LEHTINEN: No, Your Honor, because --

21 QUESTION: I thought so. Neither side takes  
22 that position.

23 MR. LEHTINEN: Neither side takes the position,  
24 but it is true that the phrase, water body, because it's  
25 used in so much of the EPA regulations, is a shorthand for

1 saying that the pollutant is added to a navigable water  
2 that wouldn't otherwise receive it. The fact is that as  
3 the First Circuit said, the argument about whether Loon  
4 Pond, well up here -- uphill from the Pemigewasset River,  
5 east branch, was hydrologically connected or not was  
6 irrelevant because Loon Pond would never receive water  
7 from the Pemigewasset River, even though that Loon Pond  
8 eventually flowed through the watershed to the river.

9 QUESTION: The dam --

10 QUESTION: May I ask you a question about --

11 QUESTION: -- our problem, aren't they, that --  
12 that the -- for you. That is that it seems to me that  
13 under your definition, it's going to be the same body of  
14 water. And then if you say, well, it didn't add any  
15 pollutant that wouldn't have been there otherwise, I bet  
16 that with most dams that isn't so, I mean, because there's  
17 a lot of mud stirred up in that lake behind the, say,  
18 Boulder, Hoover Dam and so forth. A big problem

19 And if we think of California and the central  
20 valley water project, my goodness, you're not going to say  
21 that's all one body of water. You have the Sacramento,  
22 San Joaquin, Los Angeles. You know, it goes all over the  
23 place.

24 And so that's their big problem. They are  
25 saying if you -- if you don't take a strong reading of the

1 dam cases, one that hurts you, we're suddenly going to  
2 find ourselves with -- with water valley projects all over  
3 the United States and 15 million permits required, and it  
4 just won't work.

5 All right. So what's your response to that?

6 MR. LEHTINEN: Well, Your Honor, first with  
7 respect to the same body of water, if you were referring  
8 to the Everglades, this is a -- C-11 is a canal that has  
9 gas stations, urban shopping malls, industrial parks  
10 around it. And the canal itself was dug out. It's not as  
11 though 99.99 percent of the Everglades were removed. So  
12 that canal has been dug deeper. The Everglades' ecosystem  
13 removed. It's distinctly different.

14 QUESTION: That's why I think we need a separate  
15 body of water requirement there. But what about the other  
16 part of what they say?

17 MR. LEHTINEN: Well, with respect to these  
18 larger water projects, Your Honor, first of all, if  
19 they're withdrawing water, they're not going to come under  
20 our condition, withdrawing and then being used for a  
21 consumptive use and so forth. That's already dealt with a  
22 different way. If they're returning the water through  
23 irrigation return flow, that's already exempt.

24 Otherwise, if they're -- the State does  
25 designate the use and does designate the water quality

1 standards. So these large movements through canals and  
2 water projects -- the State controls the designation of  
3 those uses.

4           And even if they were found to be a movement  
5 from one navigable water to another, they're likely to  
6 qualify for a general permit. As Colorado said on page 3  
7 of its brief, none of their movements of water, through  
8 any structures in Colorado, interbasin transfers, result  
9 in a water quality standard violation. Accordingly,  
10 Colorado solves any problem it has with one general  
11 permit.

12           As well, most of these big movements of water  
13 move water that doesn't distinctly, as in this case, move  
14 water that's four times higher in a certain content than  
15 the receiving water body's water quality standard. The  
16 State law for the Everglades and only the Everglades  
17 protection area, not the C-11 canal, is now 10 parts per  
18 billion. That actual number was changed and became  
19 effective January 1 of 2004, but it had a separate  
20 designation and water quality standard throughout all of  
21 the time of this case.

22           QUESTION: May I ask you two questions that I --  
23 I think you may have answered, but I'm just not sure? Do  
24 you -- in your view is water conservation area 3 and the  
25 C-11 basin the same body of water, or are they different



1 bodies? That's my first question.

2 My second question is in your view does the  
3 record tell us where the water from the C-11 basin  
4 primarily comes from?

5 MR. LEHTINEN: Yes, Justice Stevens. With  
6 respect to the first, they're distinctly different bodies  
7 of water. The C-11 canal is a canal that has been dug  
8 artificially deep, surrounded by gas stations, shopping  
9 malls.

10 QUESTION: I understand that.

11 MR. LEHTINEN: And it does not have the ecology  
12 of the Everglades. Nobody stands at a gas station and  
13 says to their child, there, John, is the Everglades. It  
14 -- it has -- and it doesn't have Everglades water because  
15 Everglades water would naturally flow west to east, and  
16 they have blocked that flow from the Everglades into the  
17 sloughs and into the Atlantic Ocean.

18 QUESTION: Then what about the second question?

19 MR. LEHTINEN: With respect to the second, the  
20 record shows the trial court found that substantial  
21 surface water runoff goes into the C-11, and --

22 QUESTION: That's right, but why does the --  
23 what is the source of the runoff?

24 MR. LEHTINEN: Well, the source of the runoff is  
25 sometimes rainfall.

1 QUESTION: I understand.

2 MR. LEHTINEN: And it is sometimes from the  
3 aquifer --

4 QUESTION: But surely it didn't get all their  
5 water from -- from rain.

6 MR. LEHTINEN: And it is sometimes from the  
7 aquifer below the C-11 because the C-11 basin, as opposed  
8 to the canal -- the C-11 basin is a -- has been drained  
9 and substantial fill put in for the gas --

10 QUESTION: But that -- that thing in the -- the  
11 water in the aquifer in turn comes largely from the  
12 Everglades, does it not?

13 MR. LEHTINEN: Your Honor --

14 QUESTION: It filters down to the aquifer from  
15 the Everglades and then seeps through to the other side of  
16 the levee. I thought it was -- I thought it was  
17 acknowledged on both sides that there's -- that there's  
18 transfer of water from the west to the east below the  
19 levee.

20 MR. LEHTINEN: Yes, Your Honor, from west to  
21 east, but not east to west, and when the water transfers  
22 through the --

23 QUESTION: Well, but that doesn't -- that  
24 doesn't go to the point of whether it's the same body of  
25 water or not. I mean, whether it flows east to west or

1 west to east, the point is it's -- it's the same water.

2 MR. LEHTINEN: Well, Your Honor, the fact that  
3 waters will flow from the -- in that case, there would be  
4 perhaps three bodies of water in the United States: east  
5 of the Appalachian Divide, west of it, and -- and then  
6 separated by the Continental Divide in the west. The fact  
7 that one water will flow eventually into the other doesn't  
8 make them the same water body. That is to say, Loon Pond,  
9 which was a substantially different ecology and water  
10 quality standard and different classification by the  
11 State, flowing eventually into the polluted Pemi gewassett  
12 River much further downstream, did not make them the same  
13 water body.

14 QUESTION: You say that subsurface flow doesn't  
15 count then in this question.

16 MR. LEHTINEN: That's correct. In this case  
17 subsurface flow -- that water is substantially changed in  
18 the aquifer. By the time it's underneath the C-11, it  
19 doesn't have the biological or ecosystem characteristics  
20 of the water that is in the Everglades protection area.  
21 It's been substantially changed by the -- by the aquifer.

22 QUESTION: But you say this doesn't matter  
23 anyway. You wouldn't care if it was the same water body.  
24 That isn't -- that isn't what you're arguing.

25 MR. LEHTINEN: We do argue that it is the same

1 water body and you pump it substantially upstream You  
2 would also need a permit.

3 QUESTION: Right, right.

4 MR. LEHTINEN: The downstream Pemi gewassett  
5 River --

6 QUESTION: If -- if -- do you know any place we  
7 could look for a definition of what is the same water  
8 body? Is -- is there some -- some -- can I -- you know,  
9 I'm not sure.

10 MR. LEHTINEN: Well, there is a -- there is a --

11 QUESTION: We could try Genesis --

12 (Laughter.)

13 QUESTION: -- or then the second --

14 (Laughter.)

15 MR. LEHTINEN: There is -- there is EPA  
16 guidance, but the fact that 303 of the act itself mandates  
17 that States designate different water bodies and the  
18 phrase, water bodies, used in the EPA specification of  
19 what water quality standards is means that, as a matter of  
20 fact, it's done all of the time. And in the State of  
21 Florida, the State legislature has designated the  
22 Everglades protection area quite distinct from the canal,  
23 a different water quality standard and a -- and a  
24 different use for that water. And as a hydrological  
25 matter, they are -- they are able to -- to deal with that.

1 They' ve given them different water body numbers in the  
2 State of Florida. The C-11 canal is a different water  
3 body number from the Everglades -- various parts of the  
4 Everglades protection area and -- and so forth.

5 The --

6 QUESTION: Could you explain what's at stake  
7 here practically? We're told that there are other means  
8 to deal with this phosphorus problem. If the permit you  
9 envision were required, what would that permit demand?

10 MR. LEHTINEN: This permit would most likely  
11 require simply that the plan that the district already has  
12 -- has on the books and which they mentioned in their  
13 brief would be implemented within a reasonable period of  
14 time and under a reasonable compliance schedule.

15 The Everglades restoration project was first  
16 motivated, as -- as is admitted in all briefs, by  
17 litigation against the district for discharging phosphorus  
18 that caused an imbalance of natural populations of flora  
19 and fauna, and furthermore, all of the congressional acts  
20 that deal with the Everglades restoration projects --  
21 that's -- and they're referred to in our brief called  
22 WRDA, Water Resources Development Act '96 and Water  
23 Resources Development Act 2000 -- both refer to the  
24 pending litigation and make the statement that they don't  
25 intend to interfere with pending litigation. And WRDA

1 2000 specifically says that nothing in these Everglades  
2 restoration -- this section shall be deemed to eliminate  
3 any permitting requirements under law.

4 QUESTION: What is -- what is then the -- the  
5 reason for this litigation? I mean, you -- you say you're  
6 just trying to get them to do what they have already said  
7 they are doing.

8 MR. LEHTINEN: Yes.

9 QUESTION: You don't believe that they're doing  
10 it.

11 MR. LEHTINEN: Well, Your Honor --

12 QUESTION: And you don't believe they're going  
13 to do it, you know, in the foreseeable future.

14 MR. LEHTINEN: We -- we believe, as -- as  
15 Congress did, that the Clean Water Act -- that the  
16 programs in place were not always implemented and that the  
17 Clean Water Act was necessary as a backstop to stop the  
18 backsliding. The Federal Government's litigation in 1988  
19 required the State to do no more than the State in press  
20 releases was saying that it was doing and intended to do,  
21 but the litigation, reinforced by Congress that  
22 specifically said we don't intend to interfere with any of  
23 that litigation, indicates why Federal enforcement is a --  
24 is a useful and necessary tool to ensure that States under  
25 different pressures don't backslide.

1                   Our brief appendix indicates that 2 years ago  
2 they indicated they would meet water quality standards in  
3 the S-9 by 2005, and then with the pendency of this  
4 litigation, they have eliminated any commitment to reach  
5 it by 2005, hoping that this litigation will first relieve  
6 them of the oversight of the NPDES on S-9 and then they  
7 will use this litigation to eliminate the NPDES' s that  
8 were required from 1993 forward on the other projects.  
9 The only thing that keeps those -- those other discharge  
10 structures under the restoration project from not being  
11 extended or otherwise modified by the State are the EPA-  
12 placed NPDES permits that already exist on all of those  
13 Everglades restoration projects. We simply want the same  
14 permitting backstop on the S-9 structure.

15                   With respect to the question of singular waters,  
16 the singular waters approach of the United States  
17 eliminates the different designated uses and the ability  
18 to actually determine the effects of a permit. The  
19 Minnesota amici brief is very useful in this sense because  
20 it points out that St. Paul now, like the Commonwealth of  
21 Pennsylvania and others, does get an NPDES to remove water  
22 from the Mississippi to its lake and water reservoir.  
23 However, if the Solicitor General' s position were correct,  
24 St. Paul would no longer need that NPDES permit, and St.  
25 Cloud, substantially up-river on the Mississippi, would --

1 would be under a -- a review for does its discharges to  
2 the Mississippi, which have been found to meet the NPDES  
3 requirements, not changing the designated use or violating  
4 the Mississippi's water quality standard -- it -- its  
5 discharges should be deemed to be somehow removable  
6 artificially downstream in the Mississippi so that  
7 anyplace anyone at any time might construct the pipe and  
8 move them into a more pristine water body, you, St. Cloud  
9 now have to anticipate that and will be put under that --  
10 that mandate.

11 So the inability of a permit writer to construct  
12 a 402 permit because he doesn't know that the evaluation  
13 is now to the receiving navigable water, but instead I  
14 have to evaluate where anyone with a pipe might move it,  
15 hundreds and hundreds of miles, without an NPDES permit,  
16 that permit writer essentially has to permit only for the  
17 highest designated use and the highest water quality  
18 standard anywhere in the United States, notwithstanding  
19 that where the discharge -- point source is discharging to  
20 is a particular designated use. That would make the act  
21 either impossible to administer or place burdens on the  
22 governments that the petitioner says should not be placed  
23 on the governments. Instead of placing it on the  
24 government that for some purpose, some economic purpose,  
25 is able to -- to determine the costs and to -- and to



1 clean the water or at least subject itself to review, when  
2 it takes it from a navigable water into a pristine  
3 navigable water, you place the burden instead on anyone  
4 else who might discharge so -- and -- and whose -- whose  
5 discharge, might, if removed anywhere downstream by anyone  
6 for any reason, might end up causing a violation of a  
7 water quality standard.

8           QUESTION: Look -- look, when -- when the States  
9 require permitting, as -- as they're allowed to do, they  
10 can presumably limit the permitting to just the -- the  
11 kind of difficult situations you're talking about, when it  
12 is into a pristine body of water from a more polluted body  
13 of water. But if we agree with you on the meaning of the  
14 act, permitting will be mandatory not just when -- when  
15 there are differences between the pollution levels of the  
16 two bodies of water, but whenever there is a transfer from  
17 one body of water to another. Even when the two bodies of  
18 water are equally polluted, you would need a permit  
19 because you are adding -- you are adding pollutants.

20           MR. LEHTINEN: Well, Your Honor --

21           QUESTION: Now, it may well be you're adding  
22 pollutants to a body of water that already contains it,  
23 but you will need a -- a permit in every case whenever any  
24 State tries to do flood control projects or any project  
25 that requires the transfer of water from one body to

1 another.

2 MR. LEHTINEN: Well, in the so-called worst  
3 case, Justice Scalia, they'd be qualifying because they  
4 don't have a -- they're not impairing either water body --  
5 qualifying for one general permit issued in the State.  
6 But under other circumstances --

7 QUESTION: Excuse me. Can you do that? Can --  
8 I mean, can EPA issue a general permit, say anybody  
9 that --

10 MR. LEHTINEN: Yes, Your Honor. General permits  
11 are authorized and they are often written to say under the  
12 following conditions, you qualify for the general permit,  
13 and -- and --

14 QUESTION: You don't have to get it. You just  
15 -- just --

16 MR. LEHTINEN: That's correct, Your Honor. You  
17 don't have to get it.

18 QUESTION: You just go ahead.

19 MR. LEHTINEN: The general permit might or might  
20 not say to do certain monitoring to make sure that you  
21 stay within the conditions of the general permit. Those  
22 general permits are very common, and even individual  
23 permits are usually system-wide permits. You have 80  
24 structures --

25 QUESTION: You say a general permit. You mean

1 that applies to a number of different people?

2 MR. LEHTINEN: Yes, Your Honor. A general  
3 permit can be statewide. The permit looks almost like a  
4 rule, but the permit says -- and in the case of the Corps,  
5 they do nationwide permits, but 404 is not at issue here.  
6 The general permit statewide could say that under the  
7 following circumstances, when you are an unimpaired water  
8 body discharging to an unimpaired water body or  
9 discharging at levels that have pollutants but don't  
10 impair the receiving water body, you automatically qualify  
11 for this permit. Do some monitoring. Let us know every  
12 year. That general permit is -- is frequently used and --  
13 and is very close to rulemaking.

14 But it's also possible, under those  
15 circumstances -- and this is not our case. Our case  
16 discharges at almost four times the water quality  
17 standard, 10 parts per billion, for the receiving water  
18 body. It clearly impairs the receiving water body. But  
19 if the standard for a water body were 20 of a substance,  
20 its actual receiving level was 10 and you discharged at 5,  
21 not to get too complex, but you're discharging at a lower  
22 level than the receiving water body and the water bodies  
23 are not impaired, it's possible mathematically, but not  
24 our case here -- these hypotheticals should be left to  
25 another time. It's possible that the 1 gallon in the

1 receiving water body that had 10, with 1 gallon added to  
2 it that had 5, the 2 gallons now have 15, or in fact,  
3 7-and-a-half per receiving unit. That may be determined  
4 by rule or other appropriate analysis in the western  
5 cases, if they ever come up, to not be an addition. But  
6 that's not our case here.

7           The Court, in an abundance of caution, could  
8 point out that our case here is an artificial canal that  
9 receives substantial surface water runoff, itself probably  
10 a conveyance under the Clean Water Act definition of  
11 channels or discrete conveyances, that it discharges at  
12 levels up to four times the receiving water body's water  
13 quality standard, that it is itself an impaired water  
14 body. So that the hypothetical situations or application  
15 to western States or elsewhere is -- are not being  
16 addressed by the Court.

17           Now -- now, the -- the amici from the Tongue and  
18 Yellowstone River Irrigation District point out actually  
19 that in the west, they believe that ranchers and farmers  
20 will suffer from the Federal Government's unitary water  
21 theory because they will now be subject to water that is  
22 not of sufficient quality for their irrigation district  
23 and so forth.

24           It's not simply a west -- and the State of  
25 Washington also joined in our brief. We, of course -- we

1 don't count States, but more States support the tribe in  
2 their briefs saying this is essential than do support the  
3 -- the district and the United States.

4           The -- it's particularly important to recognize  
5 the C-11 was itself dug, is not a residual part of the  
6 Everglades, and that it's -- the C-11 basin is not simply  
7 a -- a water body divided from the WCA or the Everglades  
8 protection area by a levee. Looking at pages 6a and 7a of  
9 our brief, which are the appendix to our brief, are from  
10 the district's own web site, which it cited in its brief,  
11 and it shows the urban construction right to the boundary.  
12 So it's not that the C-11 basin is water just divided.  
13 It's an artificial canal. It's no -- no more part of the  
14 Everglades protection area than Fenway Park in Boston is  
15 part of the Charles River because it's built on the  
16 landfill where the Charles River once was. They're quite  
17 distinct.

18           With respect to federalism issues, the Clean  
19 Water Act itself is a federalism instrument because it  
20 provides for the States to do the designation of uses. It  
21 provides for the States to -- to create the water quality  
22 standards, and it does protect the ability of the States  
23 to allocate quantities of water, but this is not a  
24 quantity allocation.

25           The record shows clearly that the S-9 pump is

1 turned on when you get to 1 foot of -- turned off when --  
2 when the C-11 basin is at 1 foot and turned on when it's  
3 at 4 foot. It is strictly a drainage mechanism to take  
4 surface water runoff and other water out of the C-11.  
5 They're disposing of water. They don't want the water.  
6 They're dumping the water wherever they can put it.

7           And actually the water is not our concern. It  
8 is the pollutants. Whenever they say merely conveying  
9 water, we would say conveyance is defined as a point  
10 source and they convey pollutants. If they didn't convey  
11 this massive amount of pollutants, we would not be before  
12 Your Honors.

13           The district, by pumping pollutants contained in  
14 the water against the natural flow of that water into the  
15 specially designated Everglades protection area, added  
16 that water to the Everglades protection area within the  
17 plain meaning of -- of the Clean Water Act and within the  
18 common usage of -- of language. The district put those  
19 pollutants in the Everglades and nobody but the district  
20 put those pollutants in the Everglades.

21           An effort to reconstruct the term, addition to  
22 navigable waters, to allow them to dispose of those  
23 pollutants anywhere in the United States with a navigable  
24 water of any designated use or of any water quality  
25 standard would decimate the Clean Water Act's protection

1 not only of the Everglades, but of the case law that --  
2 that Your Honors have had cited in the brief.

3 Now, the circuit court cases are not  
4 particularly precedent for your Court, but it does point  
5 out that Loon Pond would have had water that peeled paint  
6 off of the adjoining buildings put into it and not just  
7 through snow-making devices. The -- the court clearly  
8 indicated that sometimes the Pemigewasset water was put  
9 directly to Loon Pond to -- to increase the amount of  
10 water in Loon Pond.

11 Now, the -- the United States would try to save  
12 its singular water theory in some cases by saying, well,  
13 water might be removed. They said on the Dubois case, the  
14 First Circuit Loon Pond, that it was removed for snow-  
15 making, but I point out that the court said in several  
16 places that it also went directly, never through snow-  
17 making devices.

18 They would say that when you put it through  
19 tunnels or so forth, perhaps it loses its navigable water  
20 character. The State of New York, of course, is strongly  
21 in favor of the tribe because the 18-mile Shandaken Tunnel  
22 to them needs --

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
24 Lehtinen.

25 Mr. Bishop, you have only 10 seconds left, so

1 we'll consider the case submitted.

2 (Whereupon, at 12:14 p.m., the case in the  
3 above-entitled matter was submitted.)

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