No. _____

IN THE

Supreme Court of the United States

RIVERKEEPER, INC., THEODORE GORDON FLYFISHERS, INC. and WATERKEEPER ALLIANCE, INC.,

Petitioners,

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Did the Second Circuit err in holding that this Court's analysis set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983) did not apply to an evaluation of an agency's interpretation of a statute under step two of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a holding which is inconsistent with this Court's reasoning in *Michigan v. EPA*, 135 S. Ct. 2699 (2015) and created a circuit split with the United States Court of Appeals for the District of Columbia?

2) Did the Second Circuit err in applying the Clean Water Act phrase "addition . . . to navigable waters" differently to discharges of dredged materials and transfers of polluted water between water bodies, despite the phrase establishing the single broad discharge prohibition of the Act, where such an irreconcilable application was contrary to this Court's precedent in *Clark v. Martinez*, 543 U.S. 371 (2005) and *Sorenson v. Secretary of Treasury*, 475 U.S. 851 (1986)?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellees:

Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., Riverkeeper, Inc., Waterkeeper Alliance, Inc., Trout Unlimited, Inc., National Wildlife Federation, Environment America, Environment New Hampshire, Environment Rhode Island, Environment Florida, State of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, Government of the Province of Manitoba, Canada

Intervenor Plaintiffs-Appellees:

Miccosukee Tribe of Indians of Florida, Friends of the Everglades, Florida Wildlife Federation, Sierra Club

Defendants-Appellants:

United States Environmental Protection Agency, Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency

Intervenor Defendants-Appellants:

State of Colorado, State of New Mexico, State of Alaska, Arizona Department of Water Resources, State of Idaho, State of Nebraska, State of North Dakota, State of Nevada, State of

Texas, State of Utah, State of Wyoming, Central Arizona Water Conservation District, Central Utah Water Conservancy District, City and County of Denver, by and through its Board of Water Commissioners, City and County of San Francisco Public Utilities Commission, City of Boulder [Colorado], City of Aurora [Colorado], El Dorado Irrigation District, Idaho Water Users Association, Imperial Irrigation District, Kane County [Utah] Water Conservancy District, Las Vegas Valley Water District, Lower Arkansas Valley Water Conservancy District, Metropolitan Water District of Southern California, National Water Resources Association, Salt Lake & Sandy [Utah] Metropolitan Waterdistrict, Salt River Project, San Diego County Water Authority, Southeastern Colorado Water Conservancy District, the City of Colorado Springs, acting by and through its Enterprise Colorado Springs Utilities, Washington County [Utah] Water District, Western Urban Water Coalition, [California] State Water Contractors, City of New York, South Florida Water Management District

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioners, Riverkeeper, Inc., Theodore Gordon Flyfishers, Inc., and Waterkeeper Alliance, Inc., hereby disclose that they are non-profit organizations, and as such, have no parent corporations or publicly held corporations owning 10% or more of any of their stocks.

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INTRODUCTION

This case presents the Court with the opportunity to correct the Second Circuit's misinterpretation of this Court's precedent and to resolve a circuit split regarding the application of the deference test set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) in conjunction with *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983). As recently as 2015, this Court applied *State Farm* when evaluating an agency's interpretation of a statute pursuant to the second step of a *Chevron* analysis. *See Michigan v. EPA*, 135 S. Ct. 2699 (2015).

Despite this precedent, which was cited below, the Second Circuit incorrectly held that *State Farm* was inapplicable to a substantive *Chevron* analysis. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 521 (2d Cir. 2017) ("*Catskill III*"). The court declared that "[a]n agency's initial interpretation of a statutory provision should be evaluated only under the *Chevron* framework. . ." *Id.* Rather, the court held, the application of *State Farm* is limited to "a case involving a non-interpretive rule" or "a changed interpretation of a statute." *Id.* But *Michigan* presented neither of those situations, and, accordingly, the Second Circuit's decision is directly contrary to this Court's prior reasoning in *Michigan*.

In addition, the decision below creates a circuit split. The D.C. Circuit has held in several cases over

the last two decades that an evaluation of an agency's interpretation of a statute under *Chevron* Step Two is governed by this Court's analysis in *State Farm*. *See, e.g., Sociedad Anonima Vina Santa Rita v. U.S. Dep't of Treasury*, 193 F. Supp. 2d 6 (D.C. Cir. 2001); *Arent v. Shalala*, 70 F.3d 610 (D.C. Cir. 1995). This circuit split creates the potential for inconsistent statutory interpretation, forum shopping, and uncertainty regarding the proper deference due agency statutory interpretation.

Separately, the majority below failed to acknowledge the plain meaning of the phrase "addition . . . to navigable waters," which, as the Second Circuit had previously recognized, is not ambiguous. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491-93 (2d Cir. 2001) ("*Catskill I*"), *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006) ("*Catskill II*"), *cert. denied*, 127 S. Ct. 1373 (2007). Reversing course, the panel below held that the single phrase in the same section and definition in the Clean Water Act could mean two different things, depending on the context in which it was applied. *Catskill III*, 846 F.3d at 513-14. This holding is contrary to this Court's precedent in *Clark v. Martinez*, 543 U.S. 371 (2005) and *Sorenson v. Secretary of Treasury*, 475 U.S. 851 (1986), which created a strong presumption that the same phrase be interpreted consistently throughout a statute, especially when it is defined only once.

For all of the forgoing reasons, review by this Court is appropriate and necessary.

OPINIONS BELOW

The opinion of the court of appeals is reproduced below at App. 3a-110a and reported at 846 F.3d 492. The opinion of the district court is reproduced below at App. 112a-252a and reported at 8 F. Supp. 3d 500.

JURISDICTION

The court of appeals issued its opinion on January 18, 2017. Petitioner timely filed a petition for rehearing en banc, which the court denied on March 6, 2017. On July 14, 2017, Justice Ginsburg extended the time for filing this petition to and including September 15, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Clean Water Act, 33 U.S.C. §§ 1251(a), 1342(a)(1), 1344(a) and 1362(12), are reproduced at App. 256a-257a. The Water Transfers Rule, 40 C.F.R. § 122.3(i), is reproduced at App. 257a.

STATEMENT OF THE CASE

At issue on this appeal is whether it was permissible for the United States Environmental Protection Agency ("EPA") to interpret the Clean Water Act to exclude from permitting requirements additions of pollutants from one waterbody into another through a transfer of water. The Clean Water

Act prohibits the addition of a pollutant from a point source into waters of the United States unless the discharge is specifically authorized under the Act. 33 U.S.C. § 1311(a). The word "addition" appears just once in the statute, in section 502(12), within the definition of "discharge of a pollutant." Specifically, that phrase is defined as "any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12). This section is incorporated by reference in several other sections of the Act that use the defined term, including section 301, which prohibits all such discharges, and sections 402 and 404, which create exceptions to that prohibition. *See* 33 U.S.C. §§ 1311, 1332, 1344.

Consistent with the use of this same language throughout the Clean Water Act, a series of Circuit Courts of Appeal opinions between 1995 and 2006 established that Section 301's discharge prohibition and thus the Act's permitting requirement applies to transfers of polluted water between waterbodies, including water supply systems, storm water management systems, and snowmaking water supply systems. *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996); *Catskill I*, 273 F.3d 481; *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002) ("*S. Fla. Water*"), *cert. granted in part*, 539 U.S. 957 (2003); *Catskill II*, 451 F.3d 77.

Petitioners in this case were plaintiffs in *Catskill I* and *II*, which sought to require a permit for New York City's discharge of turbid, warm water into a trout stream in violation of state water quality standards, as part of its water supply system. The Second Circuit

held that this transfer of polluted water constituted an "addition" of a pollutant to navigable waters, subject to Clean Water Act permitting requirements as a matter of the "plain meaning" of the Act. *Catskill I*, 273 F.3d at 491-93; *Catskill II*, 451 F.3d at 84-85.

The Supreme Court granted certiorari in another one of these cases, *Miccosukee*, and considered, without deciding, the argument that the transfer of already polluted water did not constitute the "addition" of a pollutant subject to the Clean Water Act prohibition. This argument was based on the idea that pollutants already in any water of the United States could not be "added" by a water transfer because those pollutants were already in the waters of the United States -- the so-called "unitary waters theory." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-07 (2004). In dicta, Justice O'Connor expressed skepticism about the unitary waters theory, but remanded the issue to the Eleventh Circuit.

Despite the Second Circuit's decisions in *Catskill I* and *II* and the Supreme Court's decision in *Miccosukee*, EPA sought to reverse these decisions and implement its contrary informal interpretation through rulemaking. In June 2008, EPA adopted the rule that is the subject of this litigation, the Water Transfers Rule. *See* 73 Fed. Reg. 33,697, 33,708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i) (2008)) ("Water Transfers Rule"). The Water Transfers Rule purports to exempt water transfers from Clean Water Act permitting requirements.

A. Trial Proceedings

Plaintiffs below, which included environmental, conservation, and sporting organizations, as well as several state, provincial, and tribal governments, challenged the Water Transfers Rule under the Administrative Procedure Act ("APA") in 2008. After a lengthy stay pending the resolution of jurisdictional issues, the parties cross-moved for summary judgment before Judge Karas in the Southern District of New York. Judge Karas granted summary judgment for the plaintiffs on March 28, 2014 on the grounds that the Water Transfers Rule could not survive the second step in *Chevron* analysis because it was based on an unreasonable interpretation of the Clean Water Act. The court thus vacated the Water Transfers Rule in part and remanded the rule to EPA. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014).

B. Second Circuit's Decision

The Second Circuit reversed the district court on January 18, 2017 in a 2-1 opinion. *See Catskill III,* 846 F.3d 492. The majority held that the Water Transfers Rule was consistent with the Clean Water Act and upheld the regulation based on *Chevron* deference. The court agreed with the district court that when applying Step One of *Chevron* analysis, the Act did not speak directly to the question of whether NPDES permits are required for water transfers; thus, leaving an ambiguity in the statute which required the Court to proceed to Step Two of *Chevron*. *Id.* at 500. Under Step Two analysis, the Second Circuit determined EPA's Water Transfers Rule was a reasonable interpretation of the Clean Water Act. *Id.* at 501.

Plaintiffs filed a petition for rehearing en banc on March 6, 2017. The Second Circuit denied the petition on April 18, 2017.

REASONS FOR GRANTING THE PETITION

The panel below adopted a meaning for "addition . . . to navigable waters" that is contrary to the plain meaning of those words and inconsistent with the Act. The Act unambiguously requires permits for all discharges of pollutants into navigable waters from any point source, including pollutants moved from one waterbody to another. Indeed, the Second Circuit itself so held in both *Catskill I* and *Catskill II* when it applied traditional tools of statutory interpretation to conclude that the Act's "plain language" and "ordinary meaning" dictate that the movement of polluted water into "another, distinct body of water is plainly an addition" of pollutants that requires an NPDES permit. 273 F.3d at 491-93; *see* 451 F.3d at 84-85. The panel diverged from its own precedent, a long line of cases in the District of Columbia Circuit and this Court's precedent when it decided *Catskill III*.

I. The Second Circuit's Refusal to Apply *State Farm* Analysis to the Second Step of *Chevron* Review Departs from This Court's Precedent and the Practice of Other Circuits

A. The Second Circuit's Analysis Contradicts This Court's Precedent in Michigan v. EPA

The Second Circuit, in analyzing EPA's decisions, held that this Court's approach to arbitrary and capricious analysis set forth in *State Farm* was

inapplicable in deciding whether the agency's interpretation was permissible under a *Chevron* Step Two analysis. *Catskill III*, 846 F.3d at 521 ("An agency's initial interpretation of a statutory provision should be evaluated only under the *Chevron* framework, which does not incorporate the *State Farm* standard."). The panel found that the *State Farm* analysis, which evaluates whether the agency considered the relevant factors in its interpretation, was strictly procedural. *Id.* ("*State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process.").

In doing so, the Second Circuit cited to, but did not follow, this Court's precedent in *Michigan v. EPA*. There, this Court applied *State Farm* in a non-procedural *Chevron* Step Two analysis of an interpretive rule making. Specifically, the Court quoted *State Farm* and concluded that an "agency action is lawful only if it rests 'on a consideration of the relevant factors,'" and went on to explain that its review would be conducted "under the standard set out in *Chevron*." 135 S. Ct. at 2706-07 (quoting *State Farm*, 463 U.S. at 43). In its substantive evaluation of EPA's statutory interpretation, this Court explicitly invoked *State Farm*'s standards, reiterating that although the statutory language left a gap for the agency to fill, "an agency may not 'entirely fail to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Id.* at 2707 (quoting *State Farm*, 436 U.S. at 43). The subsequent analysis probed EPA's decision-making process, noting that "*Chevron* allows agencies to choose among competing reasonable interpretations of

a statute; it does not license interpretative gerrymanders" which allow the agency to avoid considering factors it would rather not. *Id.* at 2708. In *Michigan*, this Court held, "EPA interpreted [the statute] unreasonably when it deemed cost irrelevant to the decision," reaching that conclusion after conducting *State Farm* inquiry into whether the agency had considered all relevant factors. *Id.* at 2712.

When comparing the framework of the controversy before the *Catskill III* and *Michigan* courts, the issues were nearly identical. In *Catskill III*, the challenge specifically turned on whether the agency had considered all relevant factors. Brief for Plaintiffs-Appellees at 43-52, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017) (Nos. 14-1909(con), 14-1991(con), 14-1997(con), & 14-2003(con)) (asserting, *inter alia*, that the rule was defective for failure to consider the purpose of the Act, failure to consider alternative policies, and as the failure to provide a reasoned explanation). Likewise, in *Michigan*, this Court examined an EPA rule which proceeded from an analysis which failed to consider certain factors. 135 S. Ct. at 2701. Despite this posture being nearly indistinguishable from that of *Michigan*, the *Catskill III* Court departed from this Court's example.

Finally, the Second Circuit draws an artificial distinction, suggesting that "*State Farm* review may be appropriate in a case involving a non-interpretive rule or a rule setting forth a changed interpretation of the statute; but that is not so in the case before us." *Catskill III*, 846 F.3d at 521. However, the rule before the *Michigan* Court was no less interpretive than the

one before the *Catskill III* panel. The *Michigan* Court analyzed EPA's decision to disregard costs when regulating power plants, a decision which "rested on its interpretation" of the Clean Air Act. 135 S. Ct. at 2706. The *Catskill III* Court analyzed EPA's decision to disregard certain sources of pollution and choice not to regulate water transfer, a decision which rested on its interpretation of the Clean Water Act. 845 F.3d at 500. This purported distinction is illusory and marks an additional schism between the Second Circuit and binding precedent.

Given the deviation from binding precedent, the majority's decision warrants review by this Court. At a minimum, the petition should be granted, the decision below vacated, and the case remanded for *State Farm* review in light of *Michigan*.

B. The Decision Below Creates a Circuit Split with the District of Columbia Circuit.

The District of Columbia Circuit has long recognized that it is necessary to integrate *State Farm* considerations when performing *Chevron* analysis. In *Arent v. Shalala*, the Circuit assessed an agency rule by applying *State Farm* analysis. 70 F.3d 610 (1995). The court explained, "*Chevron* analysis and the arbitrary, capricious inquiry set forth in *State Farm* overlap in some circumstances." *Id.* at 616 n.6 (internal quotations omitted). The Court found that *Chevron* and *State Farm* harmonized; where *Chevron* indicated that the agency has authority in an area, *State Farm* is applied to discover whether that authority was exercised reasonably. *Id.* at 614-16. The Court applies *State Farm* factors to decide whether the

agency's interpretation is permissible. *Id.* The Circuit has repeatedly reaffirmed this application of *State Farm*. *See*, *e.g.*, *Independent Petroleum Ass'n of Am. v. Babbit*, 92 F.3d 1248, 1258 (1996) (holding that the case fell within the "overlap" between *Chevron* and *State Farm*, declaring that it was applying *Chevron*, then "proceed[ing] to examine the . . . decision under the APA's arbitrary and capricious standard . . . ."

In *Natural Resources Defense Council v. Daley*, the District of Columbia Circuit reviewed National Marine Fisheries Services' interpretation of statutory language. 209 F.3d 747 (2000). The court concluded that "the Service's position fail[ed] the test of *Chevron* Step Two," *id.* at 754, based not on the agency's misinterpretation of the statute, but instead because of gaps in the data used to support its conclusion. *Id.* at 754-55. The court counseled that deferring to the agency in light of the gaps in the Service's analysis would be "tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act." *Id.* at 755 (quoting *A.L. Pharma, Inc v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995)).

Here, in contrast, the Second Circuit erroneously overturned the district court explicitly because it "erred by incorporating the State Farm standard into its Chevron Step Two analysis." The error was dispositive, as an evaluation of EPA's decision-making shows it afforded little or no weight to the Clean Water Act's water quality goals. Indeed, the district court below had held EPA's failure to provide a "reasoned explanation for its decision" in balancing the goals of the Clean Water Act ran afoul of the *State Farm* arbitrary and capriciousness test. *Catskill Mountains*

Chapter of Trout Unlimited, 8 F. Supp. 3d at 557 (quoting *State Farm*, 463 U.S. at 43).

The District of Columbia Circuit jurisprudence is also inconsistent with the Second Circuit's contention that *State Farm* is used solely to detect procedural defects. *Catskill III*, 846 F.3d at 521. *See, e.g., Arent*, 70 F.3d at 617 (including in its *State Farm* analysis a discussion of whether an agency's numerical quantification of the term *de minimis* standard is reasonable); *Independent Petroleum Ass'n*, 92 F.3d at 1259 (conducting an in-depth review of agency reasoning, related precedent, and independent statutory construction in conducting *Chevron*/*State Farm* review). Either the Second Circuit splits from D.C. Circuit and Supreme Court precedent, or the definition of "procedural" is so broad as to be meaningless.

The Second Circuit's explicit refusal to consider the factors laid out in *State Farm* to determine the reasonableness of EPA's interpretation of the Clean Water Act upends the principle of *Stare Decisis* by departing from Supreme Court precedent and creates conflict with D.C. Circuit jurisprudence.

II. The Second Circuit's Inconsistent Interpretation of Statutory Terms Contravenes this Court's Holdings in *Sorenson* and *Clark*

A. The Second Circuit's Holding Turned on Inconsistent Interpretations of Section 301(a) of the Clean Water Act

Section 301 of the Clean Water Act is unequivocal. Unless the Act positively creates an exception, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). It is this section of the Act which establishes a prohibition; others merely create paths by which an otherwise impermissible action may become legal. Congress defined the term "discharge" specifying that "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(12).

The question then is whether conveyance or connections of distinct waters of the United States,[1] constitute an "addition . . . to navigable waters" within the meaning of section 502 and, by extension section 301. Both Congress and EPA have answered this question in the affirmative. In section 404, Congress outlined permit requirements for dredged material, establishing that unpermitted dredged material disposal would be unlawful under section 301. EPA clarified this rule, establishing that redepositing material dredged from a body of water back into that same body of water requires a permit in order to be

[1] This includes any pollutants, sediment, etc. within such waters.

permissible under section 301. 40 C.F.R. § 232.2(iii) (2001). The Second Circuit recognized and ratified this meaning in *Catskill III*, 846 F.3d 531-32. Thus, the discharge of pollutants taken from a waterbody and added back even to the very same waterbody constitutes a discharge (*i.e.*, an "addition") of a pollutant to navigable waters that violates the Act unless otherwise lawfully permitted.

Yet, the panel below maintained that it could give section 301 (and the definition in section 502(12)) two different, contradictory meanings depending on which permitting exception is relevant to the case. *Id.* at 531-32. The panel recognized that under section 404, the word "discharge" applies to and prohibits movement of water and sediment from one part of a body of water to another because a contrary reading would exclude dredging. *Id.* This contrary reading, the panel says, would "eviscerat[e]" Congress's intent. *Id.* Yet, when examining section 402, the Circuit determined that the section covers a broader range of pollutants and therefore, "discharge" could be interpreted so as *not* to include the addition of polluted water from one body of water to another. *Id.* at 532. The panel contended that it was interpreting "similar, ambiguous statutory language in one section of a statute differently than similar language in another, entirely distinct section." *Id.* But this was not the case at all; rather, the panel was interpreting the language in section 301 in a different and contradictory manner depending on the permitting scheme to which it is applied.

Interpreting sections 402 and 404 cannot reveal what is unlawful under the section 301 discharge prohibition because those sections outline pathways to

lawfulness under the different permitting schemes. *See* 33 U.S.C. § 1342(a)(1) ("[T]he Administrator may . . . issue a permit for the discharge of any pollutant."); *id.* at § 1344(a) ("The Secretary may issue permits . . . for the discharge of dredged or fill material into navigable waters . . ."). As a result, the panel's reasoning that it was only interpreting sections 402 and 404 fails. Specifically, if additions of pollutants from one waterbody to another were *excluded* from the definition of "discharge" within section 402 (as the panel asserts), this would mean that a *permit* could not be issued under 402 to make such discharges compliant with section 301. Consequently, the logical result of the panel's decision would be that section 402 is powerless to allow water transfers, and, therefore, water transfer would *always* be *illegal*. Unless the panel were interpreting section 301 to exclude water transfers, the decision below results in the Water Transfers Rule making all water transfers illegal. On the other hand, since the panel was in actuality interpreting section 301, it has rendered section 404 meaningless because discharge of dredged material from one waterbody to another (or back to the same waterbody) would not violate section 301 and would therefore not require a section 404 permit. The panel's reasoning is faulty and requires review by this Court.

B. The Second Circuit's Inconsistent Interpretations of Clean Water Act Section 301 Depart from Supreme Court Precedent.

Multiple, inconsistent interpretations of the same section of a statute are precisely what this Court disapproved of in *Clark v. Martinez*, 543 U.S. 371 (2005). In *Clark*, the Court reviewed a statutory

section that applied to three categories of governed entities. It pronounced that the single statutory subsection must be defined the same way regardless of which category it was applied to. *Id.* at 378. Specifically decrying the agency's inconsistent interpretation, this Court noted that "to give these same words a different meaning for each category would be to invent a statute rather than to interpret one." *Id.; accord Catskill III*, 846 F.3d at 532 (recognizing that a term found within one section of an act cannot have "one meaning when applied to the first . . . categor[y] . . . and another meaning when applied to the second"). This Court instructed that "traditional tools of statutory construction" are applied in deciding whether a statute is ambiguous at *Chevron* Step One, before deference is due. *Clark*, 542 U.S. at 402. The Second Circuit's failure to apply these tools at *Chevron* Step One violated this Court's holding in *Clark* and should be corrected.

Even if the Second Circuit had been interpreting two separate sections, which, as discussed above, could not have been the case, the failure to interpret language consistently violated this Court's precedent in *Sorenson v. Secretary of Treasury*, 475 U.S. 851 (1986). In *Sorenson*, petitioners advanced a theory of interpretation that gave a single term ("overpayments") two different uses within different sections of the same statutory subchapter. 475 U.S. at 859. In one section, it would include earned-income credits; in another it would exclude them. *Id.* This Court applied the "normal rule of statutory construction" which "assumes that 'identical words used in different parts of the same act are intended to have the same meaning,'" thus, rejecting the

interpretation. *Id.* at 860 (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). This Court acknowledged that the fact that the statute "includes an explicit definition of 'overpayment' in the same subchapter" strengthens the presumption that the terms are to be interpreted consistently. *Id.*

It follows that the Second Circuit's interpretation – and EPA's – is precluded by *Sorenson*. In *Catskill III*, one section of the statute included transfer of water within or among bodies of water without intervening processing. 33 U.S.C. § 1344. Yet, the panel's interpretation would define the term "discharge" differently, to exclude such transfers, in section 402. Just as in *Sorenson*, the subchapter defines the term "discharge" as an "addition . . . to navigable waters" thereby "strengthening the presumption" that the terms should be read consistently. 33 U.S.C. § 1362(12).

Likewise, the Second Circuit's reminder that statutory consistency is "no more than a presumption," is insufficient to support its holding. *Catskill III*, 846 F.3d at 532. The fact that the presumption is rebuttable implies precisely that it needs rebutting in order not to apply. The Second Circuit instead reverses the presumption and requires proof where *Sorenson* and foregoing cases tell us that no proof is needed. *Id.* at 513. Indeed, even after going on to list no less than seven instances where the term "navigable waters" was defined consistently with EPA's reading of section 404 and inconsistently with its reading of section 402, the panel refused to apply the rule of consistency. *Id.* at 513-14. The Second Circuit departed from this Court's precedent, replacing the presumption of

consistency with a burden assigned to the party asserting consistency.

When evaluating the plain meaning of the relevant sections in the Clean Water Act, it is impermissible to find the word "discharge" or its definition as an "addition" to have inconsistent meanings when applied to sections 402 and 404. In this way, the panel's opinion was directly contrary to this Court's holdings in *Clark* and *Sorenson*, and requires review. This is so whether one considers that the single use of the word "addition" in the statute unambiguously demonstrates Congress's intent to require permits for water transfers as a matter of *Chevron* Step One, or on the other hand, considers a contrary interpretation "impermissible" under *Chevron* Step Two.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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September 15, 2017

APPENDIX

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

Thurgood Marshall United States
Courthouse
40 Foley Square
New York, NY 10007

Office of the Clerk
Phone: (212) 857-8500
www.ca2.uscourts.gov

FINAL JUDGMENT

January 18, 2017

Before: ROBERT D. SACK, Circuit Judge
DENNY CHIN, Circuit Judge
SUSAN L. CARNEY, Circuit Judge

Nos.: 14-1823, 14-1909, 14-1991, 14-1997, 14-2003

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC. et al.,
Defendants-Appellants

Originating Case Information:

District Court Nos.: 08-CV-5606-KMK; 08-CV-8430-KMK
Southern District of New York, District Judge Kenneth M. Karas

This judgment of the District Court is REVERSED,

with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Nos. 14-1823, 14-1909, 14-1991, 14-1997, 14-2003

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., *et al.*,

Plaintiffs–Appellees,

Government of the Province of Manitoba, Canada,

Consolidated Plaintiff–Appellee,

Miccosukee Tribe of Indians of Florida, Friends of the Everglades, Florida Wildlife Federation, Sierra Club,

Intervenor Plaintiffs–Appellees,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.,*

Defendants–Appellants–Cross Appellees,

State of Colorado, State of New Mexico, State of Alaska, Arizona Department of Water Resources, State of Idaho, State of Nebraska, State of North Dakota, State of Nevada, State of Texas, State of Utah, State of Wyoming, Central Arizona Water Conservation District, Central Utah Water Conservancy District, City and County of Denver, by and through its Board of Water Commissioners, City and County of San Francisco Public Utilities Commission, City of Boulder [Colorado], City of Aurora [Colorado], El Dorado Irrigation District,

Idaho Water Users Association, Imperial Irrigation District, Kane County [Utah] Water Conservancy District, Las Vegas Valley Water District, Lower Arkansas Valley Water Conservancy District, Metropolitan Water District of Southern California, National Water Resources Association, Salt Lake & Sandy [Utah] Metropolitan Water District, Salt River Project, San Diego County Water Authority, Southeastern Colorado Water Conservancy District, The City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities, Washington County [Utah] Water District, Western Urban Water Coalition, [California] State Water Contractors, City of New York, Intervenor[1]

Defendants–Appellants–Cross Appellees,

Northern Colorado Water Conservancy District,

Intervenor Defendant,

v.

South Florida Water Management District,

Intervenor Defendant–Appellant–Cross Appellant.

Appeals from the United States District Court for the Southern District of New York.
Nos. 08-CV-5606-KMK; 08-CV-8430-KMK
Kenneth M. Karas, *Judge*.

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[1] Peter D. Nichols also appeared at oral argument on behalf of Intervenor-Defendants-Appellants-Cross Appellees States of Colorado, New Mexico, Alaska, Arizona (Department of Water Resources), Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming.

ARGUED DECEMBER 1, 2015 – DECIDED
JANUARY 18, 2017

Before SACK, CHIN, and CARNEY,
Circuit Judges.

SACK, *Circuit Judge*.

> "Water, water, everywhere / Nor any drop to drink."[2]

Because New York City cannot tap the rivers, bays, and ocean that inhabit, surround, or, on occasion, inundate it to slake the thirst of its many millions of residents, it must instead draw water primarily from remote areas north of the City, mainly the Catskill Mountain/Delaware River watershed west of the Hudson River, and the Croton Watershed east of the Hudson River and closer to New York City.[3] Water is drawn from the Schoharie Reservoir[4] through the

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[2] Samuel Taylor Coleridge, *The Rime of the Ancient Mariner* pt. II, st. 9 (1798) (as many high school students likely already know).

[3] For a New York State Department of Environmental Conservation map of the system, *see* New York City's Water Supply System, N.Y.C. Dep't of Envtl. Prot., http://www.dec.ny.gov/docs/water_pdf/nycsystem.pdf (last visited July 18, 2016), *archived at* https://perma.cc/JG4J-FP3E.

[4] The reservoir is "roughly 110 miles from New York City.... [It] is one of two reservoirs in the City's Catskill system, and the northernmost reservoir in the entire [New York City] Water Supply System." *Schoharie*, N.Y.C. Dep't of Envtl. Prot., http://www.nyc.gov/html/dep/html/watershed_protection/schohar

eighteen-mile-long Shandaken Tunnel into the Esopus Creek. The Creek's water, in turn, flows into another reservoir, then through an aqueduct, and then through several more reservoirs and tunnels alongside the Hudson River, having crossed the River to its Eastern shore some 50 miles north of New York City. Eventually, it arrives at its final destination: the many taps, faucets, and the like within the City's five boroughs.

The movement of water from the Schoharie Reservoir through the Shandaken Tunnel into the Esopus Creek is what is known as a "water transfer," an activity that conveys or connects waters of the United States without subjecting those waters to any intervening industrial, municipal, or commercial use. Water transfers are an integral part of America's water-supply infrastructure, of which the Schoharie Reservoir system is but a very small part. Each year, thousands of water transfers are employed in the course of bringing water to homes, farms, and factories not only in the occasionally rain-soaked Eastern, Southern, and Middle– and North-Western portions of the country, but also in the arid West (including large portions of the Southwest). Usable bodies of water in the West tend to be scarce, and most precipitation there falls as snow, often in sparsely populated areas at considerable distance from their water authorities' urban and agricultural clientele.

Historically, the United States Environmental Protection Agency (the "EPA") has taken a hands-off

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ie.shtml (last visited July 18, 2016), *archived at* https://perma.cc/ZPV4-EPCZ.

approach to water transfers, choosing not to subject them to the requirements of the National Pollutant Discharge Elimination System ("NPDES") permitting program established by the Clean Water Act in 1972. Some have criticized the EPA for this approach. They argue that like ballast water in ships,[5] water transfers can move harmful pollutants from one body of water to another, potentially putting local ecosystems, economies, and public health at risk. While acknowledging these concerns, the EPA has held fast to its position. Indeed, following many lawsuits seeking to establish whether NPDES permits are required for water transfers, the EPA formalized its stance in 2008—more than three decades after the passage of the Clean Water Act—in a rule known as the "Water Transfers Rule."

Shortly thereafter, several environmentalist organizations and state, provincial, and tribal governments challenged the Rule by bringing suit against the EPA and its Administrator in the United States District Court for the Southern District of New York. After many entities—governmental, tribal, and private—intervened on either side of the case, the district court (Kenneth M. Karas, *Judge*) granted summary judgment for the plaintiffs, vacating the Rule and remanding the matter to the EPA. In a thorough, closely reasoned, and detailed opinion, the district court concluded that although *Chevron* deference is applicable and requires the courts to defer to the EPA and uphold the Rule if it is reasonable, the

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[5] *See generally Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 561–62 (2d Cir. 2015).

Rule represented an unreasonable interpretation of the Clean Water Act, and was therefore invalid under the deferential two-step framework for judicial review established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court held that the Rule was contrary to the requirements established by the Act.

The Federal Government and the intervenor-defendants timely appealed. Despite the district court's herculean efforts and its careful and exhaustive explanation for the result it reached, we now reverse for the reasons set forth below.

At step one of the *Chevron* analysis, we conclude—as did the district court—that the Clean Water Act does not speak directly to the precise question of whether NPDES permits are required for water transfers, and that it is therefore necessary to proceed to *Chevron*'s second step. At step two of the *Chevron* analysis, we conclude—contrary to the district court—that the Water Transfers Rule's interpretation of the Clean Water Act is reasonable. We view the EPA's promulgation of the Water Transfers Rule here as precisely the sort of policymaking decision that the Supreme Court designed the *Chevron* framework to insulate from judicial second- (or third-) guessing. It may well be that, as the plaintiffs argue, the Water Transfers Rule's interpretation of the Clean Water Act is not the interpretation best designed to achieve the Act's overall goal of restoring and protecting the quality of the nation's waters. But it is nonetheless an interpretation supported by valid considerations: The Act does not require that water quality be improved

whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers. While we might prefer an interpretation more consistent with what appear to us to be the most prominent goals of the Clean Water Act, *Chevron* tells us that so long as the agency's statutory interpretation is reasonable, what we might prefer is irrelevant.

BACKGROUND[6]

[6] The parties and *amici* (we use the abbreviations here that we adopt for the remainder of this opinion) have filed sixteen briefs taking opposing positions on the validity of the Water Transfers Rule, as follows:

- Anti-Water Transfers Rule:
  - The States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington, and the Province of Manitoba (collectively, the "Anti-Rule States").
  - Leon G. Billings *et al.*
  - The Miccosukee Tribe of Indians of Florida *et al.*
  - Catskill Mountains Chapter of Trout Unlimited, Inc. *et al.* (collectively, the "Sportsmen and Environmental Organization Plaintiffs").
- Pro-Water Transfers Rule:
  - The State of California.
  - The United States Environmental Protection Agency and Gina McCarthy (collectively, the "EPA").
  - The American Farm Bureau Federation and Florida Farm Bureau Federation (collectively, the "Farmer *Amici*").
  - National Hydropower Association *et al.* (collectively, the "Hydropower *Amici*").
  - The City of New York ("NYC").
  - South Florida Water Management District.

The Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES") Permitting Program

In 1972, following several events such as the 1969 "burning" of the Cuyahoga River in Cleveland, Ohio that increased national concern about pollution of our nation's waters, Congress enacted the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972, 86 Stat. 816, *as amended*, 33 U.S.C. § 1251 *et seq.*, commonly known as the Clean Water Act (sometimes hereinafter the "Act" or the "CWA"). Congress's principal objective in passing the Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress also envisioned that the Act's passage would enable "the discharge of pollutants into the navigable waters [to] be eliminated by 1985." *Id.* § 1251(a)(1). Although time has proven this projection to have been over-optimistic at best, it is our understanding that the Act has succeeded to a significant degree in cleaning up our nation's waters.[7]

The Act "prohibits 'the discharge of any pollutant by

• Central Arizona Water Conservation District *et al.* (the "Water Districts").

• The States of Colorado, New Mexico, Alaska, Arizona (Department of Water Resources), Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming (the "Western States," and, together with the Water Districts, the "Western Parties").

[7] *See, e.g.*, Michael Rotman, *Cuyahoga River Fire*, Cleveland Historical, *http://clevelandhistorical.org/items/show/63#.V0XS7eRcjRs* (last visited July 18, 2016), *archived at* https://perma.cc/5VVP-TTAY.

any person' unless done in compliance with some provision of the Act." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102, 124 S.Ct. 1537, 158 L.Ed.2d 264 ("*Miccosukee*") (quoting 33 U.S.C. § 1311(a)). The statute defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source,"[8] 33 U.S.C. § 1362(12)(A), where "navigable waters" means "the waters of the United States, including the territorial seas," *id.* § 1362(7). The principal provision under which such a discharge may be allowed is Section 402, which establishes the "National Pollutant Discharge Elimination System" ("NPDES") permitting program. 33 U.S.C. § 1342. With narrow exceptions not relevant here, a party must acquire an NPDES permit in order to discharge a specified amount of a specified pollutant. *See id.*; *Miccosukee*, 541 U.S. at 102, 124 S.Ct. 1537. Thus, without an NPDES permit, it is unlawful for a party to discharge a pollutant into the nation's navigable waters.

"[B]y setting forth technology-based effluent limitations and, in certain cases, additional water quality based effluent limitations[,]the NPDES permit 'defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act].' " *Waterkeeper Alliance,*

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[8] A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," other than in the case of "agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14).

Inc. v. EPA, 399 F.3d 486, 492 (2d Cir. 2005) (third brackets in original) (quoting *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976)). Noncompliance with an NPDES permit's conditions is a violation of the Clean Water Act. 33 U.S.C. § 1342(h). Once an NPDES permit has been issued, the EPA, states, and citizens can bring suit in federal court to enforce it. *See id.* §§ 1319(a)(3), 1365(a).

The Act envisions "cooperative federalism" in the management of the nation's water resources. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (referring to the Act as an example of "cooperative federalism"); *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (the Act "anticipates a partnership between the States and the Federal Government"). Reflecting that approach, states typically control the NPDES permitting programs as they apply to waters within their borders, subject to EPA approval. *See* 33 U.S.C. §§ 1314(i)(2), 1342(b)-(c). [9] The Act also preserves states' "primary responsibilities and rights" to abate pollution, *id.* § 1251(b), including their traditional prerogatives to "plan the development and use (including restoration, preservation, and enhancement) of ... water resources," *id.* and to "allocate quantities of water within [their]

[9] The EPA has authorized forty-six states and the U.S. Virgin Islands to implement the NPDES program. *NPDES State Program Information*, EPA, https://www.epa.gov/npdes/npdes-state-program-information (last updated Feb. 19, 2016; last visited July 18, 2016), *archived at* https://perma.cc/7M4V-469F.

jurisdiction," *id.* § 1251(g),[10] subject to the federal floor on environmental protection set by the Act and regulations promulgated thereunder by the EPA, *see Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 580 (2d Cir. 2015).

Water Transfers and the Water Transfers Rule[11]

According to EPA regulations, a "water transfer" is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Water transfers take a variety of forms. A transfer may be accomplished, for example, through artificial tunnels and channels, or natural streams and water bodies; and through active pumping or passive direction. There are thousands of water transfers currently in place in the United States, including at least sixteen major diversion projects west of the Mississippi River. Many of the largest U.S. cities draw on water transfers to bring drinkable water to their residents. The City of New York's "water supply system ... relies on transfers of

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[10] The Act's statement regarding the preservation of states' water-allocation authority was added by the Clean Water Act of 1977, also known as the "1977 Amendments" to the Act. *See* Pub L. No. 95–217, § 5(a), 91 Stat. 1566, 1567 (codified as amended at 33 U.S.C. § 1251(g)).

[11] In this section, we refer to the contents of various documents supplied by the parties and *amici*. This information was not admitted into evidence in any judicial proceeding. We think, though, that it is at least plausible, and that even when treated as part of the argument, it supplies a general picture of the factual background of this appeal against which our legal conclusions may better be understood.

water among its [nineteen] collecting reservoirs. The City provides approximately 1.2 billion gallons of ... water a day to nine million people—nearly half of the population of New York State." Letter Dated August 7, 2006, from Mark D. Hoffer, General Counsel, City of New York Department of Environmental Protection to EPA, at 1, J.A. at 331.

The parties and *amici* tell us that water transfers are of special significance in the Western United States. Because much precipitation in the West falls as snow, water authorities there must capture water when and where the snow falls and melts, typically in remote and sparsely populated areas, and then transport it to agricultural and urban sites where it is most needed. *See* Western States Br. 1-2; *see also* State of California *Amicus* Br. 16 n.5. Colorado, for example, engages in over forty interbasin diversions in order to serve the State's water needs. *See* Letter Dated July 17, 2006, from Brian N. Nazarenus, Chair, Colorado Water Quality Control Commission, to Water Docket, EPA, at 1, J.A. at 320. California uses the "California State Water Project," a complex water delivery system based on interbasin transfers from Northern California to Southern California, to serve the water needs of 25 million of its 37 million residents. *See* State of California *Amicus* Br. 3-10. Water transfers are also obviously crucial to agriculture, conveying water to enormously important farming regions such as the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, the Snake River Valley of Idaho, and the Yakima Valley of Washington. *See* Water Districts Br. 16-19.

At the same time, though, water transfers, like ballast

water in ships, *see generally Nat. Res. Def. Council*, 808 F.3d at 561–62, can move pollutants from one body of water to another, potentially endangering ecosystems, portions of the economy, and public health near the receiving water body—and possibly beyond. Despite these risks, for many years the EPA has taken a passive approach to regulating water transfers, effectively exempting them from the NPDES permitting system. The States have also generally adopted a hands-off policy.[12]

During the 1990s and 2000s, prior to its codification in the Water Transfers Rule, the EPA's position was challenged by, among others, environmentalist groups, which filed several successful lawsuits asserting that NPDES permits were required for some specified water transfers. *See, e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*"), *cert. denied*, 549 U.S. 1252, 127 S.Ct. 1373, 167 L.Ed.2d 160 (2007); *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155 (9th Cir.), *cert. denied*, 540 U.S. 967, 124 S.Ct. 434, 157 L.Ed.2d 312 (2003); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"); *see also Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119, 117 S.Ct. 2510, 138 L.Ed.2d 1013 (1997). None of these decisions classified the EPA's views on the regulation of water

[12] Pennsylvania is the only NPDES permitting authority that regularly issues NPDES permits for water transfers. *See* Water Transfers Rule, 73 Fed. Reg. at 33,699 pt. II.

transfers as sufficiently formal to warrant *Chevron* deference. *See, e.g.*, *Catskill II*, 451 F.3d at 82 (declining to apply *Chevron* deference framework); *Catskill I*, 273 F.3d at 491 (same).

In response, the EPA took steps to formalize its position. In August 2005, the EPA's Office of General Counsel and Office of Water issued a legal memorandum written by then-EPA General Counsel Ann R. Klee (the "Klee Memorandum") that argued that Congress did not intend for water transfers to be subject to the NPDES permitting program. The EPA proposed a formal rule incorporating this interpretation on June 7, 2006, 71 Fed. Reg. 32,887, and then, following notice-and-comment rulemaking proceedings, on June 13, 2008, adopted a final rule entitled "National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule" (the "Water Transfers Rule"), 73 Fed. Reg. 33,697-708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

The Water Transfers Rule's summary states:

> EPA is issuing a regulation to clarify that water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This rule focuses exclusively on

> water transfers and does not affect any other activity that may be subject to NPDES permitting requirements.

Id. at 33,697.

The Rule states that water transfers "do not require NPDES permits because they do not result in the 'addition' of a pollutant."[13] *Id.* at 33,699. No NPDES permit is required if "the water being conveyed [is] a water of the U.S. prior to being discharged to the receiving waterbody" and the water is transferred "from one water of the U.S. to another water of the U.S."[14] *Id.* (footnote omitted). Thus, even if a water

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[13] The Rule added a new subsection to 40 C.F.R. § 122.3, which lists the pollutant discharges that are exempted from NPDES permitting. The new subsection provides:

> 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).

[14] "Waters of the U.S." are defined for purposes of the NPDES program in 40 C.F.R. § 122.2, but without addressing what precisely is within the scope of the term, Water Transfers Rule, 73 Fed. Reg. at 33,699 n.2. In 2015, the EPA and the U.S. Army Corps of Engineers adopted a new rule modifying the definition of "waters of the United States." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,055-37,056 (June 29, 2015). "That rule is currently stayed nationwide, pending resolution of claims that the rule is arbitrary, capricious, and contrary to law." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, —— U.S. ——, 136 S.Ct. 1807, 1812 n.1, 195 L.Ed.2d 77 (2016) (citing *In re EPA*, 803 F.3d 804, 807–09 (6th Cir. 2015)). Regardless of how expansively the term is interpreted, we would still be faced with the question of whether the EPA could permissibly exempt from NPDES permitting the

transfer conveys waters in which pollutants are present, it does not result in an "addition" to "the waters of the United States," because the pollutant is already present in "the waters of the United States." Under the EPA's view, an "addition" of a pollutant under the Act occurs only "when pollutants are introduced from outside the waters being transferred." *Id.* at 33,701. On appeal—but not in the Water Transfers Rule itself—the EPA characterizes this interpretation of Section 402 of the Clean Water Act as embracing what is often referred to as the "unitary-waters" reading of the statutory language, *see* EPA Br. 15-16, 54, which we will discuss further below.

In the Water Transfers Rule, the EPA justified its interpretation of the Act in an explanation spanning nearly four pages of the Federal Register, touching on the text of Section 402, the structure of the Act, and pertinent legislative history. *See* Water Transfers Rule, 73 Fed. Reg. at 33,700-03. The EPA explained that its "holistic approach to the text" of the statute was "needed here in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters." *Id.* at 33,701. The agency also responded to a wide variety of public comments on the proposed Rule. *See id.* at 33,703-06.

District Court Proceedings

On June 20, 2008, a group of environmental conservation and sporting organizations filed a

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transfer of water from one "water of the U.S." to another "water of the U.S."

complaint against the EPA and its Administrator (then Stephen L. Johnson, now Gina McCarthy) in the United States District Court for the Southern District of New York. The States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington, and the Province of Manitoba, Canada (collectively, the "Anti-Rule States") did the same on October 2, 2008. In their complaints, the plaintiffs requested that the district court hold unlawful and set aside the Water Transfers Rule pursuant to Section 706(2) of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706(2).[15] In October 2008, the district court consolidated the two cases and granted a motion by the City of New York to intervene in support of the defendants.

At about the same time these actions were filed, five parallel petitions for review of the Water Transfers Rule were filed in the First, Second, and Eleventh Circuits. On July 22, 2008, the United States Judicial Panel on Multidistrict Litigation consolidated these petitions and randomly assigned them to the Eleventh Circuit. The Eleventh Circuit then consolidated a sixth petition for review, and stayed all of these petitions pending its disposition of *Friends of the Everglades v. South Florida Water Management District,* 570 F.3d 1210 (11th Cir. 2009) ("*Friends I*"), a separate but conceptually related case. The district court in the case now before us granted the EPA's motion to stay the proceedings pending the Eleventh Circuit's resolution of *Friends I* and the six consolidated petitions. *See Catskill Mountains Chapter of Trout Unlimited, Inc.*

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[15] The Anti-Rule States also sought a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

v. EPA, 630 F.Supp.2d 295, 307 (S.D.N.Y. 2009). In June 2009, the Eleventh Circuit issued a decision in *Friends I*, 570 F.3d 1210 (11th Cir. 2009), *reh'g en banc denied*, 605 F.3d 962 (2010), *cert. denied*, 562 U.S. 1082, 131 S.Ct. 643, 645, 178 L.Ed.2d 512, *and cert. denied sub nom. Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 562 U.S. 1082, 131 S.Ct. 645, 178 L.Ed.2d 512 (2010), according *Chevron* deference to, and upholding, the Water Transfers Rule. *Id.* at 1227–28. Then, on October 26, 2012, the Circuit issued a decision dismissing the six consolidated petitions for lack of subject-matter jurisdiction under 33 U.S.C. § 1369(b)(1). *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286, 1289 (11th Cir. 2012) ("*Friends II*"), *cert. denied*, —— U.S. ——, 134 S.Ct. 421, 187 L.Ed.2d 280, *and cert. denied sub nom. U.S. Sugar Corp. v. Friends of the Everglades*, —— U.S. ——, 134 S.Ct. 422, 187 L.Ed.2d 280, *and cert. denied sub nom. S. Fla. Water Mgmt. Dist. v. Friends of the Everglades*, —— U.S. ——, 134 S.Ct. 422, 187 L.Ed.2d 280 (2013). The district court in the case at bar lifted the stay on December 17, 2012, the date the Eleventh Circuit's mandate in *Friends II* was issued.

On January 30, 2013, the district court granted multiple applications on consent to intervene as plaintiffs and defendants under Federal Rule of Civil Procedure 24. This added as intervenor-plaintiffs the Miccosukee Tribe of Indians of Florida, Friends of the Everglades, the Florida Wildlife Federation, and the Sierra Club, and as intervenor-defendants the States of Alaska, Arizona (Department of Water Resources), Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming, and various municipal water providers from Western

states. The parties filed multiple motions and cross-motions for summary judgment.

On March 28, 2014, the district court granted the plaintiffs' motions for summary judgment and denied the defendants' cross-motions. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F.Supp.3d 500 (S.D.N.Y. 2014). At the first step of the *Chevron* analysis, the district court decided that the Clean Water Act is ambiguous as to whether Congress intended the NPDES program to apply to water transfers. *Id.* at 518–32. The district court then proceeded to the second step of the *Chevron* analysis, at which it struck down the Water Transfers Rule as an unreasonable interpretation of the Act. *Id.* at 532–67.

The defendants and intervenor-defendants other than the Northern Colorado Water Conservancy District (hereinafter "the defendants") timely appealed.

DISCUSSION

"On appeal from a grant of summary judgment in a challenge to agency action under the APA, we review the administrative record and the district court's decision *de novo*." *Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 173–74 (2d Cir. 2006). We conclude that the Water Transfers Rule is a reasonable interpretation of the Clean Water Act and is therefore entitled to *Chevron* deference. Accordingly, we reverse the judgment of the district court.

We evaluate challenges to an agency's interpretation of a statute that it administers within the two-step

Chevron deference framework. *Lawrence + Mem'l Hosp. v. Burwell*, 812 F.3d 257, 264 (2d Cir. 2016). At *Chevron* Step One, we ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. If the statutory language is "silent or ambiguous," however, we proceed to *Chevron* Step Two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute" at issue. *Id.* at 843, 104 S.Ct. 2778. If it is—i.e., if it is not "arbitrary, capricious, or manifestly contrary to the statute," *id.* at 844, 104 S.Ct. 2778—we will accord deference to the agency's interpretation of the statute so long as it is supported by a reasoned explanation, and "so long as the construction is 'a reasonable policy choice for the agency to make,' " *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("*Brand X*") (quoting *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778).

This framework has been fashioned as a means for the proper resolution of administrative-law disputes that involve all three branches of the Federal Government, seriatim.

First, the Legislative Branch, Congress, passes a bill that reflects its judgment on the issue—in the case before us, the Clean Water Act. After the head of the Executive Branch, the President, signs that bill, it becomes the law of the land.

Second, the Executive Branch, if given the authority to do so by legislation, may address the issue through its authorized administrative agency or agencies, typically although not necessarily by regulation—in this case the EPA through its Water Transfer Rule. In doing so, the executive agency must defer to the Legislative Branch by following the law or laws that it has enacted and that cover the matter.

Only last, in case of a challenge to the Legislative Branch's authority to pass the law, or to the Executive Branch's authority to administer it in the manner that it has chosen to adopt, may we in the Judicial Branch become involved in the process. When we do so, though, we are not only last, we are least: We must defer both to the Legislative Branch by refraining from reviewing Congress's legislative work beyond determining what the statute at issue means and whether it is constitutional, and to the Executive Branch by using the various principles of deference, including *Chevron* deference, which we conclude is applicable in the case at bar. For us to decide for ourselves what in fact is the preferable route for addressing the substantive problem at hand would be directly contrary to this constitutional scheme. What we may think to be the best or wisest resolution of problems of water transfers and pollution emphatically does not matter.

Abiding by this constitutional scheme, we begin at *Chevron* Step One. We conclude, as did the district court, that Congress did not in the Clean Water Act clearly and unambiguously speak to the precise question of whether NPDES permits are required for water transfers. It is therefore necessary to proceed to

Chevron Step Two, under which we conclude that the EPA's interpretation of the Act in the Water Transfers Rule represents a reasonable policy choice to which we must defer. The question is whether the Clean Water Act can support the EPA's interpretation, taking into account the full panoply of interpretive considerations advanced by the parties. Ultimately, we conclude that the Water Transfers Rule satisfies *Chevron*'s deferential standard of review because it is supported by a reasoned explanation that sets forth a reasonable interpretation of the Act.

I. *Chevron* Step One

At *Chevron* Step One, "the [reviewing] court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *City of Arlington v. FCC*, —— U.S. ——, 133 S.Ct. 1863, 1868, 185 L.Ed.2d 941 (2013) (quoting *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778). To determine whether a statute is ambiguous, we employ "traditional tools of statutory construction" to ascertain if "Congress had an intention on the precise question at issue" that "must be given effect." *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778.

The issue before us at this point, then, is whether the Act plainly requires a party to acquire an NPDES permit in order to make a water transfer. We agree with the district court that the Clean Water Act does not clearly and unambiguously speak to that question. We will begin, however, by addressing the plaintiffs' argument that we previously held otherwise in *Catskill I*, 273 F.3d 481 (2d Cir. 2001), and *Catskill II*,

451 F.3d 77 (2d Cir. 2006).

A. Catskill I *and* Catskill II

The plaintiffs argue that this case can be resolved at *Chevron* Step One because we held in *Catskill I* and *Catskill II* that the Clean Water Act unambiguously requires NPDES permits for water transfers. We disagree with the plaintiffs' reading of those decisions because our application there of the deference standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)—so-called "*Skidmore*" or "*Skidmore/Mead*" deference—and the reasoning underlying the decisions make clear that we have not previously held that the statutory language at issue here is unambiguous, such that we cannot defer under *Chevron* to the EPA's interpretation of the Clean Water Act in the Water Transfers Rule.

In *Catskill I*, we held that that the City of New York[16] violated the Clean Water Act by transferring turbid water[17] from the Schoharie Reservoir through the Shandaken Tunnel into the Esopus Creek without an NPDES permit, because the transfer of turbid water into the Esopus Creek was an "addition" of a pollutant. 273 F.3d at 489–94. Following our remand in *Catskill I*, the district court assessed a $5,749,000 civil penalty against New York City and ordered the City to obtain a permit for the operation of the Shandaken Tunnel.

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[16] In addition to the City of New York, the New York City Department of Environmental Protection and its Commissioner at the time, Joel A. Miele, Sr., were also defendants in *Catskill I*.

[17] Turbid water is water carrying high levels of solids in suspension. *Catskill I*, 273 F.3d at 488.

The City's appeal from that ruling was resolved in *Catskill II*, in which we reaffirmed the holding of *Catskill I*. *Catskill II*, 451 F.3d at 79.

In both *Catskill I* and *Catskill II*, we applied the *Skidmore* deference standard to informal policy statements by the EPA that interpreted the same provision of the Act at issue here not to require NPDES permits for water transfers. *See id.* at 83–84 & n.5 (noting that under *Skidmore* "[w]e ... defer to the agency interpretation according to its 'power to persuade' " and "declin[ing] to defer to the EPA['s]" informal interpretation of the CWA as expressed in the Klee Memorandum (quoting *Mead*, 533 U.S. at 235, 121 S.Ct. 2164)); *Catskill I*, 273 F.3d at 490–91 (applying *Skidmore* to the EPA's position as expressed in informal policy statements and litigation positions, and concluding that "we do not find the EPA's position to be persuasive"). *Skidmore* instructs that "the rulings, interpretations and opinions" of an agency may constitute "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. The appropriate level of deference accorded to an agency's interpretation of a statute under the *Skidmore* standard depends on the interpretation's "power to persuade," which in turn depends on, *inter alia*, "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.* This "approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other." *Mead*, 533 U.S. at 228, 121 S.Ct. 2164 (internal

citations omitted).[18]

Although the *Chevron* and *Skidmore* deference standards differ in application, they are similar in one respect: As with *Chevron* deference, we will defer to the agency's interpretation under the *Skidmore* standard only when the statutory language at issue is ambiguous. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) (suggesting that it is "unnecessary" to engage in *Skidmore* analysis if "the statute itself speaks clearly to the point at issue"); *Exxon Mobil Corp. & Affiliated Cos. v. Comm'r of Internal Revenue*, 689 F.3d 191, 200 n.13 (2d Cir. 2012) (explaining that *Skidmore* analysis applies to "an agency's interpretation of an ambiguous statute"); *Wong v. Doar*, 571 F.3d 247, 258 (2d Cir. 2009) (concluding that "Congress did not speak directly to the issue" before proceeding to apply *Skidmore* deference); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) ("[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and

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[18] The Supreme Court's 2001 decision in *Mead* breathed new life into *Skidmore*, which as one court recently put it, "has had a rough go of it ever since the birth of *Chevron*. Like the figurative older child neglected in the wake of a new sibling's arrival, in 1984 *Skidmore* was relegated to the status of an administrative law sideshow while the courts fawned over *Chevron*." *Angiotech Pharmaceuticals Inc. v. Lee*, 191 F.Supp.3d 509, 616, (E.D. Va. 2016) (Ellis, J.). Remarkably, "by the age of just three and a half years, courts had cited *Chevron* over six hundred times, and by the time *Chevron* turned sixteen," a year before *Mead*, "some were ready to declare *Skidmore* dead altogether." *Id.* (collecting cases and secondary sources).

found to yield no clear sense of congressional intent."); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004) ("If the statute is clear and unambiguous, no deference is required and the plain meaning of Congress will be enforced."). As commentators have noted, although the Supreme Court has not explicitly stated "that *Skidmore* necessarily includes a 'step one' inquiry along the lines of *Chevron* [S]tep [O]ne[,] ... in practice, *Skidmore* generally does include a 'step one,' " in which a court "first review[s] the statute for a plain meaning [to] determin[e] [whether] the statute [is] ambiguous." Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1280 (2007) (collecting cases).

But as the dissent correctly notes, *see* Dissent at 541–42, it does not follow that a particular application of the *Skidmore* framework implies a threshold conclusion that the relevant statutory language is ambiguous. Although a court could first conclude that the text is unambiguous—and therefore that *Skidmore* deference is inappropriate or unnecessary[19]—it could instead engage in *Skidmore* analysis without answering this threshold question by considering the statutory text as one of several factors relevant to determining whether the agency interpretation has the "power to persuade." *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. Yet even under this approach, courts will

[19] *Skidmore* deference would be inappropriate with respect to an agency interpretation that is inconsistent with unambiguous statutory text. But with respect to an agency interpretation consistent with the unambiguous text, *Skidmore* deference would simply be unnecessary.

not rely on agency interpretations that are inconsistent with unambiguous statutory language. *See, e.g.*, *EEOC v. Arabian American Oil*, 499 U.S. 244, 257, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (declining to rely on an agency interpretation that "lack[ed] support in the plain language of the statute" after considering the statutory language as one of several factors relevant to *Skidmore* analysis). [20] Thus, regardless of whether or not a court makes a threshold ambiguity determination, "the *Skidmore* standard implicitly replicates *Chevron*'s first step." Hickman & Krueger, *supra*, at 1247.

Our application of the *Skidmore* deference standard in *Catskill I* and *Catskill II* makes clear that we did not decide and have not decided that the statutory language at issue in this case—"addition ... to navigable waters"—is unambiguous. Although we did not explicitly conclude in those cases that the statutory text was ambiguous, we made clear that we did not intend to foreclose the EPA from adopting a unitary-waters reading of the Act (i.e., waters of the United States means all of those waters rather than each of

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[20] The dissent stresses that *Skidmore* analysis is flexible and that the clarity of statutory language is one factor among many in assessing an agency interpretation's power to persuade. *See* Dissent at 542. *Skidmore* is not, however, so flexible that a court could accord *Skidmore* deference to an agency interpretation inconsistent with unambiguous statutory text. Any interpretation inconsistent with unambiguous statutory language necessarily lacks persuasive power. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980) (explaining that "[a] regulation is [not] entitled to deference" under *Skidmore* if "it can be said not to be a reasoned and supportable interpretation of the [statute]").

them) in a formal rule; indeed, we stated in *Catskill I* that "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference ... might be appropriate." *Catskill I*, 273 F.3d at 490–91 & n.2. This statement implies that we thought the relevant statutory text was at least possibly ambiguous.

The few references to "plain meaning" in *Catskill I* and *Catskill II* do not compel a different conclusion. The crucial interpretive question framed by *Catskill I*—which we identified as the "crux" of the appeal—was "the meaning of 'addition,' which the Act does not define." *Id.* at 486. As the dissent points out, *see* Dissent at 543–44, we concluded in *Catskill I* that, based on the "plain meaning" of that term, the transfer of turbid water resulted in "an 'addition' of a 'pollutant' from a 'point source'[21] ... to a 'navigable water.' " *Catskill I*, 273 F.3d at 492.[22] We do not, however,

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[21] *See supra* note 8 for the definition of "point source" contained it 33 U.S.C. § 1362(14).

[22] In *Catskill I*, we also discussed the so-called "dams cases," *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). In these opinions, the District of Columbia and Sixth Circuits deferred to the EPA's position that water released back into the same surrounding water from which it was taken is not an "addition" to navigable waters under the CWA, even though the water so released contained material that either was or could be considered a pollutant. *Gorsuch*, 693 F.2d at 174–75, 183; *Consumers Power*, 862 F.2d at 584–87, 589. We noted that our definition of "addition" was consistent with the holdings in the dams cases, because "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Catskill I*, 273 F.3d at 492. We explained that *Catskill I*

think that by referring to the "plain meaning" of "addition" in *Catskill I* we were holding that the broader statutory phrase "addition ... to navigable waters" *unambiguously* referred to a collection of individual "navigable waters"—such that the term "to navigable waters" could possibly mean only "to *a* navigable water" or "to *any* navigable water," and not to "navigable waters" in the collective singular (i.e., "*all* the qualifying navigable waters viewed as a single, 'unitary' entity"). Nowhere in *Catskill I* did we state that "navigable waters" or the broader phrase "addition ... to navigable waters" could bear only one meaning based on the unambiguous language contained in the statute. Such a statement would have been inconsistent with our acknowledgment that *Chevron* deference might be owed to a more formal agency interpretation.

Nor did we make any such statement in *Catskill II*. There, we began by succinctly summarizing *Catskill I* as "concluding that the discharge of water containing pollutants from one distinct water body into another is an 'addition of [a] pollutant' under the CWA." *Catskill*

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was factually distinguishable from those cases because it involved the discharge of water from one distinct body of water (the Schoharie Reservoir) into another (the Esopus Creek). *Id.* at 491–92. *Gorsuch* and *Consumers Power* have no bearing on the meaning of the term "navigable waters" because the discharges at issue in those cases would not constitute "addition[s] ... to navigable waters" either under a unitary-waters theory (because the potential pollutants in the dams cases were already within the navigable waters) or a non-unitary-waters theory (because those potential pollutants were not transferred from one navigable water body to another). These two cases therefore have no bearing on the outcome of this appeal.

II, 451 F.3d at 80 (brackets in original) (citing *Catskill I*, 273 F.3d at 491–93). We then again rejected the City's arguments in favor of reconsidering *Catskill I*, including its argument in favor of the "unitary-water theory of navigable waters," essentially for the reasons stated in *Catskill I*—most importantly, that these arguments "simply overlook[ed]" the "plain language" and "ordinary meaning" of the term "addition." *Id.* at 81–84. We also noted that in the then-recent *Miccosukee* decision, the Supreme Court noted the existence of the unitary-waters theory and raised possible arguments against it, providing further support for our rejection of the theory in *Catskill I*. *Catskill II*, 451 F.3d at 83 (citing *Miccosukee*, 541 U.S. at 105–09, 124 S.Ct. 1537). Nowhere did we state that the phrase "addition ... to navigable waters" was unambiguous such that it would preclude *Chevron* deference in the event that the EPA adopted a formal rule. We held only that the EPA's position, as expressed in an informal interpretation, was unpersuasive under the *Skidmore* framework. *Id.* at 83 & n.5 (noting that under *Skidmore* "[w]e ... defer to the agency interpretation according to its 'power to persuade' " and "declin [ing] to defer to the EPA" under that standard (quoting *Mead*, 533 U.S. at 235, 121 S.Ct. 2164)).

The best interpretation of *Catskill I* and *Catskill II*, we think, is that those decisions set forth what those panels saw as the most persuasive reading of the phrase "addition ... to navigable waters" in light of how the word "addition" is plainly and ordinarily understood. *Catskill I* and *Catskill II* did not hold that "addition ... to navigable waters" could bear only one meaning, such that the EPA could not interpret the

phrase differently in an interpretive rule. Therefore, as the district court concluded, neither *Catskill I* nor *Catskill II* requires us to resolve this appeal at *Chevron* Step One.

B. Statutory Text, Structure, and Purpose

Having determined that the meaning of the relevant provision of the Clean Water Act has not been resolved by prior case law, we turn to the overall statute and its context. In evaluating whether Congress has directly spoken to whether NPDES permits are required for water transfers, we employ the "traditional tools of statutory construction." *Li v. Renaud*, 654 F.3d 376, 382 (2d Cir. 2011) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778). We examine the statutory text, structure, and purpose as reflected in its legislative history. *See id.* If the statutory text is ambiguous, we also examine canons of statutory construction. *See Lawrence + Mem'l Hosp.*, 812 F.3d at 264; *see also Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 301 (3d Cir. 2015), *cert. denied*, —— U.S. ——, 136 S.Ct. 1246, 194 L.Ed.2d 176 (2016); *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012); *EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 203 (4th Cir. 2005).

1. Statutory text and structure.

"As with any question of statutory interpretation, we begin with the text of the statute to determine whether the language at issue has a plain and unambiguous meaning." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108 (2d Cir. 2012). The statutory language at issue is found in Sections 301, 402, and 502 of the Clean Water Act. Section 301(a) states that "[e]xcept as in compliance with [the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402(a)(1) states that the EPA

may issue an NPDES permit allowing the "discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a)]," so long as the discharge meets certain requirements specified by the Clean Water Act and the permit. *See id.* § 1342(a)(1). Section 502 defines the term "discharge of a pollutant," in relevant part, as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Section 502 also defines the term "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). But nowhere do these provisions speak directly to the question of whether an NPDES permit may be required for a water transfer.

Nor is the meaning of the relevant statutory text plain. The question, as we have indicated above, is whether "addition of any pollutant to navigable waters"—or, "addition of any pollutant to the waters of the United States"—refers to *all* navigable waters, meaning *all* of the waters of the United States viewed as a singular whole, or to *individual* navigable waters, meaning *one of* the waters of the United States. The term "waters" may be used in either sense: As the Eleventh Circuit observed, "[i]n ordinary usage 'waters' can collectively refer to several different bodies of water such as 'the waters of the Gulf coast,' or can refer to any one body of water such as 'the waters of Mobile Bay.' " *Friends I*, 570 F.3d at 1223. The Supreme Court too has noted that the phrase "[w]aters of the United States," as used in Section 502, is "in some respects ambiguous." *Rapanos v. United States*, 547 U.S. 715, 752, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (internal quotation marks omitted) (emphasis removed). The statutory text yields no clear answer to the question before us; it

could support either of the interpretations proposed by the parties.[23] Thus, based on the text alone, we remain at sea.

Unfortunately, placing this statutory language in the broader context of the Act as a whole does not help either. A statutory provision's plain meaning may be "understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." *Louis Vuitton*, 676 F.3d at 108 (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003)). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, —— U.S. ——, 136 S.Ct. 1061, 1070, 194 L.Ed.2d 108 (2016) (internal quotation marks omitted) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 132 S.Ct. 1350, 1357, 182 L.Ed.2d 341 (2012)). Examination of the other uses of the terms "navigable waters" and "waters" elsewhere in the Clean Water Act does not establish that these terms can bear only one meaning. The Clean Water Act sometimes regulates individual water bodies and other times entire water systems.

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[23] We find the dissent's arguments relating to the ordinary meaning of the term "addition" to be unpersuasive. *See* Dissent at 536–37. We agree that the ordinary meaning of that term refers to an increase or an augmentation. But that dictionary definition does not answer the question at issue here: whether such an increase or augmentation occurs when a pollutant is moved from one body of water to another. In addressing that question, we must consider the entire statutory phrase, "addition ... to navigable waters," not simply the definition of the term "addition."

As the plaintiffs and the dissent point out, several other provisions in the Clean Water Act suggest that "navigable waters" refers to any of several individual water bodies, specifically the Act's references to:

- "the navigable waters involved," 33 U.S.C. § 1313(c)(2)(A), (c)(4);
- "those waters or parts thereof," *id.* § 1313(d)(1)(B);
- "all navigable waters," *id.* § 1314(a)(2);
- "any navigable waters," *id.* § 1314(f)(2)(F);
- "those waters within the State" and "all navigable waters in such State," *id.* § 1314(l)(1)(A)-(B);
- "all navigable waters in such State" and "all navigable waters of such State," *id.* § 1315(b)(1)(A)-(B); and
- "the navigable waters within the jurisdiction of such State," "navigable waters within [the State's] jurisdiction," and "any of the navigable waters," *id.* § 1342.

But this pattern of usage does not establish that "navigable waters" cannot ever refer to all waters as a singular whole because it also suggests that when Congress wants to make clear that it is using "navigable waters" in a particular sense, it can and sometimes does provide additional language as a beacon to guide interpretation. *Cf. Rapanos*, 547 U.S. at 732–33, 126 S.Ct. 2208 (holding that "[t]he use of the definite article ('the') and the plural number ('waters')" made clear that § 1362(7) is limited to "fixed bodies of water," such as "streams, ... oceans, rivers, [and] lakes," and does not extend to "ordinarily dry channels through which water occasionally or

intermittently flows"). [24] If Congress had thought about the question and meant for Section 502(12) of the Clean Water Act to refer to individual water bodies, it could have referred to something like "any addition of any pollutant to *a navigable water* from any point source," or "any addition of any pollutant to *any navigable water* from any point source." As the plaintiffs and the dissent would have it, the phrases "addition to navigable waters," "addition to a navigable water," and "addition to any navigable water" necessarily mean the same thing, at least in the context of the Act. We do not disagree that the phrases *could* be interpreted to have the same meaning, but we disagree that this interpretation is clearly and unambiguously mandated in light of how the terms "navigable waters" and "waters" are used in other sections of the Act.

We thus see nothing in the language or structure of the Act that indicates that Congress clearly spoke to the precise question at issue: whether Congress intended to require NPDES permits for water transfers.

2. Statutory purpose and legislative history

Inasmuch as the statutory text, context, and structure have yielded no definitive answer to the question before us, we conclude the first step of our *Chevron* analysis by looking to whether Congress's purpose in enacting the Clean Water Act establishes that the phrase "addition ... to navigable waters" can

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[24] Contrary to the dissent's suggestion, the Supreme Court's holding in *Rapanos* does not compel the conclusion that the statutory phrase "navigable waters" is unambiguous because that phrase, unlike the phrase addressed in *Rapanos*, is not limited by a definite article. *See* Dissent at 535–37.

reasonably bear only one meaning. *See Gen. Dynamics*, 540 U.S. at 600, 124 S.Ct. 1236 (using both statutory purpose and history at *Chevron* Step One). Beginning with the name of the statute, it seems clear enough that the predominant goal of the Clean Water Act is to ensure that our nation's waters are "clean," at least in the sense of being reasonably free of pollutants. The Act itself states that its main objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The plaintiffs and the dissent argue that exempting water transfers from the NPDES permitting program could frustrate the achievement of this goal by allowing unmonitored transfers of polluted water from one water body to another. *Cf. Catskill II*, 451 F.3d at 81 (observing that a unitary-waters interpretation of navigable waters would allow for "the transfer of water from a heavily polluted, even toxic, water body to one that was pristine").

As the Supreme Court has noted, however, "no law pursues its purpose at all costs." *Rapanos*, 547 U.S. at 752, 126 S.Ct. 2208. We see no reason to think that the Clean Water Act is an exception. To the contrary, the Clean Water Act is "among the most complex" of federal statutes, and it "balances a welter of consistent and inconsistent goals," *Catskill I*, 273 F.3d at 494, establishing a complicated scheme of federal regulation employing both federal and state implementation and supplemental state regulation, *see, e.g.*, 33 U.S.C. § 1251(g) (federal agencies must cooperate with state and local governments to develop "comprehensive solutions" for pollution "in concert with ... managing water resources"). In this regard, the Act largely preserves states' traditional authority over

water allocation and use, while according the EPA a degree of policymaking discretion and flexibility with respect to water quality standards—both of which might well counsel against requiring NPDES permits for water transfers and instead in favor of letting the States determine what administrative regimen, if any, applies to water transfers. Accordingly, Congress's broad purposes and goals in passing the Act do not alone establish that the Act unambiguously requires that water transfers be subject to NPDES permitting.

Even careful analysis of the Clean Water Act's legislative history does not help us answer the interpretive question before us. Although we are generally "reluctant to employ legislative history at step one of *Chevron* analysis," legislative history is at times helpful in resolving ambiguity; for example, when the " 'interpretive clues [speak] almost unanimously,' making Congress's intent clear 'beyond reasonable doubt.' " *Mizrahi v. Gonzales*, 492 F.3d 156, 166 (2d Cir. 2007) (quoting *Gen. Dynamics*, 540 U.S. at 586, 590, 124 S.Ct. 1236). But here Congress has not left us a trace of a clue as to its intent. The more than 3,000-page legislative history of the Clean Water Act appears to be silent, or very nearly so, as to the applicability of the NPDES permitting program to water transfers. *See generally* Comm. on Env't. & Pub. Works, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977 & A Continuation of the Legislative History of the Federal Water Pollution Control Act (1978); Comm. on Pub. Works, 93rd Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973). As we noted in *Catskill I*, the legislative history does not speak to the meaning of the term "addition" standing alone, 273

F.3d at 493, suggesting that the history is similarly silent as to the meaning of the broader phrase that includes this term, "addition ... to navigable waters."

Finally and tellingly, neither the parties nor *amici* have pointed us to any legislative history that clearly addresses the applicability of the NPDES permitting program to water transfers. What few examples from the legislative history they have cited—such as the strengthening of the permit requirements in Section 301(b)(1)(C) to include water quality-based limits in addition to technology-based limitations, *see* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 Stan. Envtl. L.J. 215, 270, 275-77 (2003), and broad aspirational statements about the elimination of water pollution and the need to regulate every point source by the report of the Senate's Environment and Public Works Committee, S. Rep. No. 92-414, at 3738, 3758 (1971), provide at most keyhole-view insights into Congress's intent. They do not speak to the issue before us with the "high level of clarity" necessary to resolve the textual ambiguity before us at *Chevron* Step One. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007). The question is whether Congress has "*directly* spoken," *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778, to whether NPDES permits are required for water transfers—not whether it has made a stray or oblique reference to that issue here and there.

3. Canons of statutory construction

The traditional canons of statutory construction also provide no clear answer to the question whether Congress intended that the NPDES permitting system apply to water transfers.

First, the dissent asserts that the Water Transfers Rule violates the principle that " '[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent,' " *Hillman v. Maretta*, —— U.S. ——–, 133 S.Ct. 1943, 1953, 186 L.Ed.2d 43 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980)). *See* Dissent at 537–39. Contrary to the dissent's assertion, however, that canon of construction is not applicable where, as here, the issue is not whether to create an implied exception to a general prohibition, but the scope of the general prohibition itself.[25]

Second, the plaintiffs invoke the canon of construction that a "statute should be interpreted in a way that avoids absurd results." *SEC v. Rosenthal*, 650 F.3d 156, 162 (2d Cir. 2011) (quoting *United States v. Venturella*, 391 F.3d 120, 126 (2d Cir. 2004)). They

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[25] The dissent's argument proceeds as follows: (1) the Act imposes a general ban on "the discharge of any pollutant," defined by Section 502 as "any addition ... to navigable waters"; (2) the Act specifies certain exemptions to the general ban; and (3) the Water Transfers Rule must be rejected because it effectively creates an implied exemption to the general ban on the discharge of pollutants. *See* Dissent at 537–39. This strikes us as decidedly circular: It presupposes that the scope of the general ban on the discharge of pollutants, as defined by Section 502, extends to water transfers in order to conclude that the Water Transfers Rule is an exemption from that general ban. This argument, therefore, is unhelpful because it sidesteps the question at issue here—whether "any addition ... to navigable waters" is ambiguous.

again underscore their arguments concerning statutory purpose in arguing that by allowing for the unpermitted transfer of polluted water from one water body to another, the Water Transfers Rule is contrary to the Act's principal stated objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Additionally, the plaintiffs argue that the Water Transfers Rule may undermine the ability of downstream states to protect themselves from the pollution generated by upstream states.

The simplicity of the plaintiffs' approach helps cloak their arguments with considerable force. But we are ultimately not persuaded that they establish that the Clean Water Act unambiguously forecloses the EPA's interpretation in the Water Transfers Rule. Indeed, it is unclear to us how one can argue persuasively that the Water Transfers Rule leads to a result so absurd that the result could not possibly have been intended by Congress, while asserting at the same time that it codifies the EPA's practice of not issuing NPDES permits that has prevailed for decades without Congressional course-correction of any kind. In light of the immense importance of water transfers, it seems more likely that Congress has contemplated the very result that the plaintiffs argue is foreclosed by the Act, and acquiesced in that result.

Furthermore, as the plaintiffs would have it, the EPA and the States could not, consistent with the Clean Water Act, select *any* policy that does not improve water quality as much as is possible. But the Clean Water Act is more flexible than that. Far from establishing a maximalist scheme under which water

quality must be pursued at all costs, the Act leaves a considerable amount of policymaking discretion in the hands of both the EPA and the States—entirely understandably in light of its "welter of consistent and inconsistent goals." *Catskill I*, 273 F.3d at 494. We cannot say that the Act could not reasonably be read to permit water transfers to be exempt from the NPDES permitting program, in light of the possibility that other measures will do. Although the tension between the Rule's reading of the Act and the statute's overall goal of improving water quality casts some doubt on the reasonableness of the Rule, it may nevertheless be understandable and permissible if it furthers other objectives of the statute.

We think that the legislative compromises embodied in the Act counsel against the application of the absurdity canon here. We generally apply that canon only "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470–71, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring in the judgment) (citation omitted). Exempting water transfers from the NPDES program does not, we conclude, lead directly to a result so absurd it could not possibly have been contemplated by Congress.

As to the effect of the Rule on downstream states, even in the absence of NPDES permitting for water transfers, the States can seek to protect themselves against polluted water transfers through other means—for example, through filing a common-law

nuisance or trespass lawsuit in the polluting state's courts, *see, e.g.*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497–98, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987)—even if the protections provided by such lawsuits are less robust than those that would be available through the NPDES permitting program's application to transfers.[26] The inconsistency of the Water Transfers Rule with the Clean Water Act's primary objective may be a strike against its reasonableness, but only one strike, which is not enough for the EPA's position to be "out."

Third, arguing to the contrary, the defendants and *amicus curiae* State of California argue that we should reject the plaintiffs' preferred interpretation of Section 402 of the Clean Water Act (i.e., that permits are required for water transfers) based on a clear-statement rule and principles of federalism derived from the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANCC*"), and *Rapanos*, as well as the Tenth Amendment. If that were so, it would make our task much easier. But we think it is incorrect. To the extent that *SWANCC* and *Rapanos* establish a clear-statement rule, it does not apply here.

In *SWANCC*, the Supreme Court addressed the "Migratory Bird Rule" issued by the U.S. Army Corps of Engineers (the "Corps") under which the Corps

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[26] Although common-law nuisance and trespass lawsuits may take a long time to work through the court system, preliminary injunctions may be available in urgent cases.

asserted jurisdiction pursuant to Section 404(a) of the Clean Water Act to require permits for the discharge of dredged or fill material into intrastate waters used as habitat by migratory birds. *SWANCC*, 531 U.S. at 163–64, 121 S.Ct. 675. The Rule applied even to small, isolated ponds located entirely within a single state, such as those located in the abandoned sand and gravel pit there at issue. *See id.* at 163–65, 121 S.Ct. 675. The Court reasoned that, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, [it] expect[s] a clear indication that Congress intended that result," and that "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 172–73, 121 S.Ct. 675. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 173, 121 S.Ct. 675 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988)). The Supreme Court rejected the Corps' interpretation because (1) the Migratory Bird Rule "raise[d] significant constitutional questions" with respect to Congress's authority under the Commerce Clause; (2) Congress had not clearly stated "that it intended § 404(a) to reach an abandoned sand and gravel pit"; and (3) the Corps' interpretation of Section 404(a) "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 173–74, 121 S.Ct. 675.

In *Rapanos*, a plurality of the Supreme Court rejected the EPA's interpretation of the Clean Water Act as providing authority to regulate isolated wetlands lying near ditches or artificial drains that eventually empty into "navigable waters" because the wetlands are adjacent to "waters of the United States." *Rapanos*, 547 U.S. at 723-24, 729, 739, 126 S.Ct. 2208. The plurality rejected the interpretation because it "would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land," which was impermissible because a " 'clear and manifest' statement from Congress" is required "to authorize an unprecedented intrusion" into an area of "traditional state authority" such as the regulation of land use. *Id.* at 738, 126 S.Ct. 2208 (citation omitted). Citing *SWANCC*, the Court also noted that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power," which further counseled in favor of requiring a clear statement from Congress in order to authorize such jurisdiction. *Id.* (citing *SWANCC*, 531 U.S. at 173, 121 S.Ct. 675).

The clear-statement rule articulated in *SWANCC* and *Rapanos* does not apply here. The case at bar presents no question regarding Congress's authority under the Commerce Clause, inasmuch as it is undisputed that Congress has the power to regulate navigable waters and to delegate its authority to do so. *SWANCC* and *Rapanos* both involved attempts by the Army Corps of Engineers to extend the scope of the phrase "navigable waters" to include areas not traditionally understood to be such. They were therefore treated as attempts by the Corps to stretch the limits of its delegated authority vis-à -vis the States. Here, the EPA is not

seeking to expand the universe of waters deemed to be "navigable." The question before us is not whether the EPA has the authority to regulate water transfers; it is whether the EPA is using (or not using) that authority in a permissible manner.

The Clean Water Act was *designed* to alter the federal-state balance with respect to the regulation of water quality. Congress passed the Act precisely because it found inconsistent state-by-state regulation not up to the task of restoring and maintaining the integrity of the nation's waters. *See* S. Rep. No. 95-370, at 1 (1977) (the Act is intended to be a "comprehensive revision of national water quality policy"). True, as the defendants point out, water allocation is an area of traditional state authority. But again, we are concerned here not with water allocation, but with water quality. We know of no authority or accepted principle that would require a "clear statement" by Congress before the EPA could adopt the plaintiffs' preferred interpretation of the Act.

Fourth, and finally, several of the defendants raise the related argument that requiring permits for water transfers under the plaintiffs' preferred interpretation would pose a serious Tenth Amendment[27] problem because it would upset the traditional balance of federal and state power with respect to water regulation. This, in turn, would violate the canon of constitutional avoidance, which provides that if one of two competing statutory interpretations "would raise

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[27] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380–81, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."). These defendants argue that the EPA's interpretation must prevail because it avoids this constitutional problem.

But the plaintiffs' proposed interpretation raises no Tenth Amendment concerns that we can discern because it would not result in federal overreach into states' traditional authority to allocate water quantities. The Clean Water Act's preservation of states' water-allocation authority "do[es] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 720, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). As we noted in *Catskill II*, the "flexibility built into the [Act] and the NPDES permit scheme," which includes variances, general permits, and the consideration of costs in setting effluent limitations, "allow [s] federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either."[28] 451

[28] There is no reason to think that applying the NPDES program to water transfers would turn the prior appropriation doctrine ("first in time, first in right") on its head, as some of the defendants insist. *See* Western States Br. 31-32. NPDES permits merely put restrictions on water discharges, without changing priority or ownership rights.

F.3d at 85–86. The resolution of this appeal is not dictated by a clear-statement rule or the Tenth Amendment, but rather by straightforward considerations of statutory interpretation.

We conclude, then, that Congress did not in the Clean Water Act speak directly to the question of whether NPDES permits are required for water transfers.[29] The Act is therefore silent or ambiguous as to this question, which means that this case cannot be resolved by the Step One analysis under *Chevron*. *See also Friends I*, 570 F.3d at 1227 (similarly concluding at *Chevron* Step One that the statutory phrase "addition ... to navigable waters" is ambiguous). Accordingly, we proceed to Step Two. *See New York v. FERC*, 783 F.3d 946, 954 (2d Cir. 2015).

II. *Chevron* Step Two

At last, we reach the application of the second step of *Chevron* analysis, upon which our decision to reverse the district court's judgment turns. We conclude that the EPA's interpretation of the Clean Water Act is reasonable and neither arbitrary nor capricious.

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[29] The dissent asserts that in reaching this conclusion we are effectively construing "navigable waters" to mean all the navigable waters of the United States, collectively. *See* Dissent at 535. Not so: By concluding that the phrase "addition ... to navigable waters" is ambiguous for purposes of *Chevron* Step One, we are emphatically declining to adopt any construction of the statute in the first instance. We are instead acknowledging that Congress has left the task of resolving that ambiguity to the EPA by delegating to that agency the authority "to make rules carrying the force of law" to which we must defer so long as they are reasonable. *Mead*, 533 U.S. at 226–27, 121 S.Ct. 2164.

Although the Rule may or may not be the best or most faithful interpretation of the Act in light of its paramount goal of restoring and protecting the quality of U.S. waters, it is supported by several valid arguments—interpretive, theoretical, and practical. And the EPA's interpretation of the Act as reflected in the Rule seems to us to be precisely the kind of policymaking decision that *Chevron* is designed to protect from overly intrusive judicial review. As we have already pointed out, although we might prefer a different rule more clearly guaranteed to reach the environmental concerns underlying the Act, *Chevron* analysis requires us to recognize that our preference does not matter. We conclude that the Water Transfers Rule satisfies *Chevron*'s deferential standard of review, and, accordingly, we reverse the judgment of the district court.

A. Legal Standard

The question for the reviewing court at *Chevron* Step Two is "whether the agency's answer [to the interpretive question] is based on a permissible construction of the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011) (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). We will not disturb an agency rule at *Chevron* Step Two unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 53, 131 S.Ct. 704 (quoting *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242, 124 S.Ct. 1741, 158 L.Ed.2d 450 (2004)); *see also Lawrence + Mem'l Hosp.*, 812 F.3d at 264. Generally, an agency interpretation is not "arbitrary, capricious, or manifestly contrary to the statute" if it is "reasonable." *See Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S.Ct. 2117, 2125, 195

L.Ed.2d 382 (2016) ("[A]t [*Chevron*'s] second step the court must defer to the agency's interpretation if it is 'reasonable.' " (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778)); *Mayo*, 562 U.S. at 58, 131 S.Ct. 704 ("[T]he second step of *Chevron* ... asks whether the [agency's] rule is a 'reasonable interpretation' of the enacted text." (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778)); *Lee v. Holder*, 701 F.3d 931, 937 (2d Cir. 2012); *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012). The agency's view need not be "the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009) (emphasis in original). This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). When interpreting ambiguous statutory language "involves difficult policy choices," deference is especially appropriate because "agencies are better equipped to make [these choices] than courts." *Brand X*, 545 U.S. at 980, 125 S.Ct. 2688.

"Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation," *Michigan v. EPA*, —— U.S. ——, 135 S.Ct. 2699, 2707, 192 L.Ed.2d 674 (2015) (internal quotation marks omitted), and we therefore will not defer to an agency interpretation if it is not supported by a reasoned explanation, *see Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). An agency interpretation would surely be "arbitrary" or "capricious" if it were picked out of a hat,

or arrived at with no explanation, even if it might otherwise be deemed reasonable on some unstated ground.

In the course of its *Chevron* Step Two analysis, the district court incorporated the standard for evaluating agency action under APA § 706(2)(A) set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("*State Farm*"), a much stricter and more exacting review of the agency's rationale and decisionmaking process than the *Chevron* Step Two standard. Under that section, a reviewing court may set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In *State Farm*, the Supreme Court explained that under Section 706(2)(A),

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43, 103 S.Ct. 2856. On appeal, the plaintiffs urge us to incorporate the *State Farm* standard into our *Chevron* Step Two analysis, and to affirm the district court's vacatur of the Rule for essentially the same reasons stated by the court. While

we have great respect for the district court's careful and searching analysis of the EPA's rationale for the Water Transfers Rule, we conclude that it erred by incorporating the *State Farm* standard into its *Chevron* Step Two analysis and thereby applying too strict a standard of review. An agency's initial interpretation of a statutory provision should be evaluated only under the *Chevron* framework, which does not incorporate the *State Farm* standard. *State Farm* review may be appropriate in a case involving a non-interpretive rule or a rule setting forth a changed interpretation of a statute; but that is not so in the case before us.

As the Supreme Court, our Circuit, and other Courts of Appeals have made reasonably clear, *State Farm* and *Chevron* provide for related but distinct standards for reviewing rules promulgated by administrative agencies. *See, e.g.*, *Encino*, 136 S.Ct. at 2125–26; *Judulang v. Holder*, 565 U.S. 42, 132 S.Ct. 476, 483 n.7, 181 L.Ed.2d 449 (2011); *Nat. Res. Def. Council*, 808 F.3d at 569; *New York v. FERC*, 783 F.3d at 958; *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003); *see also, e.g.*, *Shays v. FEC*, 414 F.3d 76, 96–97 (D.C. Cir. 2005); *Arent v. Shalala*, 70 F.3d 610, 619 (D.C. Cir. 1995) (Wald, J., concurring). *State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process. *See Encino*, 136 S.Ct. at 2125; *FERC v. Elec. Power Supply Ass'n*, —— U.S. ——, 136 S.Ct. 760, 784, 193 L.Ed.2d 661 (2016). *Chevron*, by contrast, is generally used to evaluate whether the conclusion reached as a result of that process—an agency's interpretation of a statutory

provision it administers—is reasonable. *See Encino*, 136 S.Ct. at 2125; *Entergy*, 556 U.S. at 217–18, 129 S.Ct. 1498. A litigant challenging a rule may challenge it under *State Farm*, *Chevron*, or both. As Judge Wald explained,

> there are certainly situations where a challenge to an agency's regulation will fall squarely within one rubric, rather than the other. For example, we might invalidate an agency's decision under *Chevron* as inconsistent with its statutory mandate, even though we do not believe the decision reflects an arbitrary policy choice. Such a result might occur when we believe the agency's course of action to be the most appropriate and effective means of achieving a goal, but determine that Congress has selected a different—albeit, in our eyes, less propitious—path. Conversely, we might determine that although not barred by statute, an agency's action is arbitrary and capricious because the agency has not considered certain relevant factors or articulated any rationale for its choice. Or, along similar lines, we might find a regulation arbitrary and capricious, while deciding that *Chevron* is inapplicable because Congress' delegation to the agency is so broad as to be virtually unreviewable.

Arent, 70 F.3d at 620 (Wald, J., concurring) (citation and footnotes omitted).

Much confusion about the relationship between *State Farm* and *Chevron* seems to arise because both standards purport to provide a method by which to evaluate whether an agency action is "arbitrary" or "capricious," and *Chevron* Step Two analysis and *State Farm* analysis often, though not always, take the same factors into consideration and therefore overlap. *See Judulang*, 132 S.Ct. at 483 n.7 (stating, in a case governed by the *State Farm* standard, that had the Supreme Court applied *Chevron*, the "analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance" (internal quotation marks omitted)); *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015) (noting that it is "often the case" that an agency's "interpretation of its authority under *Chevron* Step Two overlaps with our arbitrary and capricious review under 5 U.S.C. § 706(2)(A)"); *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) ("The second step of *Chevron* analysis and *State Farm* arbitrary and capricious review overlap, but are not identical."). We read the case law to stand for the proposition that where a litigant brings both a *State Farm* challenge and a *Chevron* challenge to a rule, and the *State Farm* challenge is successful, there is no need for the reviewing court to engage in *Chevron* analysis. As the Supreme Court has explained, "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation."

Encino, 136 S.Ct. at 2125.[30] In other words, if an interpretive rule was promulgated in a procedurally defective manner, it will be set aside regardless of whether its interpretation of the statute is reasonable. If the rule is not defective under *State Farm*, though, that conclusion does not avoid the need for a *Chevron* analysis, which does not incorporate the *State Farm* standard of review. In fact, in many recent cases, we have applied *Chevron* Step Two without applying *State Farm* or conducting an exacting review of the agency's decisionmaking and rationale. *See, e.g.*, *Stryker v. SEC*, 780 F.3d 163, 167 (2d Cir. 2015); *Florez v. Holder*, 779 F.3d 207, 211–12 (2d Cir. 2015); *Lee*, 701 F.3d at 937; *Adams*, 692 F.3d at 95; *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012).

Several other considerations also counsel against employing the searching *State Farm* standard of review of the agency's decisionmaking and rationale at *Chevron* Step Two. The Supreme Court has decided that agencies are not obligated to conduct detailed fact-finding or cost-benefit analyses when interpreting a statute—which suggests that the full-fledged *State Farm* standard may not apply to rules that set forth

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[30] In *Encino*, which was decided after the briefing in this appeal had been completed, the Supreme Court declined to defer under *Chevron* to a Department of Labor regulation that departed from a longstanding earlier position due to a "lack of reasoned explication," inasmuch as the agency gave "almost no reasons at all" for the change in policy, and instead issued only vague blanket statements. 136 S.Ct. at 2127. Thus, the plaintiffs' indisputably proper procedural challenge was successful, and therefore the regulation was not entitled to *Chevron* deference, rendering an analysis under the two-step *Chevron* framework unnecessary. *See id.* at 2125–26.

for the first time an agency's interpretation of a particular statutory provision. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (an agency may interpret an ambiguous statutory provision by making "judgments about the way the real world works" without making formal factual findings); *Entergy*, 556 U.S. at 223, 129 S.Ct. 1498 (absent statutory language to the contrary, an agency is not required to conduct cost-benefit analysis under *Chevron*); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."). These decisions seem to establish that while an agency may support its statutory interpretation with factual materials or cost-benefit analyses, an agency need not do so in order for its interpretation to be regarded as reasonable.

Further, the Supreme Court has cautioned that *State Farm* is "inapposite to the extent that it may be read as prescribing more searching judicial review" in a case involving an agency's "first interpretation of a new statute." *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 502 n.20, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002); *see also Judulang*, 132 S.Ct. at 483 n.7 (stating that "standard arbitrary or capricious review under the APA" was appropriate because the agency action at issue was "not an interpretation of any statutory language" (internal quotation marks and brackets omitted)). Dovetailing with this point, the Supreme Court held in *Brand X* and *Fox Television Stations* that when an agency changes its interpretation of a particular statutory provision, this change is

reviewable under APA § 706(2)(A), and will be set aside if the agency has failed to provide a "reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television*, 556 U.S. at 516, 129 S.Ct. 1800; *Brand X*, 545 U.S. at 981, 125 S.Ct. 2688 (explaining that "[u]nexplained inconsistency" is "a reason for holding an [agency] interpretation to be an arbitrary and capricious change from agency practice under the [APA]"). Of course, if *all* interpretive rules were reviewable under APA § 706(2)(A) and the *State Farm* standard, these pronouncements in *Brand X* and *Fox Television Stations* would have been unnecessary. We also note that applying a reasonableness standard to the agency's decisionmaking and rationale at *Chevron* Step Two instead of a heightened *State Farm*-type standard promotes respect for agencies' policymaking discretion and promotes policymaking flexibility.

For these reasons, the plaintiffs' challenge to the Water Transfers Rule is properly analyzed under the *Chevron* framework, which does not incorporate the *State Farm* standard.[31] We will therefore address only whether the EPA provided a reasoned rationale for the Water Transfers Rule, and whether the Rule's interpretation of the Clean Water Act is reasonable. As

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[31] None of the plaintiffs argue that the Rule was procedurally defective under APA § 706(2)(A), except for the Sportsmen and Environmental Organization Plaintiffs, who do so only in the context of a *Chevron* Step Two argument. *See* Sportsmen and Environmental Organization Pls.' Br. at 36-54, 58. In any event, as we have explained above, the interpretive Rule here is properly reviewed only under the *Chevron* standard, which does not incorporate the *State Farm* standard.

to the former, the question is not whether the EPA's reasoning was flawless, impervious to counterarguments, or complete—the EPA only must have provided a reasoned explanation for its action.

B. Reasoned Rationale for the EPA's Interpretation

We conclude that the EPA provided a reasoned explanation for its decision in the Water Transfers Rule to interpret the Clean Water Act as not requiring NPDES permits for water transfers. We can see from the EPA's rationale how and why it arrived at the interpretation of the Clean Water Act set forth in the Water Transfers Rule. It is clear that the EPA based the Rule on a holistic interpretation of the Clean Water Act that took into account the statutory language, the broader statutory scheme, the statute's legislative history, the EPA's longstanding position that water transfers are not subject to NPDES permitting, congressional concerns that the statute not unnecessarily burden water quantity management activities, and the importance of water transfers to U.S. infrastructure. *See* Water Transfers Rule, 73 Fed. Reg. at 33,699-33,703.

In the Water Transfers Rule, the EPA analyzed the text of the statute, explaining how its interpretation was justified by its understanding of the phrase "the waters of the United States," *id.* at 33,701, as well as by the broader statutory scheme, noting that the Clean Water Act provides for several programs and regulatory initiatives other than the NPDES permitting program that could be used to mitigate pollution caused by water transfers, *id.* at 33,701-33,702. The EPA also justified the Rule by reference to statutory purpose, noting its view that "Congress intended to leave primary oversight of water transfers

to state authorities in cooperation with Federal authorities," and that Congress intended to create a "balance ... between federal and State oversight of activities affecting the nation's waters." *Id.* at 33,701. The EPA also stated that subjecting water transfers to NPDES permitting could affect states' ability to effectively allocate water and water rights, *id.* at 33,702, and explained how its interpretation was justified in light of the Act's legislative history, *see id.* at 33,703. The EPA concluded by addressing several public comments on the Rule, and explaining in a reasoned manner why it rejected proposed alternative readings of the Clean Water Act. *See id.* at 33,703-33,706.

This rationale, while not immune to criticism or counterargument, was sufficiently reasoned to clear *Chevron*'s rather minimal requirement that the agency give a reasoned explanation for its interpretation. We see nothing illogical in the EPA's rationale. [32] The agency provided a sufficiently

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[32] The district court criticized the EPA's rationale for the Water Transfers Rule on the grounds that it was illogical for EPA to reason that: (1) Congress did not intend to subject water transfers to NPDES permitting; (2) therefore, water transfers do not constitute an addition to navigable waters; (3) because water transfers are not an "addition," they do not constitute a "discharge of a pollutant" under § 301(a), and therefore do not require an NPDES permit. *Catskill III*, 8 F.Supp.3d at 543. According to the district court, because the NPDES program is only one of many provisions that regulate discharges made unlawful under § 301(a), step (1) could not possibly lead to steps (2) and (3)—that is, Congressional intent not to regulate water transfers under the NPDES program does not imply Congressional intent not to regulate water transfers under the other programs for regulating discharges of pollutants. *Id.* at

reasoned explanation for its interpretation of the Clean Water Act in the Water Transfers Rule. The Rule's interpretation of the Clean Water Act was therefore not adopted in an "arbitrary" or "capricious" manner. Accordingly, we must address whether the Rule's interpretation of the Clean Water Act was, ultimately, reasonable.

C. Reasonableness of the EPA's Interpretation

Having concluded that the EPA offered a sufficient explanation for adopting the Rule, we next examine whether the Rule reasonably interprets the Clean Water Act. We conclude that it does. The EPA's interpretation of the Clean Water Act as reflected in the Rule is supported by several valid arguments—interpretive, theoretical, and practical. The permissibility of the Rule is reinforced by longstanding practice and acquiescence by Congress, recent case law, practical concerns regarding compliance costs, and the existence of alternative means for regulating pollution resulting from water transfers.

First, as far as we have been able to determine, in the nearly forty years since the passage of the Clean Water Act, water transfers have never been subject to a general NPDES permitting requirement. Congress thus appears to have, however silently, acquiesced in this state of affairs. This may well reflect an intent not to require NPDES permitting to be imposed in every situation in which it might be required, including as a means for regulating water transfers. This in turn

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544. But the Water Transfers Rule did not exempt water transfers from any of the other programs for regulating discharges of pollutants—it applies only to the NPDES program.

suggests that the EPA's unitary-waters interpretation of Section 402 of the Act in the Water Transfers Rule is reasonable.

Second, the Supreme Court's decision in *Miccosukee* and the Eleventh Circuit's decision in *Friends I* support this conclusion. *Miccosukee* was decided before the EPA issued the Water Transfers Rule and, absent the interpretation of an agency rule, did not involve the application of *Chevron*. It was a citizen suit against the South Florida Water Management District (the "District"), which is also an intervenor-defendant in the instant proceedings. The *Miccosukee* plaintiffs argued that the District was impermissibly operating a pumping facility without an NPDES permit. 541 U.S. at 98–99, 124 S.Ct. 1537. The district court granted summary judgment to the plaintiffs; the Eleventh Circuit affirmed. *Id.* at 99, 124 S.Ct. 1537. The Supreme Court vacated the judgment and remanded the case on the ground that granting summary judgment was inappropriate because further factual findings as to whether the two water bodies at issue were meaningfully distinct were necessary. *Id.* In its decision, the Supreme Court addressed three key questions. First, it asked whether the definition of "discharge of a pollutant" in Section 502 of the Clean Water Act (33 U.S.C. § 1362(12)) reaches point sources that do not themselves generate pollutants. The Court held that it does. *Miccosukee*, 541 U.S. at 105, 124 S.Ct. 1537.

Second, the Court addressed whether "all the water bodies that fall within the Act's definition of 'navigable waters' (that is, all 'the waters of the United States, including the territorial seas,' § 1362(7)) should be

viewed unitarily for purposes of NPDES permitting requirements." *Id.* at 105–06, 124 S.Ct. 1537. The Court declined to defer to the EPA's "longstanding" view to that effect because "the Government d[id] not identify any administrative documents in which [the] EPA ha[d] espoused that position"; in point of fact, "the agency once reached the opposite conclusion." *Id.* at 107, 124 S.Ct. 1537. As the dissent points out, the Supreme Court suggested that it took a dim view of the unitary-waters reading of the CWA, stating that: "several NPDES provisions might be read to suggest a view contrary to the unitary-waters approach"; "[t]he 'unitary waters' approach could also conflict with current NPDES regulations"; and "[t]he NPDES program ... appears to address the movement of pollutants among water bodies, at least at times." *Id.* at 107–8, 124 S.Ct. 1537. But the Court also seemed to acknowledge that the statute could be interpreted in different ways:

> It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs. *See* 40 CFR §§ 122.28, 123.25

(2003).

Id. at 108, 124 S.Ct. 1537. Ultimately, the Court declined to rule on the unitary-waters theory because the parties did not raise the argument before the Eleventh Circuit or in their briefs supporting and opposing the Court's grant of *certiorari*. Instead, the Court did no more than note that unitary-waters arguments would be open to the parties on remand. *Id.* at 109, 124 S.Ct. 1537.

Third, the Supreme Court addressed whether a triable issue of fact existed as to whether the water transfer at issue was between "meaningfully distinct" water bodies, and thus required an NPDES permit. The Court held that such a triable issue did exist, and vacated and remanded for further fact-finding. *Id.* at 109–12, 124 S.Ct. 1537. The Court stated that if after reviewing the full record, the district court concluded that the water transfer was not between two meaningfully distinct bodies of water, then the District would not need to obtain an NPDES permit in order to operate the pumping facility. *Id.* at 112, 124 S.Ct. 1537. Thus, it seems as though the purpose of the remand was (a) to address the parties' unitary-waters arguments as a preliminary legal matter, and (b) to engage in fact-finding necessary to resolve the case if the argument as to unitary-waters did not prevail.

With respect to the unitary-waters interpretation of Section 402, then, *Miccosukee* suggested that a unitary-waters interpretation of the statute was unlikely to prevail because it was not the *best* reading of the statute, but did not conclude that it was an *unreasonable* reading of the statute. By acknowledging the arguments against requiring

NPDES permits for water transfers, and noting that unitary-waters arguments would be open to the parties on remand, the Court can be read to have suggested that such arguments are reasonable, even if not, in the Court's view, preferable.

This interpretation of *Miccosukee* is reflected in subsequent case law interpreting that decision. In *Catskill II*, we expressed our view that "*Miccosukee* did no more than note the existence of the [unitary-waters] theory and raise possible arguments against it." 451 F.3d at 83. And in *Friends I*, the Eleventh Circuit concluded, despite its discussion of *Miccosukee*, that the Water Transfers Rule's interpretation of the CWA *is* entitled to *Chevron* deference. *See Friends I*, 570 F.3d at 1217–18, 1225, 1228.

Friends I provides further support for the reasonableness of the Rule's interpretation. Like *Miccosukee*, the decision addressed whether the District was required to obtain NPDES permits to conduct certain specified water transfers. *See Friends I*, 570 F.3d at 1214. This time, however, the issue was addressed *after* the EPA had issued the Water Transfers Rule, and the deferential framework of *Chevron* therefore applied. In *Friends I*, the parties did not contest that the donor water bodies (canals from which water was pumped into Lake Okeechobee) and the receiving water body (the lake) were "navigable waters." *Id.* at 1216. Because under *Miccosukee* the NPDES "permitting requirement does not apply unless the bodies of water are meaningfully distinct," the question was therefore "whether moving an existing pollutant from one navigable water body to

another is an 'addition ... to navigable waters' of that pollutant." *Id.* at 1216 & n.4 (quoting 33 U.S.C. § 1362(12)). The District argued, based on the "unitary waters theory," that "it is not an 'addition ... to navigable waters' to move existing pollutants from one navigable water to another." *Id.* at 1217. "An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." *Id.*

The Eleventh Circuit agreed. It began its analysis by surveying relevant prior decisions, noting that "[t]he unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate." *Id.* (collecting cases). In the time since those decisions were issued, however, there "ha[d] been a change. An important one. Under its regulatory authority, the EPA ha[d then-]recently issued a regulation adopting a final rule specifically addressing this very question. Because that regulation was not available at the time of the earlier decisions," including *Catskill I*, *Catskill II*, and *Miccosukee*, "they [we]re not precedent against it." *Id.* at 1218. Therefore, the question before the Court was whether to give *Chevron* deference to the Rule. "All that matters is whether the regulation is a reasonable construction of an ambiguous statute." *Id.* at 1219. The cases on which the plaintiffs relied—which included *Catskill I*, *Catskill II*, and *Miccosukee*—were therefore unhelpful because there was then no formal rule to which to apply the *Chevron* framework. "Deciding how best to construe statutory language is not the same thing as deciding whether a particular construction is within the ballpark of reasonableness." *Id.* at 1221.

The court then engaged in a *Chevron* analysis strikingly similar to the one we are tasked with conducting here. As to the plain meaning of the statutory language, the Eleventh Circuit determined that the key question was whether " 'to navigable waters' means to *all* navigable waters as a singular whole." *Id.* at 1223 (emphasis in original). This question could not be resolved by looking to the common meaning of the word "waters," which could be used to refer to several different bodies of water collectively (e.g., "the waters of the Gulf coast") or to a single body of water (e.g., "the waters of Mobile Bay"). *Id.* After examining the statutory language in the context of the Clean Water Act as a whole, the court then noted that Congress knew how to use the term "any navigable waters" in other statutory provisions when it wanted to protect individual water bodies (even though it at times used the unmodified term "navigable waters" for the same meaning), and determined that the Act's goals were so broad as to be unhelpful in answering this difficult, specific question. *See id.* at 1224–27. The court therefore concluded that the statutory language was ambiguous, and that the EPA's unitary-waters reading of Section 402 was reasonable. *Id.* at 1227–28. The Court of Appeals explained, using an analogy we think is applicable to in the case before us:

> Sometimes it is helpful to strip a legal question of the contentious policy interests attached to it and think about it in the abstract using a hypothetical. Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket,

> and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? On one hand, as the [plaintiffs] might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the [District] might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other we cannot say that either side is unreasonable.

Id. at 1228 (first brackets in original).

Following *Friends I*, the Eleventh Circuit in *Friends II* dismissed several petitions for direct appellate review of the Water Transfers Rule on the grounds that the Court lacked subject-matter jurisdiction under the Act (specifically, 33 U.S.C. §§ 1369(b)(1)(E), (F)) and could not exercise hypothetical jurisdiction. *Friends II*, 699 F.3d at 1286–89. In the course of doing so, the Eleventh Circuit clarified its holding in *Friends I* that "the water-transfer rule was a reasonable interpretation of an ambiguous provision of the Clean Water Act," and therefore passed muster under *Chevron*'s deferential standard of review. *Id.* at 1285. We are in general agreement with the *Friends I* approach, and in complete agreement with its conclusion that we must give *Chevron* deference to the EPA's interpretation of Section 402 of the Act in the Water Transfers Rule.[33]

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[33] The Supreme Court's more recent decision in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 133 S.Ct. 710, 184 L.Ed.2d 547

Another factor favoring the reasonableness of the Water Transfers Rule's interpretation of the Clean Water Act is that compliance with an NPDES permitting scheme for water transfers is likely to be burdensome and costly for permittees, and may disrupt existing water transfer systems. For instance,

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(2013), on which some of the plaintiffs and the dissent rely, does not suggest that the Water Transfers Rule's interpretation of the Clean Water Act is or is not reasonable. In *Los Angeles County*, the Supreme Court held that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA," reasoning that, "[u]nder a common understanding of the meaning of the word 'add,' no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." *Id.* at 713. This conclusion is consistent with both a unitary-waters reading of the CWA (under which a discharge of a pollutant occurs only when the pollutant is first introduced to any of the navigable waters), and with a non-unitary-waters reading (under which a discharge of a pollutant occurs only when a pollutant is first introduced from a particular navigable water to another, and not when it moves around within the same navigable water).

The Supreme Court's opinion in *Los Angeles County* does not discuss the definition of "navigable waters," nor does it imply a definition of that term. True, the Supreme Court characterized *Miccosukee* as holding that a "water transfer would count as a discharge of pollutants under the CWA only if the canal and the reservoir were 'meaningfully distinct water bodies.' " *Id.* (quoting *Miccosukee*, 541 U.S. at 112, 124 S.Ct. 1537). But this cannot change what the *Miccosukee* majority opinion actually said, and, as we discussed above, *Miccosukee* indicates that a unitary-waters reading may be "within the ballpark of reasonableness." *See Friends I*, 570 F.3d at 1221. Ultimately, *Los Angeles County* does not provide support for either side of the debate over the unitary-waters theory encapsulated in the Water Transfers Rule.

several intervenor-defendant water districts assert that it could cost an estimated $4.2 billion to treat just the most significant water transfers in the Western United States, and that obtaining an NPDES permit and complying with its conditions could cost a single water provider hundreds of millions of dollars. *See* Water Districts Br. 21. Similarly, intervenor-defendant New York City submits that if it is not granted the permanent variances it has requested in its most recent permit application, it will be forced to construct an expensive water-treatment plant, *see* NYC Br. 22-23, 28-30, 35-37, 55-56, and *amicus curiae* the State of California argues that requiring NPDES permits would put a significant financial and logistical strain on the California State Water Project, *see* State of California *Amicus* Br. 16. Further, *amici curiae* the American Farm Bureau Federation and Florida Farm Bureau Federation argue that the invalidation of the Water Transfers Rule would (i) throw the status of agricultural water-flow plans into doubt, and (ii) require state water agencies to increase revenues to pay for permits for levies and dams, which they would likely accomplish by raising agricultural and property taxes, and which in turn would raise farmers' costs and hurt their international economic competitiveness. *See* Farmer *Amici* Br. 2-3. The potential for such disruptive results, if accurate, would provide further support for the EPA's decision to interpret the statutory ambiguity at issue so as not to require NPDES permits for water transfers.[34]

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[34] Examples of nonpoint source programs are state water quality management plans and total maximum daily loads (commonly called "TMDLs"). *See* EPA Br. 30; EPA Reply Br. 19-20; NYC Br. 51-53; Western States Br. 37-38; Western Parties J. Reply 25-28.

Yet another consideration supporting the reasonableness of the Water Transfers Rule is that several alternatives could regulate pollution in water transfers even in the absence of an NPDES permitting scheme, including: nonpoint source programs;[35] other federal statutes and regulations (like the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, and the Surface Water Treatment Rule, 40 C.F.R. § 141.70 *et seq.*); the Federal Energy Regulatory Commission's regulatory scheme for non-federal hydropower dams; state permitting programs that have more stringent requirements than the NPDES program, *see* 33 U.S.C. § 1370(1); other state authorities and laws; interstate compacts; and international treaties [36] The availability of these regulatory alternatives further points towards the reasonableness of the EPA's interpretation of the Act in the Water Transfers Rule.

With respect to other state authorities and laws, the Act "recognizes that states retain the primary role in planning the development and use of land and water resources, allocating quantities of water within their jurisdictions, and regulating water pollution, as long

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[35] Examples of nonpoint source programs are state water quality management plans and total maximum daily loads (commonly called "TMDLs"). *See* EPA Br. 30; EPA Reply Br. 19-20; NYC Br. 51-53; Western States Br. 37-38; Western Parties J. Reply 25-28.

[36] One example of such a treaty is the Boundary Waters Treaty of 1909, *Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada*, Int'l Joint Comm'n, art. IV (May 13, 1910), *available at* http://www.ijc.org/en_/BWT (last visited July 18, 2016), *archived at* https://perma.cc/M3F3-NWLT. *See* Western States Br. 46-47.

as those state regulations are not less stringent than the requirements set by the CWA." *Catskill II*, 451 F.3d at 79 (citations omitted). To these ends, states can rely on statutory authorities at their disposal for regulating the potentially negative water quality impacts of water transfers.[37] States can also enforce

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[37] For instance, the States and their agencies generally have broad authority to prevent the pollution of the States' waters. Colorado's Water Quality Control Commission is authorized to promulgate regulations providing for mandatory or prohibitory precautionary measures concerning any activity that could cause the quality of any state waters to be in violation of any water quality standard. *See, e.g.*, Colo. Rev. Stat. §§ 25–8–205(1)(c), 25–8–503(5). In addition, New Mexico's State Engineer is authorized to deny a water transfer permit if he or she finds that the transfer will be detrimental to the State's public welfare (for example, by jeopardizing water quality). *See* N.M. Stat. Ann. § 72–5–23; *Stokes v. Morgan*, 101 N.M. 195, 680 P.2d 335, 341 (1984) (suggesting that the State Engineer could deny a permit to change the point of diversion and place of use of groundwater rights where "intrusion of poor quality water could result in impairment of existing rights"). In California, interbasin transfers are already subject to water quality regulation separate from the federal NPDES permitting authority by California's State Water Resources Control Board and the State's regional water quality control boards. *See* Cal. Water Code §§ 1257-58, 13263; *Lake Madrone Water Dist. v. State Water Res. Control Bd.*, 209 Cal.App.3d 163, 174, 256 Cal.Rptr. 894, 901 (1989) (noting that California "may enact more stringent controls on discharges than are required by the [Clean Water Act]"); *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 127–30, 149–52, 227 Cal.Rptr. 161, 185–87, 200–02 (1986) (California's State Water Resources Control Board can reexamine previously issued water-rights permits to address newly discovered water-quality matters). And the State of New York's Department of Environmental Conservation (the "NYSDEC") enforces its own water quality standards outside of the NPDES permitting program. *See, e.g.*, N.Y. Envtl. Conserv.

water quality standards through their certification authority under Section 401 of the Clean Water Act, which requires that applicants for federal licenses or permits obtain a state certification that any discharge of pollutants will comply with the water-quality standards applicable to the receiving water body. *See* 33 U.S.C. § 1341; *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006); *PUD No. 1*, 511 U.S. at 712, 114 S.Ct. 1900.

States have still more regulatory tools at their disposal. State agencies may be granted specific authority to address particular pollution or threats of pollution. For example, in New York, the NYSDEC is authorized and directed to promulgate rules to protect the recreational uses—such as trout fishing and canoeing—of waters affected by certain large reservoirs such as the Schoharie Reservoir. *See* N.Y. Envtl. Conserv. Law §§ 15–0801, 15–0805 (McKinney 2008). And as discussed above, states likely can also bring common-law nuisance suits to enjoin and abate pollution. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) (the common law of the state in which the point source is located can provide a basis for a legal challenge to an interstate discharge or transfer). Lastly, although water transfers apparently do not often have interstate or international effects, the States and the Federal Government can address any such effects

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Law §§ 15–0313(2) (the NYSDEC is authorized to modify water quality standards and to reclassify the State's waters), 17-0301 (the NYSDEC has authority to classify waters and apply different standards of quality and purity to waters in different classes), 17-0501 (general prohibition on water pollution).

through interstate compacts or treaties,[38] as well as Section 310 of the Clean Water Act, which authorizes an EPA-initiated procedure for abating international pollution, 33 U.S.C. § 1320. The existence of these available regulatory alternatives suggests that exempting water transfers from the NPDES permitting program would not necessarily defeat the fundamental water-quality aims of the Clean Water Act, which further counsels in favor of the reasonableness of the Water Transfers Rule. We need not now evaluate the effectiveness of such alternatives; we note only that their existence suggests that the Rule is reasonable.

The plaintiffs advance several other arguments against the reasonableness of the Water Transfers Rule's interpretation of the Clean Water Act. Ultimately, none persuades us that the Rule is an unreasonable interpretation of the Clean Water Act.

The plaintiffs first argue, as we have noted, that the Water Transfers Rule arises out of an unreasonable reading of the Act because it subverts the main objective of the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), by allowing "the transfer of water from a heavily polluted, even toxic, water body to one that was pristine," *Catskill II*, 451 F.3d at 81. While this is a powerful argument against the EPA's position, we are not convinced that it establishes that the Water Transfers Rule is an unreasonable interpretation of the Clean Water Act, which is "among the most

[38] *See supra* note 36.

complex" of federal statutes and "balances a welter of consistent and inconsistent goals." *Catskill I*, 273 F.3d at 494. Congress's overarching goal in passing the Act does not imply that the EPA could not accommodate some of the compromises and other policy concerns embedded in the statute in promulgating the Water Transfers Rule.

Some plaintiffs also argue that the EPA's interpretation of Section 402 contained in the Water Transfers Rule is unreasonable in light of the EPA's interpretation of Section 404. They point out that the EPA has interpreted the phrase "discharge of dredged ... material into the navigable waters" from Section 404 to require a permit when dredged material is moved from one location to another within the same water body, regardless of whether the dredged material is ever removed from the water. *See* 33 U.S.C. § 1344(a); 40 C.F.R. § 232.2. They argue that if moving dredged material from one part of a water body to another part of that same water body is an "addition ... into ... the waters of the United States," *see* 40 C.F.R. § 232.2, then it is unreasonable to say that the movement of heavily polluted water from one water body into a pristine water body is not also an "addition" to "waters" that would require an NPDES permit.

But Section 404 contains different language that suggests that a different interpretation of the term "addition" is appropriate in analyzing that section. Section 404 concerns "dredged material," which, as the EPA pointed out in the Water Transfers Rule, "by its very nature comes from a waterbody." 73 Fed. Reg. at 33,703. As the Fifth Circuit has observed, in the

context of Section 404, one cannot reasonably interpret the phrase "addition ... into ... the waters of the United States" to refer only to the addition of dredged material from the "outside world"—that is, from outside the "waters of the United States"—because the dredged material comes from within the waters of the United States itself. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). Interpreting Section 404 so as not to require permits for dredged material already present in "the waters of the United States" would effectively mean that dredged material would *never* be subject to Section 404 permitting, eviscerating Congress's intent to establish a dredge-and-fill permitting system. By contrast, Section 402 concerns a much broader class of pollutants than Section 404, and the Water Transfers Rule's interpretation of Section 402 would not require the dismantling of existing NPDES permitting programs. The EPA can therefore reasonably interpret what constitutes an "addition" into "the waters of the United States" differently under each provision.[39]

Finally, we think that the plaintiffs' reliance on *Clark*

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[39] In any event, there is no requirement that the same term used in different provisions of the same statute be interpreted identically. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574–76, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007). Indeed, "[i]t is not impermissible under *Chevron* for an agency to interpret [the same] imprecise term differently in two separate sections of a statute which have different purposes." *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990), *cert. denied sub nom. Abbott Labs. v. Kessler*, 502 U.S. 819, 112 S.Ct. 76, 116 L.Ed.2d 49 (1991); *see also Aquarius Marine Co. v. Peña*, 64 F.3d 82, 88 (2d Cir. 1995) (an agency has "discretion to undertake independent interpretations of the same term in different statutes").

v. Martinez, 543 U.S. 371, 386–87, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), and *Sorenson v. Sec'y of the Treasury of U.S.*, 475 U.S. 851, 860, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986), is misplaced. In *Clark*, the Supreme Court cautioned against "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark*, 543 U.S. at 386, 125 S.Ct. 716. But that cautionary statement referred to an interpretation of a specific subsection of the Immigration and Nationality Act that would give a phrase one meaning when applied to the first of three categories of aliens, and another meaning when applied to the second of those categories. *See id.* at 377–78, 386, 125 S.Ct. 716. It does not follow that an agency cannot interpret similar, ambiguous statutory language in one section of a statute differently than similar language contained in another, entirely distinct section. In *Sorenson*, the Supreme Court noted in *dicta* that there is a presumption that "identical words used in different parts of the same act are intended to have the same meaning," 475 U.S. at 860, 106 S.Ct. 1600 (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, 55 S.Ct. 50, 79 L.Ed. 211 (1934)). But this is no more than a presumption. It can be rebutted by evidence that Congress intended the words to be interpreted differently in each section, or to leave a gap for the agency to fill. *See Duke*, 549 U.S. at 575–76, 127 S.Ct. 1423 ("There is, then, no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically." (internal quotation marks omitted)). Here, there is evidence that Congress gave the EPA the discretion to interpret the terms "addition" and the broader phrases "addition ... to navigable waters" (Section 402) and "addition ...

into ... the waters of the United States" (40 C.F.R. § 232.2, defining "discharge of dredged material" in Section 404) differently.

* * *

In sum, the Water Transfers Rule's interpretation of the Clean Water Act—which exempts water transfers from the NPDES permitting program—is supported by several reasonable arguments. The EPA's interpretation need not be the "only possible interpretation," nor need it be "the interpretation deemed *most* reasonable." *Entergy*, 556 U.S. at 218, 129 S.Ct. 1498 (emphasis in original). And even though, as we note yet again, we might conclude that it is not the interpretation that would most effectively further the Clean Water Act's principal focus on water quality, it is reasonable nonetheless. Indeed, in light of the potentially serious and disruptive practical consequences of requiring NPDES permits for water transfers, the EPA's interpretation here involves the kind of "difficult policy choices that agencies are better equipped to make than courts." *Brand X*, 545 U.S. at 980, 125 S.Ct. 2688. Because the Water Transfers Rule is a reasonable construction of the Clean Water Act supported by a reasoned explanation, it survives deferential review under *Chevron*, and the district court's decision must therefore be reversed.

CONCLUSION

For the foregoing reasons, we defer under *Chevron* to the EPA's interpretation of the Clean Water Act in the Water Transfers Rule. Accordingly, we reverse the judgment of the district court and reinstate the

challenged rule.

CHIN, *Circuit Judge*, dissenting:

I respectfully dissent.

The Clean Water Act (the "Act") prohibits the "discharge of any pollutant by any person" from "any point source" to "navigable waters" of the United States, without a permit. 33 U.S.C. §§ 1311(a), 1362(12)(A). The question presented is whether a transfer of water containing pollutants from one body of water to another—say, in upstate New York, from the more-polluted Schoharie Reservoir through the Shandaken Tunnel to the less-polluted Esopus Creek—is subject to these provisions.

The United States Environmental Protection Agency ("EPA") takes the position that such a transfer is not covered, on what has been called the "unitary waters" theory—all water bodies in the United States, that is, all lakes, rivers, streams, etc., constitute a single unit, and therefore the transfer of water from a pollutant-laden water body to a pristine one is not an "addition" of pollutants to the "navigable waters" of the United States because the pollutants are already present in the overall single unit. Consequently, in a rule adopted in 2008 (the "Water Transfers Rule"), EPA determined that water transfers from one water body to another, without intervening industrial, municipal, or commercial activity, were excluded from the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES"), even if dirty water was transferred from a polluted water body to a clean one. The majority holds that the Water

Transfers Rule is a reasonable interpretation of the Act. I disagree.

As the majority notes, we evaluate EPA's interpretation of the Act under the two-step framework of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). At step one, we consider whether Congress has "unambiguously expressed" its intent. *Riverkeeper Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004). If so, we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. If the statute is "silent or ambiguous," however, we turn to step two and determine " 'whether the agency's answer is based on a permissible construction of the statute,' which is to say, one that is 'reasonable,' not 'arbitrary, capricious, or manifestly contrary to the statute.' " *Riverkeeper*, 358 F.3d at 184 (quoting *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778).

I would affirm the district court's decision to vacate the Water Transfers Rule. First, I would hold at *Chevron* step one that the plain language and structure of the Act is unambiguous and clearly expresses Congress's intent to prohibit the transfer of polluted water from one water body to another distinct water body without a permit. In my view, Congress did not intend to give a pass to interbasin transfers of dirty water, and excluding such transfers from permitting requirements is incompatible with the goal of the Act to protect our waters.[40]

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[40] The term "interbasin transfer" refers to an artificial or man-made conveyance of water between two distinct water bodies that would not otherwise be connected. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481,

Second, prior decisions of this Court and the Supreme Court make clear that the unitary waters theory is inconsistent with the plain and ordinary meaning of the text of the Act and its purpose. Third, even assuming there is any ambiguity, I would hold at *Chevron* step two that the Water Transfers Rule is an unreasonable, arbitrary, and capricious interpretation of the Act. Accordingly, I dissent.

I

I begin with the language of the Act, its structure, and its purpose.

A. *The Statutory Language*

The Act provides that "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a), except to the extent allowed by other provisions, including, for example, those provisions establishing the NPDES permit program, 33 U.S.C. § 1342.

The Act defines "*discharge* of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). It defines "*pollutant*" to include solid, industrial, agricultural, and biological waste. *Id.* § 1362(6) (emphasis added). It defines "*navigable waters*" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7) (emphasis added).

489–93 (2d Cir. 2001) ("*Catskill I*"); *see also* 40 C.F.R. § 122.3(i) ("water transfer" is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use").

And it defines a "*point source*" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14) (emphasis added). The Act does not define the word "*addition*."

In my view, the plain language of the Act makes clear that the permitting requirements apply to water transfers from one distinct body of water through a conveyance to another. As noted, the Act prohibits "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). The transfer of contaminated water from a more-polluted water body through a conveyance, such as a tunnel, to a distinct, less-polluted water body is the "addition" of a pollutant (contained in the contaminated water) to "navigable waters" (the less-polluted water body) from a "point source" (the conveyance). In the context of this case, as we held in *Catskill I*:

> Here, water is artificially diverted from its natural course and travels several miles from the [Schoharie] Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility.

> When the water and the suspended sentiment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

273 F.3d at 492.

EPA contends that such a transfer of contaminated water, from a polluted body of water to a distinct and pristine one, is not an "addition" because all the waters of the United States are to be "considered collectively," EPA Br. at 2, that is, because the polluted and pristine bodies of water are both part of the waters of the United States and all the waters of the United States are considered to be one unit, the transfer of pollutants from one part of the unit to another part is not an "addition." I do not believe the words of the Act can be so interpreted. The critical words for our purposes are "addition" and "navigable waters." I take them in reverse order.

1. *"Navigable Waters"*

EPA's position—accepted by the majority—requires us to add words to the Act, as we must construe "navigable waters" to mean "*all* the navigable waters of the United States, considered *collectively*." *Contra Dean v. United States*, 556 U.S. 568, 572, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009) (courts must "ordinarily resist reading words or elements into a statute that do not appear on its face") (quoting *Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215

(1997)).

EPA also argues that if Congress had intended the NPDES permitting requirements to apply to individual water bodies, it would have inserted the word "any" before "navigable waters." *See* 33 U.S.C. § 1362(12)(A) ("any addition of any pollutant to navigable waters from any point source"). This interpretation is flawed, for the use of the plural "waters" obviates the need for the word "any." The use of the plural "waters" indicates that Congress was referring to individual water bodies, not one collective water body. The Supreme Court addressed this precise issue in its discussion of "the waters of the United States" in *Rapanos v. United States.* There the Court considered the issue of whether § 1362(7)'s definition of "navigable waters" meant "waters of the United States," and the Court squarely held that "waters" referred to "individual bodies," not one collective body:

> But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows plainly that § 1362(7) *does not refer to water in general*. In this form, "the waters" refers more narrowly to water "[a]s found in streams and *bodies* forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or *bodies*." Webster's New International Dictionary 2882.

547 U.S. 715, 732, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (alterations in original) (emphases added). Hence, the Supreme Court concluded the plural form "waters" does not refer to "water in general," but to

water *bodies* such as streams, lakes and ponds.[41]

As the majority acknowledges, the Act contains multiple provisions suggesting that the term "navigable waters" refers to multiple water bodies, not one national collective water body. Op. at 513 (citing 33 U.S.C. §§ 1313(c)(2)(A), (c)(4), 1313(d)(1)(B), 1314(2), 1314(f)(2)(F), 1314(l)(1)(A)-(B), 1342). [42]

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[41] The majority writes that the Supreme Court's holding in *Rapanos* "does not compel the conclusion that the statutory phrase 'navigable waters' is unambiguous because that phrase, unlike the phrase in *Rapanos*, is not limited by a definite article." Op. at 514, n.24. While *Rapanos* may not "compel" that conclusion, it certainly supports it. In *Rapanos,* the Supreme Court was interpreting the same definition of "navigable waters" in operation here, § 1362(7), which defines "navigable waters" as "the waters of the United States." The lack of the word "the" before "navigable waters" in § 1362(12)(A) hardly negates the Supreme Court's holding that the definition of "navigable waters" as found in § 1362(7) does not refer to water in general, but water bodies. Moreover, the existence or non-existence of a definite article before a noun, on its own, has no bearing on the plural or singular nature of a noun. "The" can be used to refer to a particular person or thing or a group. *See* Bryan A. Garner, *Garner's Modern American Usage: The Authority on Grammar, Usage and Style*, 883 (3rd Ed. 2009) ("The definite article can be used to refer to a group < the basketball team > or, in some circumstances, a plural < The ideas just keep on flowing >.").

[42] There are additional sections in which the term "navigable waters" clearly refers to individual water bodies. *See, e.g.*, 33 U.S.C. §§ 1341 (requiring any applicant for federal license or permit "to conduct any activity, including but not limited to, the construction or operation of facilities which may result in any discharge in the navigable waters" to obtain a state certification that any discharge of pollutants will comply with the *receiving* water body's water-quality standard), 1344(a) (requiring permits for "[d]ischarge into navigable waters at specified disposal sites"

Likewise, EPA's own regulations suggest that "navigable waters" refers to individual water bodies. For example, 40 C.F.R. § 122.45(g)(4) regulates intake credits. As the Supreme Court has observed, this regulation is incompatible with the "unitary waters" theory:

> The "unitary waters" approach could also conflict with current NPDES regulations. For example, 40 C.F.R. § 122.45(g)(4)(2003) allows an industrial water user to obtain "intake credit" for pollutants present in the water that it withdraws from navigable waters. When the permit holder discharges the water after use, it does not have to remove pollutants that were in the water before it was withdrawn. There is a caveat, however: EPA extends such credit "only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made." The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times.

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 107–08, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004). In all of these instances, the phrase "navigable waters" refers to individual water bodies and not one collective national water body. Indeed, neither the majority nor the parties have identified a single provision in the Act where "navigable waters" refers to the waters of the United States as a unitary whole.

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by establishing a separate permit program for discharges of "dredged or fill material," which by definition come from water bodies); *see also* 33 U.S.C. §§ 1313(a), (d)(1)(A), 1313(e)(4), 1314(l)(1), (b)(1), (d)(2)(D), (h)(9), (h)(11)(B).

2. *"Addition"*

EPA's interpretation also requires us to twist the meaning of the word "addition." Because the word "addition" is not defined in the Act, we consider its common meaning. *See S.D. Warren Co. v. Me. Bd. of Environ. Prot.*, 547 U.S. 370, 376, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006) (in considering the definition of "discharge" in 33 U.S.C. § 1362(12), noting that where a word is "neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning' " (citing *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994))); *see also Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) (words should be interpreted according to their "ordinary, contemporary, common meaning").

The ordinary meaning of "addition" is "the result of adding: anything added: increase, augmentation." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1968); *see also Webster's New World Dictionary of the American Language* 16 (2d College ed. 1970 and 1972) ("a joining of a thing to another thing"). Transferring water containing pollutants from a polluted water body to a clean water body is "adding" something to the latter; there is an "addition"—an increase in the number of pollutants in the second water body. In this context, "addition" means adding a pollutant to "navigable waters" when that pollutant would not otherwise have been in those "navigable waters." Words should be given their "contextually appropriate ordinary meaning," Antonin Scalia & Bryan A. Garner, *Reading*

Law: The Interpretation of Legal Texts 70 (2012), and the context here is a statute intended to eliminate water pollution discharges. *See Catskill I*, 273 F.3d at 486. That context makes clear that the word "addition" encompasses an increase in pollution caused by an interbasin transfer of water.

The plain words of the statute thus make clear that Congress did not intend to except water transfers from §§ 1311 and 1362 of the Act.

B. *The Structure of the Act*

Congress's intent to require a permit for interbasin water transfers is even clearer when we consider the statutory language in light of the Act's structure. In determining whether Congress has spoken to the precise question at issue, we consider the words of the statute in "their context and with a view to their place in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000), because "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," *King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) (citing *Brown & Williamson*, 529 U.S. at 133, 120 S.Ct. 1291); *see also Util. Air Regulatory Grp. v. EPA*, ——U.S. ——, 134 S.Ct. 2427, 2442, 189 L.Ed.2d 372 (2014) ("reasonable statutory interpretation must account for both 'the specific context in which ... language is used' and 'the broader context of the statute as a whole' " (citations omitted)); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) (a "fundamental canon of statutory construction" is "that

the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Here, EPA's "unitary waters" theory, when considered in the context of other provisions of the Act, contravenes Congress's unambiguous intent to subject interbasin transfers to permitting requirements and is therefore unreasonable. *See King*, 135 S.Ct. at 2489 (a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law" (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988))).

First, the Water Transfers Rule creates an exemption to permitting requirements, in violation of the canon *expressio unius est exclusio alterius*, which cautions against finding implied exceptions where Congress has created explicit ones. Section 1311(a) of the Act prohibits "[t]he discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Supreme Court has held that "*every* point source discharge" is covered by the Act:

> Congress' intent in enacting the [1972] Amendments [to the Federal Water Pollution Control Act] was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The "major purpose" of the

> Amendments was clearly to "establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95, 2 Leg. Hist. 1511 (emphasis supplied). No Congressman's remarks on the legislation were complete without reference to the "comprehensive" nature of the Amendments.

See City of Milwaukee v. Illinois, 451 U.S. 304, 318, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).

Congress created specific exceptions to the prohibition on the discharge of pollutants, as § 1311(a) bans such discharges "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344." 33 U.S.C. § 1311(a). These include specific exemptions to the NPDES permitting requirements for, *e.g.*, return flows from irrigated agriculture, 33 U.S.C. § 1342(l)(1), stormwater runoff, 33 U.S.C. § 1342(l)(2), and discharging dredged or fill material into navigable waters, 33 U.S.C. § 1344(a). Congress did not create an exception for interbasin water transfers.

It is well-settled that when exceptions are explicitly enumerated, courts should not infer additional exceptions. *See Hillman v. Maretta*, ——U.S. ——, 133 S.Ct. 1943, 1953, 186 L.Ed.2d 43 (2013) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent." (citing *Andrus v. Glover Constr., Co.*, 446 U.S. 608, 616–617, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980))). This prohibition against implying exceptions has been applied to the Act's permitting requirements. *See NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) ("The wording of the statute,

legislative history and precedents are clear: the EPA Administrator does not have authority to except categories of point sources from the permit requirements of § [1342]"); *Nw. Envir. Advocates v. EPA*, 537 F.3d 1006, 1021–22 (9th Cir. 2008) (EPA may not "exempt certain categories of discharge from the permitting requirement"); *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003) ("Only Congress may amend the CWA to create exemptions from regulation."). Defendants' position that all water transfers between water bodies are exempt from § 1342 permitting requirements is a substantial exemption that Congress did not create.

Second, the Act also sets forth a specific plan for individual water bodies. The Act requires States to establish water-quality standards for each distinct water body within its borders. *See* 33 U.S.C. § 1313(c)(1), (2)(A). To establish water-quality standards, a State must designate a use for every waterway and establish criteria for "the amounts of pollutants that may be present in [those] water bodies without impairing" their uses. *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) (citing 33 U.S.C. § 1313(c)(2)(A)). The NPDES permit program is "the primary means" by which the Act seeks to achieve its water-protection goals. *Arkansas v. Oklahoma*, 503 U.S. 91, 101–02, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992). The NPDES program covers all "point sources," including "any pipe, ditch, channel, [or] tunnel," 33 U.S.C. § 1362(14), and a broad range of pollutants, including chemicals, biological materials, rock, and sand, *id.* § 1362(6).

This carefully designed plan to fight water pollution

would be severely undermined by an EPA-created exception for water transfers. A State's efforts to control water-quality standards in its individual lakes, rivers, and streams would be disrupted if contaminated water could be transferred from a polluted water body to a pristine one without a NPDES permit. It is hard to imagine that Congress could have intended such a broad and potentially devastating exception. Indeed, exempting water transfers from the NPDES program would undermine the ability of downstream States to protect themselves from the pollution generated by upstream States. The NPDES program provides a procedure for resolving disputes between States over discharges. *See Upper Blackstone Water Pollution Abatement Dist.,* 690 F.3d at 15 (citing *City of Milwaukee,* 451 U.S. at 325–26, 101 S.Ct. 1784). When a State applies for a permit that may affect the water quality of a downstream State, EPA must notify the applying State and the downstream State. If the downstream State determines that the discharge "will violate its water quality standards, it may submit its objections and request a public hearing." *Id.* If water transfers are exempt from NPDES requirements, the ability of downstream States to protect themselves from upstream states sending their pollution across the border will be severely curtailed.[43]

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[43] Downstream states would have to resort to common law nuisance suits in the courts of the polluting state, instead of addressing permit violations with EPA. As the district court points out, "EPA never explains how states, post Water Transfers Rule, can address interstate pollution effects 'through their WQS [water quality standards] and TMDL [total maximum daily loads] programs' or 'pursuant to state authorities preserved by section 510,' given that states do not

The City and certain of the States argue that subjecting water transfers to permitting requirements will be extremely burdensome. As we have repeatedly recognized, however, there is ample flexibility in the NPDES permitting process to address dischargers' concerns. *See Catskill Mountains v. EPA*, 451 F.3d 77, 85–86 (2d Cir. 2006) (*"Catskill II"*); *see also Nw. Envtl.,* 537 F.3d at 1010 ("Obtaining a permit under the CWA need not be an onerous process."). The draft permit issued in this case allows for variable turbidity level restrictions by season and exemptions from the limitations in times of drought to remedy emergency threats or threats to public health or safety. *Catskill II,* 451 F.3d at 86. Point source operators can also seek a variance from limits. *See* 40 C.F.R. § 125.3(b).

In addition, much of the concern over water transfers involved agricultural use, but water diversions from a "navigable water" for agricultural use direct water *away* from a "navigable water," and thus do not trigger the need for a § 402 permit. Waters returning to a "navigable water" which are "agricultural stormwater discharges" and "return flows from irrigated agriculture" are specifically exempted from the

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have authority to require other states to adhere to effluent limitations or state-based regulations. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987)." *Catskill Mountains Chapter of Trout Unlimited v. U.S. E.P.A.*, 8 F.Supp.3d 500, 552 (2014). Indeed, at oral argument before the district court, counsel for the State of Colorado conceded that a downstream State's only remedy for interstate pollution of this sort is a common-law nuisance suit and "drink[ing] dirty water until this case makes its way up to the courts." *Id.* at 553. This cannot be what Congress intended.

statutory definition of "point source." 33 U.S.C. § 1362(14); *see also* 33 U.S.C. § 1342(l) (exempting "discharges composed entirely of return flows from irrigated agriculture" from permitting requirements). Thus, the catastrophic results of applying NPDES permits to water transfers bemoaned by appellants are exaggerated.[44]

Third, as discussed above, Congress used the phrase "navigable waters" to refer to individual water bodies in numerous provisions of the Act. Another well-settled rule of statutory interpretation holds that the same words in a statute bear the same meaning. *See Sullivan v. Stroop,* 496 U.S. 478, 483, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990) ("the 'normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.' " (internal citations omitted)); *Prus v. Holder*, 660 F.3d 144, 147 (2d Cir. 2011) ("the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning"). When the Act is read as a whole, it is clear that Congress did not intend the phrase "navigable waters" to be interpreted as a single water body because that interpretation is "inconsisten[t] with the design and structure of the statute as a whole." *Utility Air*, 134 S.Ct. at 2442; *see also* Scalia & Garner, *Reading Law* 63 ("A textually permissible interpretation that furthers rather than

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[44] In addition, general permits can be issued to "an entire class of hypothetical dischargers in a given geographic region," and thus covered discharges can commence automatically without an individualized application process. *Nw. Envtl.*, 537 F.3d at 1011 (citations omitted); *see* 40 C.F.R. § 122.28.

obstructs the document's purpose should be favored.").

Accordingly, in my opinion, the structure and context of the Act show clearly that Congress did not intend to exempt water transfers from the permitting requirements.

C. *The Purpose of the Act*

The Act was passed in 1972 to address environmental harms caused by the discharge of pollutants into water bodies. As the Act itself explains, its purpose was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *accord Miccosukee*, 541 U.S. at 102, 124 S.Ct. 1537; *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 490–91 (2d Cir. 2005); *see also Catskill I*, 273 F.3d at 486 ("[T]he Act contains the lofty goal of eliminating water pollution discharges altogether.").

The Water Transfers Rule is simply inconsistent with the purpose of the Act and undermines the NPDES permit program. It creates a broad exemption that will manifestly interfere with Congress's desire to eliminate water pollution discharges. As the majority acknowledges, water transfers are a real concern. Artificial transfers of contaminated water present substantial risks to water quality, the environment, the economy, and public health. If interbasin transfers are not regulated, there is a substantial risk that industrial waste, toxic algae, invasive species, and human and animal contaminants will flow from one water body to another. Accepting the argument that water transfers are not covered by the Act on the theory that pollutants are not being added but merely

moved around surely undermines Congress's intent to restore and maintain the integrity of our waters. *See* Robert A. Katzmann, *Judging Statutes* 31 (2014) ("The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes.").

In sum, based on the plain words of §§ 1311 and 1362, the structure and design of the Act, and its overall purpose, I would hold that Congress has "unambiguously expressed" its intent to subject water transfers to the Act's permitting requirements.

II

As the majority notes, our Court has twice interpreted these precise provisions of the Act as applied to these very facts. *See Catskill I*, 273 F.3d at 484–85; *Catskill II*, 451 F.3d at 79–80. The decisions are not controlling, however, because EPA had not yet adopted the Water Transfers Rule and we conducted our review under a different deference standard. *See Catskill I*, 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference *might* be appropriate." (emphasis added)); *Catskill II*, 451 F.3d at 82 ("The City concedes that this EPA interpretation is not entitled to *Chevron* deference."). Nonetheless, the two decisions are particularly helpful to the analysis at hand. Similarly, Supreme Court decisions have also suggested that EPA's unitary waters theory is inconsistent with the plain wording of the Act.

A. *Catskill I and II*

In *Catskill I* and *II*, we conducted our inquiry under

Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). *See Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 83 n.5. [45] Our application of the *Skidmore/Mead* framework does not imply that we found the Act to be ambiguous. Rather, to the contrary, we concluded in *Catskill I* and *II* that the meaning of the Act was plain and unambiguous.

1. *Skidmore*

Under *Skidmore,* the court applies a lower level of deference to certain agency interpretations and considers "the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments." *Community Health Ctr. v. Wilson–Coker*, 311 F.3d 132, 138 (2d Cir. 2002); *accord In re New*

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[45] While we discussed *Mead* and *Skidmore* in *Catskill I* and *II*, we rejected EPA's position as unpersuasive. In *Catskill I* we held:

> [C]ourts do not face a choice between *Chevron* deference and no deference at all. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference: the agency position should be followed to the extent persuasive. *See Mead*, 121 S.Ct. at 2175–76 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). For the reasons that follow, however, we do not find the EPA's position to be persuasive.

273 F.3d at 491. In *Catskill II*, we observed that because EPA's position was not the product of a formal rulemaking, the most EPA could hope for was to persuade the court of the reasonableness of its position under *Skidmore,* a position we did not accept. *Catskill II*, 451 F.3d at 83 n.5 ("[W]e do not find the ['holistic'] argument persuasive and therefore decline to defer to the EPA.").

Times Sec. Servs., Inc., 371 F.3d 68, 83 (2d Cir. 2004); *see Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. The appropriate level of deference afforded an agency's interpretation of a statute depends on its "power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). Unlike *Chevron*, however, *Skidmore* does not require a court to make a threshold finding that the statute is ambiguous before considering the persuasiveness of the agency's interpretation. Instead, *Skidmore* merely supplies the appropriate framework for reviewing agency interpretations that "lack the force of law." *Id.*

As the majority notes, the Supreme Court has never explicitly held that courts must find ambiguity before applying the *Skidmore* framework. While there is some scholarly authority for the proposition that " 'the *Skidmore* standard implicitly replicates *Chevron*'s first step,' " Op. at 510 (quoting Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard,* 107 Colum. L. Rev. 1235, 1247 (2007)), the Supreme Court has decided numerous cases under *Skidmore* without finding that a statute's language was ambiguous, *see, e.g., EEOC v. Arabian American Oil*, 499 U.S. 244, 257, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (applying *Skidmore* without finding ambiguity in statute and noting that agency's interpretation "lacks support in the plain language of the statute"); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980) (applying *Skidmore* without finding ambiguity in statute and holding that regulation was permissible after considering statute's "language, structure and legislative history"); *see generally* Richard J. Pierce, Jr., I *Admin. L. Treatise* § 6.4 (5th ed. 2010).

Of course, the Supreme Court did not hold, in either *Skidmore* or *Mead*, that ambiguity was a threshold requirement to applying the framework. *See Mead*, 533 U.S. at 235, 121 S.Ct. 2164 (An agency ruling is entitled to "respect proportional to its 'power to persuade,'.... Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, and any other sources of weight." (citations omitted)); *Skidmore*, 323 U.S. at 164, 65 S.Ct. 161 ("The weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). Rather, the *Skidmore/Mead* framework adopts a less rigid, more flexible approach, *see U.S. Freightways Corp. v. Comm'r*, 270 F.3d 1137, 1142 (7th Cir. 2001) (referring to "the flexible approach *Mead* described, relying on ... *Skidmore*"), as it presents "a more nuanced, context-sensitive rubric" for determining the level of deference a court will give to an agency interpretation, Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 836 (2001); *see also* Pierce, *supra*, § 6.4, at 444 ("The Court has referred to a variety of factors that can give an agency statement 'power to persuade.' ... [N]o single factor is dispositive....").

Ambiguity in a statute, of course, can be a factor, and in the sliding-scale analysis of the *Skidmore/Mead* framework, the "power to persuade" of an agency determination can be affected by the clarity—or lack thereof—of the statute it is interpreting. Indeed, upon

applying the *Skidmore/Mead* framework, a court may uphold—or reject—an agency interpretation because the interpretation is consistent with—or contradicts—a statute whose meaning is clear. *See* Pierce, *supra*, § 6.4, at 443. Here, we did not defer to the agency's interpretation of the Act in *Catskill I* and *II,* precisely because the Water Transfers Rule contravened the plain meaning of the Act.

2. *The Plain Meaning of the Act*

The majority dismisses the notion that we ruled on the plain meaning of the Act in *Catskill I* and *II*, asserting that there were only a "few references to 'plain meaning' " in our decisions. Op. at 510. To the contrary, through both our words and our reasoning, we made clear repeatedly in *Catskill I* and *II* that the agency's unitary waters theory was inconsistent with the unambiguous plain meaning of the Act.

In *Catskill I*, we held that defendants' interpretation was "inconsistent with the *ordinary meaning* of the word 'addition.' " 273 F.3d at 493 (emphasis added). Specifically, we held that there is an "addition" of a pollutant into navigable water from the "outside world"—thus triggering the permitting requirement—any time such an "addition" is from "*any place* outside the particular water body to which pollutants are introduced." *Id.* at 491 (emphasis added). We reasoned that:

> Given the *ordinary meaning* of the [Act]'s text and our holding in *Dague*, we cannot accept the *Gorsuch* and *Consumers Power* courts'

> understanding of "addition," at least insofar as it implies acceptance of what the *Dubois* court called a "singular entity" theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States.... We properly rejected that approach in *Dague*. *Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants*. Such an interpretation is *inconsistent with the ordinary meaning* of the word "addition."

Id. at 493 (emphases added).[46] As a result, we held that "the transfer of water containing pollutants from one body of water to another, distinct body of water is *plainly* an addition and thus a 'discharge' that demands an NPDES permit." *Id.* at 491 (emphasis

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[46] In *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), the City of Burlington argued that "pollutants would be 'added' only when they are introduced into navigable waters for the first time," *id.* at 1354, an argument mirroring those raised by defendants here. We rejected the contention, in light of "the intended broad reach of § 1311(a)," noting "that the definition of 'discharge of a pollutant' refers to 'any point source' without limitation." *Id.* at 1355 (quoting 33 U.S.C. § 1362(12)). We rejected the assertion that water flowing from a pond to a marsh was not an "addition." *See Catskill I*, 273 F.3d at 492.

added). Accordingly, we clearly were relying on the plain meaning of the Act in reaching our conclusion.

We also noted that "[e]ven if we were to conclude that the proper application of the statutory text to the present facts was sufficiently ambiguous to justify reliance on the legislative history of the statute, ... that source of legislative intent would not help the City." 273 F.3d at 493. That language certainly makes clear we concluded the statutory text was *not* ambiguous.

Finally, in the penultimate paragraph of *Catskill I*, we made absolutely clear that our holding was based on the plain meaning of the statutory text. We held:

> In any event, none of the statute's broad purposes sways us from what we find to be the *plain meaning of its text*.... Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck *in the text* is *sufficiently clear to point to an answer*. We find that the *textual* requirements of the discharge prohibition in § 1331(a) and the definition of "discharge of a pollutant" in § 1362(12) are met here.

Id. at 494 (emphases added).[47]

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[47] At least one commentator has agreed that we found in *Catskill I* that "the statute's plain meaning was clear." Jeffrey G. Miller, *Plain Meaning, Precedent and Metaphysics, Interpreting the "Addition" Element of the Clean Water Act*

Our analysis in *Catskill II* was similar, as we dismissed defendants' arguments as merely "warmed-up" versions of those rejected in *Catskill I*, made no more compelling by EPA's new "holistic" interpretation of the statute. 451 F.3d at 82. We rejected New York City's " 'holistic arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute,' " because, we concluded, they "simply overlook its *plain language*." *Id.* at 84. (emphasis added). We noted our dismissal of the unitary waters theory in *Catskill I* based on the ordinary meaning of the word "addition":

> We also rejected the City's "unitary water" theory of navigable waters, which posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an addition. We pointed out that this theory would lead to the *absurd result* that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an

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Offense, 44 Envtl. L. Rep. News & Analysis 10770, 10792 (2014) ("Although the Second Circuit did not explicitly employ the two-step *Chevron* deference test to EPA's water transfer rule, it left no doubt as to how it would have decided the case under *Chevron*. With regard to the first step, whether the statute is ambiguous, the court in *Catskill I* held that the statute's plain meaning was clear.").

> "addition" of pollutants and would not be subject to the [Act]'s NPDES permit requirements. *Catskills I* rejected the "unitary water" theory as inconsistent with the *ordinary meaning* of the word "addition."

Id. at 81 (emphasis added) (internal citations omitted). Again, we considered the very interpretation of "navigable waters" proffered in the current appeal and rejected it based on "the plain meaning" of the Act's text. *Id.* at 82.[48]

I do not suggest that we are bound by our prior decisions. But in both decisions, we carefully considered the statutory language, and in both decisions, based on the plain wording of the text, we rejected an interpretation of §§ 1311 and 1362 that

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[48] The majority suggests that we ruled on the meaning of "addition" based on the plain meaning of the statute without reaching the meaning of "addition ... *to navigable waters*." Op. at 510 (emphasis added) ("We do not ... think that by referring to the 'plain meaning' of 'addition' in *Catskill I* we were holding that the broader statutory phrase 'addition ... to navigable waters' unambiguously referred to a collection of individual 'navigable waters.' " (internal citations and quotations omitted)). It is not possible, however, to define "addition" without defining the object to which the addition is made, as the concepts are inexorably linked. It is clear from our reasoning in *Catskill I* and *II*, that we considered the *entire phrase* in reaching our conclusion. Thus, when we stated "that the discharge of water containing pollutants from one distinct water body to another is an 'addition of [a] pollutant' under the CWA," we could only have meant that the discharge of water containing pollutants constitutes "an 'addition' of [a] pollutant" *to navigable waters*. *Catskill II,* 451 F.3d at 80.

construes "navigable waters" and "the waters of the United States" to mean a single water body. Hence, we have twice rejected the theory based on the plain language of the Act. That plain language has not changed, and neither should our conclusion as to its meaning.

B. *The Supreme Court Precedents*

Finally, although the Supreme Court has not explicitly ruled on the validity of EPA's "unitary waters" theory, it has expressed serious reservations. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004), the Court strongly suggested that the theory is not reasonable. First, the Court remanded for fact-finding on whether the two water bodies at issue were "meaningfully distinct water bodies." 541 U.S. at 112, 124 S.Ct. 1537. That disposition follows from Judge Walker's soup ladle analogy in *Catskill I*: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle)." 273 F.3d at 492. In *Catskill II*, we noted that such a transfer would be an intrabasin transfer, from one water body back into the same water body, and we then applied the analogy to the facts of this case: "The Tunnel's discharge ... was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer." 451 F.3d at 81. In *Miccosukee*, the Supreme Court cited the "soup ladle" analogy with approval, and remanded the case to the district court to determine whether the water bodies in question were "two pots of soup, not one." 541 U.S. at 109–10, 124 S.Ct. 1537; *see also id.*

at 112, 124 S.Ct. 1537. If the "unitary waters" theory were valid, however, there would have been no need to resolve this factual question. If all the navigable waters of the United States were deemed one collective national body, there would be no need to consider whether individual water bodies were distinct—there would be no need to determine whether there were two pots of soup or one.

Second, as previously discussed, the Court observed that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id.* at 107, 124 S.Ct. 1537. The Court noted that under the Act, states "may set individualized ambient water quality standards by taking into consideration 'the designated uses of the navigable waters involved,' " thereby affecting local NPDES permits. *Id.* (quoting 33 U.S.C. § 1313(c)(2)(A)). "This approach," the Court wrote, "suggests that the Act protects individual water bodies as well as the 'waters of the United States' as a whole." *Id.*[49]

Subsequent Supreme Court decisions support this reading of *Miccosukee*. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.,* the Supreme Court held that a water transfer between one portion of a river through a concrete channel to a lower portion of the same river did not trigger a NPDES permit requirement. —— U.S. ——, 133 S.Ct. 710, 184 L.Ed.2d 547 (2013). The Court observed that "[w]e held [in *Miccosukee*] that th[e]

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[49] In *Catskill II*, we concluded that "[o]ur rejection of [the unitary waters] theory in *Catskill I* ... is supported by *Miccosukee*, not undermined by it." 451 F.3d at 83.

water transfer would count as a discharge of pollutants under the CWA *only if* the canal and the reservoir were 'meaningfully distinct water bodies.' " *Id.* at 713 (emphasis added) (citations omitted). In holding that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA," *id.* the Court again suggested that it *would* be a discharge of pollutants if the transfer were between two *different* water bodies.

In *Miccosukee*, the Supreme Court acknowledged the concerns that have been raised about the burdens of permitting, but also observed that "it may be that such permitting authority is *necessary to protect water quality*, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs." 541 U.S. at 108, 124 S.Ct. 1537 (emphasis added). Indeed, recognizing the importance of safeguarding drinking water, Congress created an extensive system to protect this precious resource, a system that would be undermined by exempting interbasin water transfers.

Hence, the Supreme Court's decisions in *Miccosukee* and *Los Angeles County* support the conclusion that water transfers between two distinct water bodies are not exempt from the Act.

III

In my view, then, Congress has "unambiguously expressed" its intent to subject interbasin water

transfers to the requirements of §§ 1311 and 1362 of the Act. Accordingly, I would affirm the judgment of the district court based on step one of *Chevron*. Even assuming, however, that the statutory text is ambiguous, I agree with the district court that the Water Transfers Rule also fails at *Chevron* step two because it is an unreasonable and manifestly contrary interpretation of the Act, largely for the reasons set forth in the district court's thorough and carefully-reasoned decision. I add the following:

First, *Chevron* deference has its limits. "Deference does not mean acquiescence," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), and "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking," *Judulang v. Holder*, 565 U.S. 42, 132 S.Ct. 476, 484–85, 181 L.Ed.2d 449 (2011).

Second, an agency's interpretation of an ambiguous statute is not entitled to deference where the interpretation is "at odds" with the statute's "manifest purpose," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), or the agency's actions " 'deviate from or ignore the ascertainable legislative intent,' " *Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (quoting *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983)). *See* Katzmann, *Judging Statutes* 31 ("The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes. When the text is ambiguous, a court is to provide the meaning that the legislature intended. In that circumstance, the judge gleans the purpose and policy underlying the legislation and

deduces the outcome most consistent with those purposes."). As discussed above, in my view the Water Transfers Rule is manifestly at odds with Congress's clear intent in passing the Act.

Third, the Water Transfers Rule is not entitled to deference because it will lead to absurd results. *See Michigan v. EPA*, —— U.S. ——, 135 S.Ct. 2699, 2707, 192 L.Ed.2d 674 (2015) ("No regulation is 'appropriate' if it does 'significantly more harm than good.' "); *see also* Scalia & Garner, *Reading Law* 234 ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve."). Indeed, this Court has already held—twice—that the "unitary waters" theory would lead to absurd results. In *Catskill I*, we concluded that "[n]o one can *reasonably* argue that the water in the Reservoir and the Esopus are in any sense the 'same,' such that 'addition' of one to the other is a logical impossibility." 273 F.3d at 492 (emphasis added). In *Catskill II*, we rejected the "unitary water" theory for a second time, observing that it "would lead to the *absurd* result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants." 451 F.3d at 81 (emphasis added). It would be an absurd result indeed for the Act to be read to allow the unlimited transfer of polluted water to clean water. Clean drinking water is a precious resource, and Congress painstakingly created an elaborate permitting system to protect it. Deference has its limits; I would not defer to an agency interpretation that threatens to undermine that entire system.

* * *

I would affirm the judgment of the district court, and, accordingly, I dissent.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

The Hob. Charles L. Brieant Jr.
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FINAL JUDGMENT

March 28, 2014

Before: KENNETH M. KARAS, District Judge

Nos.: 08-CV-5606-KMK; 08-CV-8430-KMK

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., et al.,
Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants.

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Nos. 08-CV-5606-KMK; 08-CV-8430-KMK

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., et al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

ARGUED MARCH 22, 2013 --
DECIDED MARCH 28, 2014

Before KARAS, District Judge.

KARAS, District Judge:

In the context of water regulation, federal law provides that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). And, as relevant here, it defines a "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The Environmental Protection Agency ("EPA") interprets these provisions not to apply to a "water transfer," which it has defined, in a regulation, to mean "an

activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Before the Court are multiple motions and cross-motions for summary judgment challenging or defending this regulation as promulgated under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.,* and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* As with many things legal and nautical, there is much complexity to confront below the surface of this seemingly simple language. Let's dive in.

I. Background

A. Statutory History

Congress has long sought to protect the integrity of our Nation's waters by limiting what we put in them. In 1899, it passed the Rivers and Harbors Act, which made it unlawful, in part, "to throw, discharge, or deposit ... from or out of any ... floating craft of any kind, or from the shore ... any refuse matter of any kind or description whatever ... into any navigable water of the United States, or into any tributary of any navigable water...." Rivers and Harbors Appropriations Act of 1899, ch. 425, § 13, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407). In addition to limiting the "discharge ... [of] refuse matter," the Act authorized the Secretary of the Army, acting pursuant to the judgment of the Army Corps of Engineers, to "permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him." *Id.*

Almost fifty years later, Congress significantly

expanded its water-regulation authority when it passed the Federal Water Pollution Control Act of 1948, ch. 758, Pub.L. No. 845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251 *et seq.*). This Act provided, *inter alia,* that

> [t]he pollution of interstate waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is hereby declared to be a public nuisance and subject to abatement as herein provided.

Id. § 2(d)(1). Although the Act did not define "pollution," it did define "interstate waters" to mean "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." *Id.* § 10(e). This part of the Act was slightly amended in 1956, *see* ch. 518, Pub.L. No. 660, § 8(a), 70 Stat. 498, and it was again amended in 1961 to expand the scope of the regulation from "interstate waters" to "interstate or navigable waters," *see* Pub.L. No. 87–88, § 8(a), 75 Stat. 204 ("The pollution of interstate or navigable waters in or adjacent to any State or States ... which endangers the health or welfare of any persons, shall be subject to abatement...."). The 1961 amendments also modified the definition of "interstate waters," but it did not define the newly added term "navigable waters." *See id.* § 9(e) ("The term 'interstate waters' means all

rivers, lakes, and other waters that flow across or form a part of State boundaries, including coastal waters.").

Then, about a decade later, Congress passed the Federal Water Pollution Control Act Amendments of 1972 ("1972 Amendments"), Pub.L. No. 92–500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251 *et seq.*), which represented a "comprehensive revision of national water quality policy." S.Rep. No. 95–370, at 1 (1977), 1977 U.S.C.C.A.N. 4326, 4327. As relevant here, § 301 of the amended Act provided that, "[e]xcept as in compliance with" certain sections of the Act, "the discharge of any pollutant by any person shall be unlawful." *Id.* § 301(a), 86 Stat. at 844 (codified as amended at 33 U.S.C. § 1311(a)). Separately, the Act defined "discharge of a pollutant" to mean, in relevant part, "any addition of any pollutant to navigable waters from any point source." *Id.* § 502(12), 86 Stat. at 886 (codified as amended at 33 U.S.C. § 1362(12)). It further defined "pollutant" to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 502(6), 86 Stat. at 886 (codified as amended at 33 U.S.C. § 1362(6)). It also defined "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, ... or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 502(14), 86 Stat. at 887 (codified as amended at 33 U.S.C. § 1362(14)). Finally, the Act defined "navigable waters" to mean "the waters of the

United States, including the territorial seas." *Id.* § 502(7), 86 Stat. at 886 (codified as amended at 33 U.S.C. § 1362(7)).

In addition to significantly revising federal water-quality standards, Congress, through § 402 of the Act, created the National Pollutant Discharge Elimination System ("NPDES"). *See id.* § 402, 86 Stat. at 880–83 (codified as amended at 33 U.S.C. § 1342). Under this program, which explicitly replaced the permit program previously established by the Rivers and Harbors Act of 1899, *see id.* § 402(a)(5), 86 Stat. at 880 (codified as amended at 33 U.S.C. § 1342(a)(5)), the Administrator of the EPA "may ... issue a permit for the discharge of any pollutant[ ] ... notwithstanding [§]301(a), upon condition that such discharge will meet ... such conditions as the Administrator determines are necessary to carry out the provisions of this Act." *Id.* § 402(a)(1), 86 Stat. at 880 (codified as amended at 33 U.S.C. § 1342(a)(1)). After obtaining a permit, any person discharging pollutants in compliance with the permit's terms is deemed to comply with § 301(a)'s ban on pollutant discharges. *Id.* § 402(k), 86 Stat. at 883 (codified as amended at 33 U.S.C. § 1342(k)). But in addition to providing federal authority to issue permits, Congress also provided state governments with authority to create their own permit programs that, once established, would supersede the EPA's ability to issue permits in that state. Specifically, § 402 provides that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." *Id.* §

402(b), 86 Stat. at 880–82 (codified as amended at 33 U.S.C. § 1342(b)). Thereafter, "the Administrator shall suspend the issuance of permits ... as to those navigable waters subject to such program unless he [or she] determines [within ninety days of the State's submission] that the State permit program does not meet ... or does not conform to" various requirements and guidelines in the Act. *Id.* § 402(c)(1), 86 Stat. at 882 (codified as amended at 33 U.S.C. § 1342(c)(1)).[1][2] Once established, however, the Administrator must continually monitor the state program to ensure that it remains in compliance with the Act. *Id.* §§ 402(c)(2)-(3), 86 Stat. at 882 (codified as amended at 33 U.S.C. § 1342(c)(2)-(3)) (providing that "[a]ny State permit program under this section shall at all times be in accordance with this section and [other] guidelines," and that "[w]henever the Administrator determines ... that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if

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[1] The first footnote referenced the appearances of counsel which is not reproduced in this appendix and stated the following: Mr. Teyber and Mr. Walline, law students at the Pace University School of Law, were granted permission to appear on behalf of Environmental Plaintiffs pursuant to this Court's Student Practice Rule under the supervision of Mr. Estrin and Mr. Coplan.

[2] Pursuant to a conforming amendment enacted in 1987, this section currently provides that "the Administrator shall suspend the issuance of permits ... as to those *discharges* subject to such program...." 33 U.S.C. § 1342(c)(1) (emphasis added); *see* Water Quality Act of 1987, Pub.L. No. 100–4, § 403(b)(2), 101 Stat. 7, 67 ("Section 402(c)(1) is amended by striking out 'as to those navigable waters' and inserting in lieu thereof 'as to those discharges.' ").

appropriate corrective action is not taken within a reasonable time, ... the Administrator shall withdraw approval of such program"). And the Administrator may object to, and thereby block, the issuance of any permit pursuant to a state program. *Id.* § 402(d), 86 Stat. at 882 (codified as amended at 33 U.S.C. § 1342(d)). Or the Administrator may waive his or her ability to object to a single permit application, *see id.* § 402(d)(3), 86 Stat. at 882 (codified as amended at 33 U.S.C. § 1342(d)(3)), or to a category of permit applications, *see id.* § 402(e), 86 Stat. at 882 (codified as amended at 33 U.S.C. § 1342(e)) (waiver of objections to categories of point sources); *id.* § 402(f), 86 Stat. at 882 (codified as amended at 33 U.S.C. § 1342(f)) (authority to "promulgate regulations establishing categories of point sources which [the Administrator] determines shall not be subject to the [approval] requirements" of § 402(d)).

Following the 1972 Amendments, Congress enacted another significant set of Amendments five years later when it passed the Clean Water Act of 1977 ("1977 Amendments"), Pub.L. No. 95–217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251 *et seq.*). Although these amendments did not substantially alter the NPDES program under § 402, the pollutant-discharge limitation under § 301(a), or the definitions of any of the previously discussed statutory terms defined in § 502, they did add a policy statement to § 101's "Declaration of Goals and Policy." Where the 1972 Amendments provided that "[t]he objective of th[e] Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 1972 Amendments § 101(a), 86 Stat. at 816 (codified as amended at 33 U.S.C. § 1251(a)), and that

"[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources, and to consult with the Administrator in the exercise of his [or her] authority," *id.* § 101(b), 86 Stat. at 816 (codified as amended at 33 U.S.C. § 1251(b)), the 1977 Amendments added § 101(g), providing that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by th[e] Act," 1977 Amendments § 5(a), 91 Stat. at 1567 (codified as amended at 33 U.S.C. § 101(g)).

Taken together, these provisions of the CWA—prohibiting pollutant discharges, establishing the NPDES program, defining key terms, and clarifying congressional policy goals—comprise the relevant statutory framework within which the Court analyzes the instant Motions. But we have only just gotten our feet wet. The Court will now proceed to discuss EPA's history of administering and interpreting the Act as it relates to the present case.

B. Regulatory History

1. "Navigable Waters"

As discussed, the CWA defines "navigable waters" to mean "the waters of the United States." 33 U.S.C. § 1362(7). In this context, EPA's interpretation of the scope of its regulatory authority over the Nation's waters has evolved over time, but, in general, it represents an expansion of the statutory concept of "navigable waters." Initially, in the immediate

aftermath of Congress's passage of the 1972 Amendments, EPA interpreted "navigable waters" to match precisely the statutory phrase. *See* 37 Fed.Reg. 28,390, 28,392 (Dec. 22, 1972) (formerly codified at 40 C.F.R. § 124.1(n)) ("The definition[ ] of ['navigable waters'] contained in [§] 502 of the Act shall be applicable to such terms as used in this part...."). Soon thereafter, EPA's Office of the General Counsel published a memorandum concluding, based on a review of the legislative history of the 1972 Amendments, that, in defining "navigable waters" to mean "the waters of the United States," Congress intended that the statute "eliminate[ ] the requirement of navigability," but also that "pollution of waters covered by the bill must be capable of affecting interstate commerce." Memorandum from the EPA Office of the General Counsel on Water Pollution, at *1 (Feb. 6, 1973), *available at* 1973 WL 21937 (EPA Office of the General Counsel). The memorandum then noted that the Agency would face "a major task to determine, on a case by case basis, what waters fall within" the statutory category, but it proposed that at least the following waters would appear to be "waters of the United States":

(1) All navigable waters of the United States;

(2) Tributaries of navigable waters of the United States;

(3) Interstate waters;

(4) Interstate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;

(5) Interstate lakes, rivers, and streams from which

> fish or shellfish are taken and sold in interstate commerce; and
>
> (6) Interstate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

Id. EPA subsequently adopted the memorandum's recommended interpretation of "navigable waters" in a 1973 rulemaking, noting that, in the newly adopted regulation, "[t]he definition of 'navigable waters' ha[d] been clarified by incorporating additional language." *See* 38 Fed.Reg. 13,528, 13,528–29 (May 22, 1973) (codifying the memorandum's proposed interpretation at 40 C.F.R. § 125.1(*o*)).

Approximately two years later, the EPA's Office of the General Counsel again issued a memorandum—this time in the form of a formal opinion—discussing the scope of "navigable waters" as applied to the question of whether discharges of pollutants from "irrigation return flows" required permits under the NPDES program. *See* In re Riverside Irrigation Dist., Ltd. & 17 Others (June 27, 1975), *available at* 1975 WL 23864 (EPA Office of the General Counsel, Opinion No. 21). Although the Opinion's conclusion rested primarily on its determination that an irrigation return flow is a "point source" subject to NPDES permit requirements, *see id.* at *2–3, it also discussed its interpretation of "navigable waters" in response to a claim that, if an irrigation return flow were determined to be a "navigable water," it would not be subject to regulation as a "point source." First, it reaffirmed the 1973 memorandum's case-by-case approach for determining whether any individual water fit within the statutory framework, declining to deem irrigation ditches as a

category to be "navigable waters," and instead concluding that "the waters that are the subject of these permits may well be determined by the finder of fact, applying the statutory and regulatory test to the facts of these cases, to be navigable waters within the definition of the Act." *Id.* at *4. Second, it noted that, even if "any *given* irrigation ditch [were determined to be] a navigable water, it would still be permittable as a point source where it discharges into another navigable water body...." *Id.* (emphasis in original). Third, it recognized that the term "navigable waters" encompassed not only entire bodies of water but also individual portions of those bodies, stating that "[i]t is clear that the intent of Congress in adopting this definition of 'navigable waters' was to broaden the concept of navigable waters to 'portions thereof, tributaries thereof ... and the territorial seas and the Great Lakes.' " *Id.* at *3 (second alteration in original) (emphasis removed) (quoting *United States v. Holland,* 373 F.Supp. 665, 671 (M.D.Fla.1974)). Fourth, and most importantly, it defended EPA's broad interpretation of the scope of "navigable waters" while explicitly basing its ability to expand this scope on Congress's intent that EPA would have broad permitting authority over pollution discharges:

> The clear tenor of the legislative history ... is that the broad definition of "navigable waters" serves to expand the application of the Act and the permit program, not narrow it.... [T]o define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly

> directly in the face of clear legislative intent to the contrary.

Id. at *4. In other words, in its determination that pollutant-discharging point sources that could also be classified as "navigable waters" would still be subject to NPDES permitting requirements, the Opinion foreclosed the possibility that it could interpretively expand the scope of "navigable waters" in a way that restricted its permitting authority.

Subsequent regulations continued to clarify the expansive scope of "navigable waters" by focusing less on the "navigability" component and more on the "interstate commerce" component. In a 1979 rulemaking, EPA codified a definition of "navigable waters" that it claimed was "slightly revised to clarify its intent and scope," but faithful to "the basic thrust and coverage" of the previous definition. 44 Fed.Reg. 32,854, 32,858 (June 7, 1979). Per the new regulation,

> [w]aters [would] be considered to be waters of the United States not only if they [we]re actually used, but also if they [could] be susceptible to use, for industrial purposes by industries in interstate commerce. Thus the regulations [focused], not on the nature of the stream's users, but on the characteristics of the stream itself, and it [would] no longer be necessary to show actual industrial use for a stream to fall within the definition.

Id. Pursuant to the new focus on *potential* use in

interstate commerce, the regulation defined "navigable waters" to include "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce," and "[a]ll other waters ... the use, degradation or destruction of which would affect or could affect interstate or foreign commerce." *Id.* at 32,901 (previously codified at 40 C.F.R. § 122.3(t)). Moreover, to reinforce the declining emphasis on "navigability," EPA noted in a comment included in the newly codified definition that, "[f]or purposes of clarity the term 'waters of the United States' is primarily used throughout the regulations rather than 'navigable waters.' " *Id.*

Following the 1979 rulemaking and, in particular, the rulemaking's nod toward replacing "navigable waters" with "waters of the United States" throughout the regulations, EPA eliminated its definition of "navigable waters" while reappropriating that definition's language to define the statutory phrase "waters of the United States." *See* 45 Fed.Reg. 33,290, 33,298 (May 19, 1980) (" '[N]avigable waters' ... now appears as the definition of 'Waters of the United States[ ]'...."). Currently, after a reorganization of the NPDES regulations in 1983, *see* 48 Fed.Reg. 14,146 (Apr. 1, 1983), EPA's definition of "waters of the United States" appears in 40 C.F.R. § 122.2, which provides, in relevant part:

> *Waters of the United States or waters of the U.S.* means:
>
> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are

subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified [above];

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters ... identified [above].

40 C.F.R. § 122.2.

Throughout this regulatory evolution of the EPA's interpretation of its permitting authority, the Supreme Court remained relatively silent. However,

in *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), it finally dipped its oar in the water. In that case, the Supreme Court confronted the Army Corps of Engineers' ("the Corps' ") assertion of permitting authority over discharges of a pollutant into a "wetland," which assertion the Corps had made under § 404 of the CWA—a provision that, like § 402, allowed the Corps (instead of EPA) to issue permits for discharges into "navigable waters" as defined in § 502(7). *See* 33 U.S.C. § 1344(a) ("The Secretary [of the Corps] may issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites."). In holding that the Corps' expansive definition of "navigable waters" to include "wetlands" was "a permissible interpretation of the [CWA]," the Supreme Court held that

> Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.

Riverside Bayview, 474 U.S. at 133, 106 S.Ct. 455 (citations omitted). And in accepting the Corps' expansive interpretation of "navigable waters," the Supreme Court explicitly relied on "the evident

breadth of congressional concern for protection of water quality and aquatic ecosystems," specifically holding that,

> [i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

Id. at 133–34, 106 S.Ct. 455. Although *Riverside Bayview* did not directly evaluate EPA's similarly expansive interpretation of "navigable waters," its holding was in line with EPA's view that its broad authority over "navigable waters" flowed from Congress's intent to expand EPA's authority to prohibit and, where appropriate, to permit pollutant discharges.

The Supreme Court made a splash again over a decade later in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"),* 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), wherein it limited "navigable waters" as defined in *Riverside Bayview* not to encompass the Corps' new interpretation, which defined "navigable waters" to include a "seasonally ponded, abandoned gravel min[e] ... used as [a] habitat by migratory bird [s]." *Id.* at 164–65, 121 S.Ct. 675 (internal quotation marks omitted). Although the Supreme Court had previously held that

"the term navigable as used in the [CWA] is of limited import," *Riverside Bayview,* 474 U.S. at 133, 106 S.Ct. 455, the Court in *SWANCC* clarified that "Congress' separate definitional use of the phrase 'waters of the United States' [did not] constitute[ ] a basis for reading the term 'navigable waters' out of the statute," 531 U.S. at 172, 121 S.Ct. 675. Instead, it noted that

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. It thus found that the Corps' interpretation was foreclosed by the statute, and it rejected the Corps' attempt further to expand the scope of "navigable waters." *See id.* at 174, 121 S.Ct. 675 ("We hold that [the Corps' interpretation of 'navigable waters'] ... exceeds the authority granted to [the Corps] under § 404(a) of the CWA."). Again, the Supreme Court's holding did not apply directly to the EPA's interpretation. But the EPA subsequently endorsed the Supreme Court's approach in SWANCC in a regulation specifying that "[t]he determination of whether a particular cooling pond is or is not 'waters of the United States' is to be made by the permit writer on a case-by-case basis, informed by the principles announced in" that case. *See* 66 Fed.Reg. 65,256, 65,259 (Dec. 18, 2001).

2. The Water Transfers Rule

Somewhat parallel to the regulations and cases defining the scope of "navigable waters," EPA began to clarify—through positions it took in various court cases—its interpretation of its permitting authority over pollutant discharges resulting from transfers of water within and between navigable waters. In *National Wildlife Federation v. Gorsuch,* 693 F.2d 156 (D.C.Cir.1982), EPA defended its policy of not requiring a permit to transfer water through a dam against the argument that the "release of polluted water through [a] dam into [a] downstream river constitutes the 'addition' of a pollutant to navigable waters 'from' a point source" under § 502(12), triggering EPA's "nondiscretionary duty to regulate" the discharges under § 402. *Id.* at 165. It argued, instead, that "for [an] addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world; dam-caused pollution, in contrast, merely passes through the dam from one body of navigable water ... into another." *Id.* The D.C. Circuit, according "great deference" to the EPA, *id.* at 166 (internal quotation marks omitted), accepted this interpretation, holding that it was "reasonable" and "not inconsistent with congressional intent," *id.* at 183. [3] Similarly, as an *amicus curiae* in *National Wildlife Federation v. Consumers Power Co.,* 862 F.2d 580 (6th Cir.1988), EPA made many of the same

[3] *Gorsuch* was decided approximately two years before the Supreme Court decided *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), which established the prevailing standard for deference to agency rulemaking.

arguments it had made in *Gorsuch* to support a power company defending itself from the claim that it was required to obtain an NPDES permit to operate a hydroelectric dam. Like the D.C. Circuit in *Gorsuch,* the Sixth Circuit deferred to EPA's interpretation in holding that "no pollutant is introduced from the outside world ... because any [pollutant] released with the ... water originate[d] in [a navigable water], and [did] not enter the [receiving navigable water] from the outside world."[4] *Id.* at 585. In so holding, the court also joined the D.C. Circuit in holding that Congress did not intend to regulate dams as "point sources." *See id.* at 587–88 (citing 33 U.S.C. § 1314(f)(2)(F); *Gorsuch,* 693 F.2d at 177). But, because the dams in *Consumers Power*—which removed, held, and altered water—were arguably distinguishable from the dams in *Gorsuch*—which "were ... located within navigable waters ... [and] merely pass[ed] on water of already altered quality," *id.* at 589 (internal quotation marks omitted)—the Sixth Circuit offered an additional rationale for excluding the dams at issue from the NPDES program:

> The water which passes through the [dam] never loses its status as water of the United States.... The [dam's] movement or diversion of water from [a navigable water] into a storage reservoir is distinguishable from the diversion of waters of the United States by industrial operations for cooling purposes in which the water loses its status as water of the United States. The [dam] merely changes the

[4] In *Consumers Power,* decided in 1988, the court did apply *Chevron* deference. *See Consumers Power,* 862 F.2d at 584–85.

> movement, flow, or circulation of navigable waters when it temporarily impounds waters ... in a storage reservoir, but does not alter their character as waters of the United States. On the other hand, steam/electric industrial operations remove water, which then enters the industrial complex and absorbs heat and other minerals produced by the plant or electric generator before being added to waters of the United States.

Id. The Sixth Circuit thus distinguished between dams, which it had followed the D.C. Circuit in holding were non-point sources of pollution "generally not subject to the NPDES permit requirements," *id.* at 590, and industrial operations, which subjected the water to industrial use before discharging it back into navigable waters.

In the wake of *Gorsuch* and *Consumers Power,* other courts refused to extend these decisions outside the context of dams in cases not directly involving the EPA. In *Dague v. City of Burlington,* 935 F.2d 1343 (2d Cir.1991), *rev'd in part on other grounds,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), the Second Circuit held that water transferred between two navigable bodies of water through a "railroad culvert" constituted a "discharge of a pollutant" because the culvert met the statute's definition of a "point source." *See id.* at 1355. And in *Dubois v. U.S. Department of Agriculture,* 102 F.3d 1273 (1st Cir.1996), the First Circuit held that a ski resort's transfer of water from a river into a pond via a system of pumps and pipes used to make snow was a "discharge of a pollutant" into the pond because "the pipe discharging the water into [the pond was] a point source," and the river and

the pond were "not the same body of water." *Id.* at 1296–97. Moreover, in contrast to the Sixth Circuit in *Consumers Power,* the First Circuit held that the water "lost its status as waters of the United States" during the transfer because "the water [left] the domain of nature and [was] subject to private control rather than purely natural processes." *Id.* at 1297. *Finally, in Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York ("Catskills I"),* 273 F.3d 481 (2d Cir.2001), the Second Circuit held that New York City's transfer of water from a reservoir to a creek—both "navigable waters"—via a tunnel—which "plainly qualifie[d] as a point source," *id.* at 493—resulted in the "discharge of a pollutant" without a permit, in violation of § 301(a). *See id.* at 494. The Second Circuit distinguished its holding from *Gorsuch* and *Consumers Power* in two ways. First, it held that EPA's interpretation—on which the City relied—did not deserve deference because it "had [not] been adopted in a rulemaking or other formal proceeding," but was instead "based on a series of informal policy statements ... and ... litigation positions." *Id.* at 490. Second, although it agreed with EPA's and other courts' interpretation that an "addition" of a pollutant required that the pollutant be introduced "from the outside world," it defined the "outside world" to be "any place outside the particular water body to which pollutants are introduced." *Id.* at 491 (internal quotation marks omitted). Thus, whereas "*Gorsuch* and *Consumers Power* essentially involved the recirculation of water" through a dam, *id.* at 491, the situation the Second Circuit confronted "strain[ed] past the breaking point the assumption of 'sameness' " made in those cases because the water was "artificially diverted from its natural course and travel[led] several

miles from the [reservoir] through [the tunnel] to [the creek], a body of water utterly unrelated in any relevant sense to the [reservoir]," *id.* at 492. Thus, the Second Circuit in *Catskills I* followed its prior decision in *Dague* and the First Circuit's decision in *Dubois* in holding that the transfer of water between two distinct navigable bodies of water through a point source required a permit under § 402. *See id.* at 492–93.

A few years after *Catskills I,* the Supreme Court addressed the water-transfer issue in *South Florida Water Management District v. Miccosukee Tribe of Indians ("SFWMD"),* 541 U.S. 95, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004). In that case, the Miccosukee Tribe challenged the operation of a pumping facility that transferred water from a canal into a nearby reservoir without an NPDES permit. *See id.* at 98, 124 S.Ct. 1537. Initially, the Court rejected the argument that § 301(a) covers only pollutants originating from a point source, holding instead that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.' " *Id.* at 105, 124 S.Ct. 1537. Then, the Supreme Court proceeded to address the argument—made for the first time in the Government's *amicus* brief—that "all the water bodies that fall within the [CWA's] definition of 'navigable waters' ... should be viewed *unitarily* for purposes of NPDES permitting requirements," and thus that "such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body." *Id.* at 105–06, 124 S.Ct. 1537 (first emphasis added) (some internal quotation marks omitted). The Court ultimately declined to resolve whether this interpretation—which it called the "unitary waters" approach—was

consistent with the statute, holding that EPA's interpretation did not deserve deference because the government "[had] not identif[ied] any administrative documents in which EPA ha[d] espoused that position," *id.* at 107, 124 S.Ct. 1537, and that the parties had failed to raise this argument in their memoranda to the courts below or in their petitions for certiorari, *id.* at 109, 124 S.Ct. 1537. Instead, because both parties conceded that a permit would not be required if the canal and the reservoir were "simply two parts of the same water body," *id.,* it remanded the case for a determination of whether the canal and the reservoir were "meaningfully distinct water bodies," *id.* at 112, 124 S.Ct. 1537—a factual determination that the district court had made prematurely at the summary-judgment stage, *id.* at 111, 124 S.Ct. 1537.

In light of the Second Circuit's decision in *Catskills I* and the Supreme Court's decision in *SFWMD,* both of which declined to defer to EPA's interpretation of § 301(a) in the context of a water transfer, EPA in 2005 took the first step toward formalizing its interpretation. In a memorandum issued from the EPA's Office of the General Counsel to all Regional EPA Administrators—referred to as the "Klee Memorandum" because it was issued by EPA General Counsel Ann R. Klee—EPA concluded, after an analysis of the CWA's language, its legislative history, and relevant case law, that "Congress intended to leave the oversight of water transfers to authorities other than the NPDES program." (Administrative Record ("AR") 5, at 19 (Memorandum from Ann R. Klee to EPA Regional Administrators on Agency Interpretation on Applicability of Section 402 of the

Clean Water Act to Water Transfers (Aug. 5, 2005)).)[5] In clarifying language, the Memorandum defined a "water transfer" as "any activity that conveys or connects navigable waters ... without subjecting the water to intervening industrial, municipal, or commercial use." (*Id.* at 1.) And while the Memorandum explicitly "[did] not address the meaning of the terms[ ] 'point source,' 'pollutant' or 'navigable waters,' " (*id.* at 18 n. 19), it based its conclusion instead entirely on the statutory term "addition," (*see id.* at 18), which it interpreted using a "holistic view" of the statute, "[giving] meaning to those statutory provisions where Congress expressly considered the issue of water resource management, as well as Congress' overall division of responsibility between State and federal authorities under the statute," (*id.* at 13). The Memorandum also addressed EPA's aforementioned 1975 formal opinion in which it concluded that pollutant discharges from irrigation ditches required NPDES permits, noting that "th[e] opinion did not specifically address the question of whether an 'addition' has occurred when a navigable water is merely conveyed to another navigable water," and that the opinion's practical effect was overridden by subsequent legislation specifically exempting irrigation return flows from regulation. (*Id.* at 2–3 n. 5 (citing 33 U.S.C. § 1342(*l*)(1) ("The Administrator shall not require a permit under this section for

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[5] In addition to being part of the record in this case, (*see* Dkt. No. 119 (08–CV–5606 Dkt.) (Administrative Record, filed with the Clerk of the Court in CD format pursuant to Dkt. No. 118)), the Administrative Record is also accessible online. *See National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule,* Regulations.gov, http:// www.regulations.gov/# !docketDetail;D=EPA–HQ–OW–2006–0141 (last visited Mar. 25, 2014).

discharges composed entirely of return flows from irrigated agriculture...."); *id.* § 1362(14) ("Th[e] term [point source] does not include ... return flows from irrigated agriculture.")).) It otherwise concluded that, "[t]o the extent the 1975 [o]pinion ... conflicts with this Agency interpretation with respect to water transfers, it is superseded." (*Id.*)

After the Supreme Court decided *SFWMD* and after EPA issued the Klee Memorandum, the Second Circuit was confronted with an opportunity to reconsider its holding in *Catskills I* in an appeal from a district court order (issued after the remand in *Catskills I*) granting summary judgment against the City of New York and assessing a civil penalty for failing to obtain an NPDES permit. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York ("Catskills II"),* 451 F.3d 77, 80 (2d Cir.2006). Holding that the Supreme Court's decision in *SFWMD* supported its decision in *Catskills I, id.* at 83, and accepting the City's concession that the EPA's interpretation as expressed in the Klee Memorandum did not deserve *Chevron* deference, *id.* at 82, the Second Circuit reaffirmed its holding in *Catskills I, id.*[6] Notably, in so doing, it criticized the Klee Memorandum's " 'holistic' arguments about the allocation of state and federal rights" in the CWA because those arguments "simply

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[6] In accordance with *United States v. Mead Corp.,* 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), the Second Circuit applied so-called *Skidmore* deference, "defer[ring] to the agency interpretation according to its 'power to persuade,' " *id.* at 235, 121 S.Ct. 2164 (some internal quotation marks omitted) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). *See Catskills II,* 451 F.3d at 82.

overlook[ed] [the CWA's] plain language," which requires that EPA "balance" the "seemingly inconsistent goals" of "achiev[ing] water allocation goals as well as ... restor[ing] and maintain[ing] the quality of the nation's waters." *Id.* at 84–85. It thus rejected EPA's interpretation, which "tip [ped] the balance toward allocation goals," in favor of "honoring ... the balance that Congress has struck and remains free to change." *Id.* at 85.

Approximately one week before the Second Circuit decided *Catskills II,* EPA initiated notice-and-comment rulemaking on a proposed rule codifying the Klee Memorandum's position that transfers of water between navigable bodies of water do not require NPDES permits. *See* 71 Fed.Reg. 32,887 (June 7, 2006). EPA received over 18,000 comments on the rule, (*see* AR 1428 at 3 (Response to Public Comments: National Pollutant Discharge Elimination System (NPDES) Water Transfers Final Rule (40 C.F.R. Part 122); Docket # : EPA–HQ–OW–2006–0141)), and it responded to the issues raised by these comments in a document filed as part of the Administrative Record, (*see id.*). Then, on June 13, 2008, EPA issued its final rule, adding, as an "exclusion" to the NPDES program, "[d]ischarges from a water transfer." *See* 73 Fed.Reg. 33,697, 33,708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). Thus, pursuant to the Water Transfers Rule, EPA's regulations currently read, in relevant part:

The following discharges do not require NPDES 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).

C. Procedural History

These two rivers of regulatory history—the scope of "navigable waters" and the Water Transfers Rule—have now converged in this Action, where the Court must decide whether EPA's interpretation of the statute sinks or swims. Wasting no time after EPA issued the final rule on June 13, 2008, one group of plaintiffs—which the Court will refer to as the "Environmental Plaintiffs"[7]—filed a Complaint less than one week later against the agency and its Administrator[8] (collectively, "EPA"). (*See* Dkt. No. 1 (08–CV–5606 Dkt.) (Compl., filed on June 20, 2008).) Separately, another group of plaintiffs—which the

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[7] These plaintiffs include Catskill Mountains Chapter of Trout Unlimited, Inc.; Theodore Gordon Flyfishers, Inc.; Catskill–Delaware Natural Water Alliance, Inc.; Federated Sportsmen's Clubs of Ulster County, Inc.; Riverkeeper, Inc.; and Waterkeeper Alliance, Inc.

[8] The Complaint originally named as a defendant Stephen L. Johnson, who was the EPA Administrator at the time the Complaint was filed. However, because Mr. Johnson is no longer the Administrator, the Court has automatically substituted Gina McCarthy, the current Administrator, as a defendant. *See* Fed.R.Civ.P. 25(d) ("[W]hen a public officer who is a party in an official capacity ... ceases to hold office while the action is pending[,] [t]he officer's successor is automatically substituted as a party.").

Court will refer to as the "State Plaintiffs"[9]—filed a Complaint a few months later, also against EPA. (*See* Dkt. No. 1 (08–CV–8430 Dkt.) (Compl., filed on Oct. 2, 2008).) On October 8, the Court granted the State Plaintiffs' request to consolidate both cases. (*See* Dkt. No. 18 (08–CV–5606 Dkt.) (entered Oct. 10, 2008).)[10]

At approximately the same time that the actions were filed in this Court, a number of parallel actions were filed in other courts, some by Parties to this Consolidated Action. *See, e.g., Env't Am. v. EPA,* No. 08–1853 (1st Cir.); *Jones River Watershed Ass'n v. EPA,* No. 08–2322 (1st Cir.); *Catskill Mountain Chapter of Trout Unlimited, Inc. v. EPA,* No. 08–3203 (2d Cir.); *New York v. EPA,* No. 08–8444 (2d Cir.); *Pennsylvania v. EPA,* No. 08–4178 (3d Cir.); *Mich. Chapter of Trout Unlimited, Inc. v. EPA,* No. 08–4366 (6th Cir.); *Sierra Club v. EPA,* No. 08–14921 (11th Cir.); *Miccosukee Tribe of Indians of Fla. v. EPA,* No. 08–13652 (11th Cir.); *Fla. Wildlife Fed'n v. EPA,* No. 08–13657 (11th Cir.); *Friends of the Everglades v. EPA,* No. 08–CV–21785 (S.D.Fla.); *Miccosukee Tribe of Indians of Fla. v. EPA,* No. 08–CV–021858 (S.D.Fla.); *Rivers Coal. Def. Fund, Inc. v. EPA,* 08–CV–80922 (S.D.Fla.). "On July 22, 2008, pursuant to 28 U.S.C. § 2112(a)(3), the United States Judicial Panel on Multidistrict Litigation ... consolidated the five petitions for review of the Water Transfers Rule then pending in the First, Second, and Eleventh

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[9] These Plaintiffs include New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, and the Government of the Province of Manitoba, Canada.

[10] Because the Court consolidated the cases under the 08–CV–5606 Docket, all subsequent citations to docket entries will refer to that Docket, unless otherwise noted.

Circuit Courts of Appeal and randomly assigned them to the Eleventh Circuit." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.,* 630 F.Supp.2d 295, 304 (S.D.N.Y.2009). The Eleventh Circuit then "granted in part the parties' joint motion to consolidate those petitions," consolidated a sixth petition for review, and stayed all of those petitions pending disposition of the appeal of *Friends of the Everglades v. South Florida Water Management District,* No. 07–13829–HH (11th Cir.), a separate but conceptually related case filed in August 2007 and on appeal to the Eleventh Circuit. *Id.* The District Court for the Southern District of Florida also stayed proceedings in its case pending disposition of that appeal. *Id.* at 304 n. 6.

In December 2008, EPA filed a Motion To Stay or, in the alternative, To Dismiss the Case for lack of subject-matter jurisdiction in light of both the *Friends of the Everglades* appeal and the consolidated petitions. (*See* Dkt. No. 28 (Mot.); Dkt. No. 29 (Mem. of Law in Supp. of Defs.' Mot. for Stay or, in the Alternative, To Dismiss).) On April 29, 2009, the Court granted the Motion To Stay "pending the Eleventh Circuit's resolution of *Friends of the Everglades* and the Consolidated Petitions." *Catskill Mountains,* 630 F.Supp.2d at 307.[11] Two months later, the Eleventh Circuit decided the appeal in *Friends of the Everglades,* applying *Chevron* deference to the Water Transfers Rule and reversing the district court's ruling that the water transfer at issue required an NPDES permit. *See Friends of the Everglades v. S. Fla. Water*

[11] The Court did not address EPA's Motion, in the alternative, To Dismiss the Case. *See Catskill Mountains,* 630 F.Supp.2d at 307 n. 8.

Mgmt. Dist. ("Friends I"), 570 F.3d 1210, 1228 (11th Cir.2009). But, in September 2012, because the Eleventh Circuit had not yet resolved the Consolidated Petitions, the Court placed this Case on the Suspense Calendar. (*See* Dkt. No. 79.)

Then, on October 26, 2012, the Eleventh Circuit issued an opinion dismissing the consolidated petitions for lack of subject-matter jurisdiction under 33 U.S.C. § 1369(b)(1). *See Friends of the Everglades v. U.S. E.P.A. ("Friends II"),* 699 F.3d 1280 (11th Cir.2012).[12] Thereafter, pursuant to this Court's Order, the Stay lifted on December 17, 2012, when the Eleventh Circuit's mandate dismissing the case was scheduled to issue. (*See* Dkt. No. 84.)

Subsequently, a number of other plaintiffs and defendants waded into the case when, after a pre-motion conference held on January 30, 2013, the Court granted, on the Parties' consent, multiple applications to intervene as plaintiffs and defendants under Rule 24 of the Federal Rules of Civil Procedure. (*See* Dkt. No. 114.) This added, as Intervenor–Plaintiffs, the Miccosukee Tribe of Indians of Florida, Friends of the Everglades, the Florida Wildlife Federation, and the Sierra Club (collectively, "Environmental Intervenor–Plaintiffs"), and, as Intervenor–Defendants, Alaska, Arizona, Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming (collectively, "State Intervenor–Defendants"); South Florida Water Management District ("SFWMD"); and

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[12] The Eleventh Circuit also declined to exercise so-called "hypothetical jurisdiction." *See Friends II,* 699 F.3d at 1288–89.

multiple municipal water providers from western states ("Western Water Providers"). (*See id.*) In joining the case as intervenors, these Parties followed the City of New York, which previously joined as an Intervenor–Defendant after the Court granted its Rule 24 Motion To Intervene in October 2008. (*See* Dkt. No. 22).

At the same time that it granted the Parties' applications to intervene, the Court also adopted a briefing schedule, whereby the Parties could file motions and cross-motions to dismiss or for summary judgment. (*See* Dkt. No. 114.) Initially, both EPA and SFWMD filed motions to dismiss for lack of subject matter jurisdiction, arguing that, pursuant to 33 U.S.C. § 1369(b)(1), and contrary to the Eleventh Circuit's ruling in *Friends II,* this Court did not have original jurisdiction over the Complaint. (*See* Dkt. No. 122 (EPA's Mot.); Dkt. No. 125 (SFWMD's Mot.).) However, pursuant to a later Stipulation of Dismissal, the Court dismissed these Motions without prejudice pending further action by the Supreme Court on the Eleventh Circuit's decision, which decision the Parties acknowledged had collateral-estoppel effect. (*See* Dkt. No. 154.) The Supreme Court ultimately declined to hear the appeal. *See U.S. Sugar Corp. v. Friends of the Everglades,* —— U.S. ——, 134 S.Ct. 422, 187 L.Ed.2d 280 (2013); *Envmtl. Prot. Agency v. Friends of the Everglades,* —— U.S. ——, 134 S.Ct. 421, 187 L.Ed.2d 280 (2013); *S. Fla. Water Mgmt. Dist. v. Friends of the Everglades,* —— U.S. ——, 134 S.Ct. 422, 187 L.Ed.2d 280 (2013).

Prior to the Supreme Court's denial of certiorari and pursuant to the Court's January 2013 scheduling

order, the Parties submitted multiple Motions and Cross-motions for Summary Judgment. (*See* Dkt. No. 136 (Envtl. Pls.' Mot. for Summ. J.); Dkt. No. 142 (Envtl. Intervenor–Pls.' Joint Mot. for Summ. J.); Dkt. No. 148 (State Pls.' Mot. for Summ. J.); Dkt. No. 158 (EPA's Cross–Mot. for Summ. J.); Dkt. No. 165 (SFWMD's Cross–Mot. for Summ. J.); Dkt. No. 167 (City of New York's Mot. for Summ. J.); Dkt. No. 170 (State Intervenor–Defs.' Mot. for Summ. J.); Dkt. No. 174 (Western Water Providers' Cross–Mot. for Summ. J.).) These Motions were fully submitted as of August 2013. (*See* Dkt.) Thus, after it received notice of the certiorari denial, the Court scheduled oral argument on the motions, (*see* Dkt. No. 216), which hearing it held on December 19, 2013, (*see* Dkt. No. 219 (Hr'g Tr.)). Having held oral argument, and after reviewing thoroughly the Parties' submissions and the Administrative Record, the Court is now ready to resolve the Motions.

II. Discussion

A. Legal Standard

1. Summary Judgment

Summary judgment shall be granted where it is shown "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (same). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the

non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dall. Aerospace, Inc. v. CIS Air Corp.,* 352 F.3d 775, 780 (2d Cir.2003).

Where a court reviews agency action under the APA, "[s]ummary judgment ... serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Bennett v. Donovan,* 4 F.Supp.3d 5, 8, 2013 WL 5424708, at *2 (D.D.C. Sept. 30, 2013); *see also Physicians Comm. for Responsible Med. v. Johnson,* 436 F.3d 326, 331 (2d Cir.2006) (resolving conflict over agency action and interpretation of a statute in the context of cross-motions for summary judgment); *Consumer Fed'n of Am. & Pub. Citizen v. U.S. Dep't of Health & Human Servs.,* 83 F.3d 1497, 1501 (D.C.Cir.1996) (same). Thus, "[w]here, as here, a party seeks review of agency action under the APA and the entire case on review is a question of law, summary judgment is generally appropriate." *Noroozi v. Napolitano,* 905 F.Supp.2d 535, 541 (S.D.N.Y.2012) (internal quotation marks omitted); *see also Just Bagels Mfg., Inc. v. Mayorkas,* 900 F.Supp.2d 363, 372 (S.D.N.Y.2012) ("When a party seeks review of agency action under the APA, ... judicial review of agency action is often accomplished by filing cross-motions for summary judgment." (internal quotation marks and alterations omitted)).

2. Review of Agency Rulemaking

"The fair measure of deference to an agency administering its own statute has been understood to

vary with circumstances," and this understanding "has produced a spectrum of judicial responses, from great respect at one end ... to near indifference at the other." *United States v. Mead Corp.,* 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (citations omitted). In certain circumstances, an agency's interpretation of a statute "is 'entitled to respect' only to the extent it has the 'power to persuade.' " *Gonzales v. Oregon,* 546 U.S. 243, 256, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). But, where, as here, "Congress has unambiguously vested [an agency] with general authority to administer [a statute] through rulemaking ... and the agency interpretation at issue was promulgated in the exercise of that authority," the Court analyzes the agency's interpretation under the two-step framework established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *City of Arlington v. F.C.C.,* —— U.S. ——, 133 S.Ct. 1863, 1874, —— L.Ed.2d —— (2013). At step one, the Court asks "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. "If the intent of Congress is clear, ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43, 104 S.Ct. 2778. However, where the statute "simply does not speak with the precision necessary to say definitively whether it applies" to the precise question, *United States v. Eurodif S.A.,* 555 U.S. 305, 319, 129 S.Ct. 878, 172 L.Ed.2d 679 (2009), the Court "must uphold the [agency's] judgment as long as it is a permissible construction of the statute, even if it differs from how the court would have interpreted the statute in the

absence of an agency regulation," *Sebelius v. Auburn Reg'l Med. Ctr.,* —— U.S. ——, 133 S.Ct. 817, 826, 184 L.Ed.2d 627 (2013). The agency's interpretation is thus "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead,* 533 U.S. at 227, 121 S.Ct. 2164.

B. Chevron Step One

To determine "whether Congress has directly spoken to the precise question at issue," *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778, it is first necessary to define the precise question. The Water Transfers Rule merely adds "[d]ischarges from a water transfer" to its list of NPDES "[e]xclusions." 40 C.F.R. § 122.3(i). Reading this text in isolation, the rule arguably addresses the precise question whether Congress intended to require NPDES permits for water transfers as defined by the rule—or, put differently, whether Congress intended to allow EPA to decide whether to exclude water transfers from NPDES regulation. But if this were the question, then EPA would lose at step one, because courts have consistently held that EPA does not have statutory authority to create NPDES exclusions. *See, e.g., Nw. Envtl. Advocates v. U.S. E.P.A.,* 537 F.3d 1006, 1021–22 (9th Cir.2008) (holding that "[§] 402 allows the [EPA] to issue a permit, but it does not provide that the [EPA] may entirely exempt certain categories of discharges from the permitting requirement"—a conclusion that "EPA [did] not seriously contest"); *N. Plains Res. Council v. Fid. Exploration & Dev. Co.,* 325 F.3d 1155, 1164 (9th Cir.2003) ("EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only Congress may amend the CWA to create exemptions

from regulation."); *Natural Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1377 (D.C.Cir.1977) ("The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of [§]402."); *see also Decker v. Nw. Envtl. Def. Ctr.,* ——U.S. ——, 133 S.Ct. 1326, 1331, 185 L.Ed.2d 447 (2013) (noting, without comment, the D.C. Circuit's holding in *Costle* "that the [CWA] did not give the EPA 'authority to exempt categories of point sources from the permit requirements' of the Act" (quoting *Costle,* 568 F.2d at 1377)).

Consequently, EPA claims to have answered the broader question whether Congress intended to prohibit water transfers generally under § 301(a), such that water transfers would be subject to regulation under NPDES, among other programs. (*See* EPA's Mem. of Law in Opp'n to Pls.' & Intervenor Pls.' Mots. for Summ. J. & in Supp. of the Federal Defs.' Cross–Mot. for Summ. J. ("EPA Mem.") (Dkt. No. 173) 24 ("[T]he statutory question at issue is whether the NPDES regime extends to water transfers in the first place."); *id.* at 36 n. 11 ("EPA in promulgating the Water Transfers Rule did not create a regulatory exemption, but rather exercised its inherent authority to interpret ambiguous provisions of a statute administered by the agency."); EPA's Reply Mem. of Law in Supp. of Its Cross–Mot. for Summ. J. ("EPA Reply") (Dkt. No. 206) 3 ("EPA at no point 'created,' nor indeed presumed to have the authority to create, any exemptions from the NPDES permitting scheme that were not already contained within the CWA. Rather, EPA interpreted the CWA applying traditional

principles of statutory construction, and concluded that the CWA itself, as reasonably interpreted, excludes certain water transfers from NPDES permitting requirements. The Water Transfers Rule, therefore, merely clarifies the relevant ambiguous statutory provisions in manner [sic] consistent with EPA's longstanding practice."); AR 1428 at 11 ("[T]he principal issue in [the Water Transfers Rule] is not whether EPA may exempt from NPDES permit obligations a class of entities responsible for the discharge of a pollutant, but the conditions under which one would properly have a discharge of a pollutant.").) Because § 301(a) provides that "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a), the question then becomes whether a water transfer, as defined by the rule, is a "discharge of a pollutant." That question, in turn, requires an analysis of § 502(12), which defines "discharge of a pollutant" to mean, in relevant part, "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

The focal point of the Court's *Chevron*-step-one analysis, therefore, is whether Congress clearly answered the precise question whether a transfer of water and any pollutants contained therein is an "addition" of those pollutants "to navigable waters." *See* 73 Fed.Reg. 33,700 ("The legal question addressed by [the Water Transfers Rule] is whether a water transfer as defined in the new regulation constitutes an 'addition' within the meaning of section 502(12)."). (*See* AR 5 at 2 & n. 3 ("The precise legal question addressed here is whether the movement of pollutants from one navigable water to another by a water transfer is the 'addition' of a pollutant potentially

subjecting the activity to the permitting requirement under section 402 of the Act.").) If Congress clearly intended not to consider water transfers to be "addition[s] ... to navigable waters" under § 502(12), then it would follow that EPA has authority to adopt a regulation "excluding" water transfers from programs that regulate such "additions," including the NPDES program. But if Congress clearly intended EPA to consider water transfers to be "addition[s] ... to navigable waters," then the Water Transfer Rule would violate the statute. And if it were unclear whether Congress intended either interpretation, then it would follow that EPA could use its general delegation of authority to "prescribe such regulations as are necessary to carry out [its] functions under" the CWA to choose an interpretation of § 502(12) that does not include water transfers, thereby allowing EPA to promulgate a regulation "exempting" them from the NPDES program. 33 U.S.C. § 1361(a) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his [or her] functions under [the CWA]."); *see also* 73 Fed.Reg. 33,698 ("This final rule is issued under the authority of sections 402 and 501 of the Clean Water Act[,] 33 U.S.C. [§§]1342[,] 1361.").[13] The focal point of the step-one analysis, therefore, is whether Congress directly spoke to the issue of whether a water transfer is an "addition ... to navigable waters" under § 502(12).[14]

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[13] In similar circumstances, EPA has previously invoked its authority to interpret general terms in § 502 to promulgate an NPDES "exception." *See* 71 Fed.Reg. 68,483, 68,488 (Nov. 27, 2006) (promulgating pesticide "exception" under 40 C.F.R. § 122.3 by interpreting "pollutant" in § 502(6) not to include pesticides).

[14] For this reason, the Court rejects Plaintiffs' arguments that the rule is invalid because EPA has no statutory authority to

"Because the judiciary functions as the final authority on issues of statutory construction, an agency is given no deference at all on the question whether a statute is ambiguous." *Wells Fargo Bank, N.A. v. F.D.I.C.,* 310 F.3d 202, 205–06 (D.C.Cir.2002) (internal quotation marks and alterations omitted). It is thus the Court's task to determine, at step one, whether Congress has answered the "precise question at issue." *See Vill. of Barrington, Ill. v. Surface Transp. Bd.,* 636 F.3d 650, 659–60 (D.C.Cir.2011) ("Because at *Chevron* step one we alone are tasked with determining the Congress's unambiguous intent, we answer [the step-one question] without showing the agency any special deference."). This determination requires a multipart analysis. First, the Court asks whether "[any] court's prior judicial construction of [the] statute" conflicts with EPA's interpretation. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). If such a conflicting interpretation "follow[ed] from the unambiguous terms of the statute," such that the court specifically held "that the statute unambiguously forecloses the agency's interpretation," then that court's interpretation "displaces [the] conflicting agency construction" and the analysis ends at step one. *Id.* at 982–83, 125 S.Ct. 2688. However, if the court merely identified the "*best* reading" of the statute, but not the "*only permissible* reading," *id.* at 984, 125 S.Ct.

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create NPDES exemptions. (*See* Dkt. No. 138 at 3, 7 (Envtl. Pls.' Mem. of Law); Dkt. No. 143 at 15 & n. 1 (Envtl. Intervenors' Mem. of Law); Dkt. No. 150 at 9, 36 (State Pls.' Mem. of Law); Dkt. No. 197 at 2 n. 1 (Envtl. Intervenors' Opp'n & Reply Mem.); Dkt. No. 201 at 7 (Envtl. Pls.' Opp'n & Reply Mem.).)

2688, then this Court must employ "traditional tools of statutory construction [to] ascertain[ ] [whether] Congress had an intention on the precise question at issue," *Chevron,* 467 U.S. at 843 n. 9, 104 S.Ct. 2778. In conducting this analysis, the Court should "begin with the statutory text" of §§ 301(a) and 502(12). *Cohen v. JP Morgan Chase & Co.,* 498 F.3d 111, 116 (2d Cir.2007). Then, "[i]f the statutory language is ambiguous ... [the Court] [would] resort first to canons of statutory construction, and, if the [statutory] meaning remains ambiguous, to legislative history, to see if these interpretive clues permit [the Court] to identify Congress's clear intent." *Id.* (citations and internal quotation marks omitted) (fifth alteration in original). If, after this analysis, the Court determines that Congress has not spoken to the precise question at issue, it proceeds to step two.

1. Prior Judicial Constructions

Initially, Plaintiffs argue that the Second Circuit's interpretations of the CWA in *Catskills I* & *II* foreclose EPA's interpretation at step one. (*See* Dkt. No. 1 (08–CV–8430 Dkt.) ¶¶ 26, 47 (State Pls.' Compl.); Dkt. No. 3 ¶ 33 (Envtl. Pls.' First Am. Compl.); Dkt. No. 121 ¶ 27 (Envtl. Intervenors' Compl.); Trout Pls.' Mem. of Law in Supp. of Mot. for Summ. J. ("Envtl. Pls.' Mem.") (Dkt. No. 138) 12–15; Trout Pls.' Reply Mem. of Law in Supp. of Their Mot. for Summ. J. & in Opp'n to Defs.' Cross–Mots. for Summ. J. ("Envtl. Pls.' Opp'n & Reply Mem.") (Dkt. No. 201) 8.) In *Catskills I,* the Second Circuit based its holding that § 301(a) prohibits discharges of pollutants during water transfers on "what [it] f[ou]nd to be the plain meaning of [the statute's] text." 273 F.3d at 494. It also implied that

the text was unambiguous in this context. *See id.* at 493 ("*Even if we were to conclude* that the proper application of the statutory text to the present facts was *sufficiently ambiguous* to justify reliance on the legislative history of the statute, that source of legislative intent would not help [the defendant]." (emphasis added) (citation omitted)). Based on this language, it is possible to construe *Catskills I* as holding that the statute unambiguously forecloses EPA's interpretation.

But, in that case, the Second Circuit also explicitly held that EPA's interpretation was not entitled to *Chevron* deference—not because the statute was unambiguous, but because EPA had not yet sufficiently formalized its interpretation. *See id.* at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference ... might be appropriate."). And, in *Catskills II,* the court again applied a lower level of deference, *see* 451 F.3d at 82 ("The City concedes that this EPA interpretation is not entitled to *Chevron* deference.... We thus defer to the agency interpretation according to its power to persuade." (internal quotation marks omitted)), while reaffirming its holding in *Catskills I* rejecting EPA's interpretation in light of the "plain language" of the statute, *see id.* at 84–85. Given that the Second Circuit did not clearly hold in either case that the statute unambiguously forecloses EPA's interpretation, and given that the court explicitly left open the door to *Chevron* analysis, this Court rejects Plaintiffs' argument that the Water Transfers Rule fails at *Chevron* step one in the context of these prior judicial constructions. *See Brand X,* 545 U.S. at 985, 125 S.Ct. 2688 ("Before a judicial construction of a

statute ... may trump an agency's, the court *must hold* that the statute *unambiguously requires* the court's construction." (emphasis added)). The Court therefore proceeds to its own analysis of the statute.

2. Statutory Text

"As with any question of statutory interpretation, [the Court] begin[s] with the text of the statute...." *Louis Vuitton Malletier S.A. v. LY USA, Inc.,* 676 F.3d 83, 108 (2d Cir.2012); *see also Robinson v. Shell Oil Co.,* 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning...."). As discussed, the statutory text at issue is § 502(12)'s definition of "discharge of a pollutant" to mean an "addition ... to navigable waters." 33 U.S.C. § 1362(12). The phrase itself suggests a two-part analysis.

Initially, EPA identifies ambiguity in the term "addition," which it noted, in the preamble to the rule, is "undefined by the statute." 73 Fed.Reg. at 33,701. (*See* EPA Mem. 20 ("[A]mbiguity is introduced ... because the term 'addition' is not defined under the Act.").) But here, none of the Parties really disputes the meaning of "addition," which they variously define to mean, essentially, a "joining" or "uniting." (*See* Envtl. Pls.' Mem. 9 (defining "add" to mean " 'to join or unite so as to increase in size, quantity, quality, or scope[.]' " (alteration in original) (quoting Am. Heritage Dictionary 19 (4th ed.2000))); Intervenor–Pls. Miccosukee Tribe of Indians of Florida; Friends of the Everglades; Florida Wildlife Federation, & Sierra Clubs' Joint Mem. of Law in Supp. of Mot. for Summ.

J. ("Envtl. Intervenor's Mem.") (Dkt. No. 143) 7 (defining "addition" to mean "the 'joining of one thing to another' " (quoting Webster's Third Int'l Dictionary Unabridged 24 (1993))); Intervenor South Florida Management District's Mem. of Law in Resp. to All Pls.' Mots. for Summ. J. & in Supp. of Intervenor, South Florida Water Management District's Cross–Mot. for Summ. J. ("SFWMD Mem.") (Dkt. No. 164) 17–18 (defining "addition" to mean " 'the joining or uniting of one thing to another' " (quoting Webster's Third New Int'l Dictionary 24 (2002))); EPA Mem. 21 ("An '[a]ddition' is the 'result of adding; anything added,' and to 'add' is to 'join, annex, or unite ... so as to bring about an increase (as in number [or] size).' " (alterations in original) (quoting Webster's Third New Int'l Dictionary 24 (1993))).) Moreover, these definitions are consistent with the Supreme Court's recent interpretation of "addition" as it is used in § 502(12). *See L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, —— U.S. ——, 133 S.Ct. 710, 713, 184 L.Ed.2d 547 (2013) (defining "add" to mean " 'to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate' " (quoting Webster's Third New Int'l Dictionary 24 (2002))).

In this context, EPA unsurprisingly conceded at oral argument that, to the extent that the phrase "addition ... to navigable waters" creates a statutory ambiguity, "a lot of the work is done on the [']navigable waters['] side of the phrase." (Hr'g Tr. 40.) As EPA put it, in the context of water transfers, the "ordinary definition of the term 'addition' leaves open whether, under [§] 502(12) ..., pollutants are only 'joined' or 'united' with ['navigable waters']—and therefore are only added—

when they first enter those waters as a whole, or whether pollutants are 'added' to ['navigable waters'] every time they move to new [sic] body of 'navigable water'...." (EPA Mem. 21 (citations omitted).) The Water Transfers Rule would be permissible under the former interpretation, but not under the latter. *See Catskills I,* 273 F.3d at 494. The question at this part of the step-one analysis, therefore, is whether EPA is correct that the text is ambiguous enough to support both interpretations.

At one extreme, Plaintiffs contend that the statute unambiguously means that an "addition of ... pollutants" occurs when polluted water is transferred from one distinct body of water to another distinct body of water. (*See* Mem. of Law in Supp. of State Pls.' Mot. for Summ. J. ("State Pls.' Mem.") (Dkt. No. 150) 34 ("[W]hen pollutants are transferred from one waterbody into a distinctly different waterbody from a point source such as a pipe or pump, they are 'added' to the receiving waterbody because the transfer 'joins' pollutants from the donor waterbody with the receiving waters, bringing about 'an increase' in the amount of pollutants found in the receiving waters."); Envtl. Pls.' Mem. 10–12; Envtl. Intervenor's Mem. 5–7; State Pls.' Mem. of Law in Reply to Defs.' Opp'n to Their Mot. for Summ. J. & in Opp'n to Defs.' Cross–Mots. for Summ. J. ("State Pls.' Opp'n & Reply Mem.") (Dkt. No. 199) 4–8; Envtl. Pls.' Opp'n & Reply Mem. 4–10.) They claim support for their argument in both Second Circuit and Supreme Court cases that purportedly agree with their interpretation. *See, e.g., L.A. Cnty. Flood Control Dist.,* 133 S.Ct. at 713 ("In [*SFWMD*], ... [w]e held that [the relevant] water transfer would count as a discharge of pollutants

under the CWA only if the canal and the reservoir were 'meaningfully distinct water bodies.' " (quoting *SFWMD,* 541 U.S. at 112, 124 S.Ct. 1537)); *SFWMD,* 541 U.S. at 107–08, 124 S.Ct. 1537 ("[Section 303] suggests that the Act protects individual water bodies as well as the 'waters of the United States' as a whole.... The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times."); *Catskills II,* 451 F.3d at 84 (reaffirming *Catskills I* and rejecting EPA's interpretation because it "simply overlook[s] [the statute's] plain language"); *Catskills I,* 273 F.3d at 491 ("[T]he transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."). In particular, in *Catskills I,* the Second Circuit employed an analogy to explain the difference between discharges within a single body of water, and discharges between two distinct bodies of water: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." 273 F.3d at 492; *see also SFWMD,* 541 U.S. at 109–10, 124 S.Ct. 1537 (quoting the Second Circuit's soup analogy and characterizing the issue as a dispute over whether the waters in question were "two pots of soup, not one"). The implication of the analogy is that ladling one type of soup—say, mulligatawny—into a pot containing another type of soup—say, wild mushroom—adds "pollutants" to the recipient pot of soup, spoiling the soup and leaving *no soup for you.*[15]

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[15] *See Seinfeld: The Soup Nazi* (NBC television broadcast Nov. 2, 1995). (*See also* Hr'g Tr. 10.)

See also Catskills II, 451 F.3d at 81 ("In *Catskills I,* we analogized the dams cases to a soup ladle scooping soup out of a pot and returning it to that pot, a type of water transfer known as an intrabasin transfer. The Tunnel's discharge, in contrast, was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer."). If it adopted the interpretation of the statute represented in this analogy and supported by these cases, the Court would invalidate the Water Transfers Rule under the theory that the statute unambiguously prohibits water transfers between distinct bodies of water.

At the other interpretive extreme, Intervenor–Defendant SFWMD argues that the statute unambiguously *requires* the Court to adopt an interpretation of § 502(12) that does not treat water transfers as "addition[s] ... to navigable waters." (*See* SFWMD Mem. 15 ("[T]he plain meaning of the Act ... reflects an unequivocal intent to leave water transfers to non-NPDES authorities."); Mem. in Resp. to the EPA's Cross Mots. for Summ. J. ("SFWMD Reply Mem.") (Dkt. No. 196) 7 ("EPA's rule should be upheld not as an ambiguous option and, therefore, out of deference to the agency, but as the proper *de novo* construction of the Act.").)[16] It argues that the statute

[16] In fact, even though SFWMD, like EPA, argues in favor of upholding the Water Transfers Rule, it presents its argument as an attack on EPA's argument. (*See, e.g.,* SFWMD Reply Mem. 2–3 (arguing that "EPA ... misapplies[ ] two important interpretive principles," that "EPA manipulates its result by selectively discussing isolated terms," and that "EPA misreads the natural and ordinary meaning of the relevant text").)

defines "navigable waters" to mean "the waters of the United States," *see* 33 U.S.C. § 1362(7), and that in substituting the latter phrase for the former, the statute applies only to the first "joining" of a pollutant to any part of "the" waters as a whole. (*See* SFWMD Mem. 18–20.) In support of its argument, it offers an analogy explaining the difference between "adding" (or "importing") something to an entity and "moving" something between subparts of an entity:

> Consider the phrase "addition of wine to the United States." A court would find absurd any argument that the distribution of wine from California to Florida would be considered an "addition" to the "United States." To constitute an "addition ... to the United States," the wine must enter from outside the United States. This straightforward principle is unaffected by the reality that the United States is not monolithic, but rather comprises fifty meaningfully distinct states.
>
> (*Id.* at 18 (alteration in original).)

Finally, in between the extremes, EPA argues that the statutory language is reasonably susceptible of either interpretation. (*See* EPA Mem. 16 ("The term 'navigable waters' is ambiguous and can be construed in at least two reasonable ways."); EPA Reply 13 (arguing that "navigable waters" in § 502(12) "can refer either to 'individual water bodies' or to 'a collective whole' ").) It finds support in the Eleventh Circuit's opinion in *Friends I,* which held that "[t]here are two reasonable ways to read the § [502(12)] language.... One is that it means 'any addition ... to [any] navigable waters;' the other is that it means 'any addition ... to navigable waters [as a whole].' " *Friends I,* 570 F.3d at 1227 (third and fourth alterations in original). In so holding, the Eleventh Circuit

contributed to the collection of analogies attempting to add analytical clarity to the issue:

> Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none.... A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? On the one hand, ... there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, ... there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred.

Id. at 1228 (second alteration in original).

Ultimately, the Court agrees with EPA that the statutory text alone is ambiguous and is arguably susceptible of either interpretation. Specifically, it is persuaded by the Eleventh Circuit's analysis, which concluded that "[t]he statutory context indicates that sometimes the term 'navigable waters' was used in one sense[, i.e. to refer to 'the waters collectively,'] and sometimes in the other sense[, i.e. to refer to 'many individual water bodies']." *Id.* at 1224–25. Moreover, the use of "warring analogies"—such as soups, states, and buckets—to explain the statute's meaning is another good indication that the statutory text is sufficiently ambiguous. *See Brand X,* 545 U.S. at 991–92, 125 S.Ct. 2688 ("Because the term 'offer' can sometimes refer to a single, finished product and sometimes to the 'individual components in a package being offered' ..., the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves

federal telecommunications policy in this technical and complex area to be set by the [FCC], not by warring analogies."). The Court thus proceeds to a holistic analysis of the statute's "structure, purpose, and history to determine whether these construction devices can convincingly resolve the ambiguity." *Cohen,* 498 F.3d at 120 (internal quotation marks omitted).

3. Holistic Analysis

In *Catskills I,* the Second Circuit recognized that the CWA "is among the most complex" statutes because it "balances a welter of consistent and inconsistent goals." 273 F.3d at 494. EPA agrees, as it explained in its Memorandum of Law:

> In the CWA, Congress balanced the goals to maintain and restore the quality of the nation's waters with the need "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution" and "to plan the development and use ... of land and water resources," as well as its "policy" that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the CWA.

(EPA Mem. 22–23 (alteration in original) (quoting 33 U.S.C. §§ 1251(a), 1251(b), 1251(g)); *see also* EPA Reply 14 (noting the "competing goals" within the CWA).) As EPA also explains, when Congress created the CWA's federal regulatory scheme, it "was keenly aware of the importance of balancing a federal water pollution control regime with the preservation of the states' primacy in water quality protection and land

and water resource management." (EPA Mem. 23–24.) Indeed, throughout the process of promulgating the Water Transfers Rule—from the Klee Memorandum, to the proposed rule, to the responses to comments in the administrative record, to the final rule itself—EPA has acknowledged this "delicate balance." (*See* AR 5 at 2 ("Th[is] question touches on the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States and water resource management agencies."); AR 1428 at 12 ("[T]he heart of this matter is the balance Congress created between Federal and State oversight of activities affecting the nation's waters. Among the purposes of the CWA is protection of water quality. Congress nevertheless recognized that programs already existed at the State and local levels for managing water quantity; and it recognized the delicate relationship between the CWA and State and local programs."); *see also* Hr'g Tr. 59–60 ("THE COURT: [H]ow would you describe ... the purpose of the [CWA] ...? [EPA]: ... I would say the [CWA] has a welter of consistent and inconsistent goals. And I would say without a doubt, the objective of the [CWA] is to restore and maintain the physical, biological and chemical integrity of the nation's waters, but at the same time, the [CWA] recognizes the states' primary responsibility on matters of water [allocation] and water use[,] creating a tension in the purposes as applied to this particular issue of water transfers.").) *See* 71 Fed.Reg. at 32,889 ("[T]he heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that

programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and State and local programs."); 73 Fed.Reg. at 33,701 (same).

On one side of this balance, many CWA provisions support an interpretation of § 502(12) that is consistent with Congress's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see also Riverside Bayview Homes,* 474 U.S. at 132, 106 S.Ct. 455 (noting that the objective expressed in § 101(a) "incorporated a broad, systemic view of the goal of maintaining and improving water quality"). First, to the extent that water transfers might produce harmful environmental consequences, *see Catskills I,* 273 F.3d at 494 ("Artificially transferring water and pollutants between watersheds ... might well interfere with [water] integrity."), classifying them as discharges of pollutants under § 502(12) and thereby regulating them generally under § 301(a) and specifically under the NPDES program would be entirely consistent with that goal. Indeed, Congress established the NPDES program specifically "to prevent harmful discharges into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 650, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007).

Second, in at least one part of the statute, Congress did express an intent to use the NPDES permit program to protect marine life against the potential negative effects of pollution transfers. Specifically, in § 403 of the Act—which regulates NPDES permits specifically for discharges into the subset of navigable waters that includes "the territorial sea, the waters of

the contiguous zone, [and] the oceans," 33 U.S.C. § 1343(a)—Congress indicated its concern for "the effect of disposal of pollutants on marine life" in these waters, "including the *transfer,* concentration, and dispersal of *pollutants* or their byproducts through biological, *physical,* and chemical processes," *id.* § 1343(c)(1)(B) (emphases added).

Finally, in § 302 of the Act—which addresses EPA's authority to impose "[w]ater quality related effluent limitations" to "discharges of pollutants from a point source or group of point sources"—Congress provided that, in certain circumstances, EPA "shall" establish "effluent limitations ... which can reasonably be expected to contribute to the attainment or maintenance of such water quality." *Id.* § 1312(a). This duty is triggered

> [w]henever, in the judgment of the [EPA], ... *discharges of pollutants* from a point source or group of point sources, with the application of effluent limitations required under [§ 301(b)(2)], would interfere with the attainment or maintenance of that water quality in a *specific portion of the navigable waters* which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water.

Id. (emphases added). Because an interpretation of

"discharge of a pollutant" as used in § 301(a) and as defined in § 502(12) would also apply to an interpretation of "discharges of pollutants" in § 302(a), the latter provision offers persuasive evidence that Congress intended, at least in certain circumstances, to regulate "discharges of pollutants" into "specific portion[s] of the navigable waters." *Id.*

On the other side of the balance, interpreting § 502(12) such that water transfers are prohibited under § 301(a) might be inconsistent with multiple statutory provisions that arguably prioritize states' rights to manage water resources at the expense of federal regulatory authority. First, in § 101(b), Congress communicated its desire "to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the [EPA] in the exercise of [its] authority under [the CWA]." 33 U.S.C. § 1251(b). Second, in § 101(g), Congress expressed its intent "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA]," and that "nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." *Id.* § 1251(g). Third, § 510(2) provides that "nothing in [the CWA] shall ... be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States." *Id.* § 1370. Finally, in a House Report explaining § 208 of the Act, the House Public Works Committee recognized that,

> in some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation, should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system.

H.R.Rep. No. 92–911, at 96–97 (1972). Taken together, these provisions indicate what EPA describes as "Congress's general direction against unnecessary federal interference with state water allocation rights." (EPA Mem. at 25.)

Many of these general expressions of congressional recognition of the states' role in water-allocation management are limited, however, by specific language qualifying that intent, and by specific provisions within the NPDES program indicating the precise balance that Congress intended to strike. First, the Supreme Court has conclusively rejected the argument that "§§ 101(g) and 510(2) exclude the regulation of water quantity from the coverage of the Act" when it held that, even though those sections "preserve the authority of each State to allocate water quantity as between users," "they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a

water allocation." *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology,* 511 U.S. 700, 720, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) (citations omitted). EPA does not address this holding in any of its Memoranda of Law, but it did address it in the preamble to the Water Transfers Rule, where it conceded that § 101(g) "does not prohibit EPA from taking actions under the CWA that it determines are needed to protect water quality." 73 Fed.Reg. 33,702.

Second, § 510(2)'s supposed limitation on "impairing or in any manner affecting" state water rights applies "[e]xcept as expressly provided in [the Act]." *See* 33 U.S.C. § 1370(2). Because this language does not address what other provisions of the Act "expressly provide[ ]," this provision has little bearing on an interpretation of those other provisions—i.e., §§ 301(a) and 502(12).

Third, some of the provisions prioritizing states' rights actually appear to support an interpretation allowing for meaningful federal regulation of water transfers. For example, § 101(b)'s statement of a policy "to recognize, preserve, and protect the *primary* responsibilities and rights of States ... to plan the development and use ... of land and water resources" implicitly recognizes a *secondary* role for the federal government, which role could include regulation of water transfers. *Id.* § 1251(b) (emphasis added). Moreover, the aforementioned House Report discussing § 208 actually makes explicit this understanding of the federal government's "secondary" role, suggesting that, "[t]o avoid *duplication,* ... a State which has an approved program ... under [§]402, and which has a program for water

resource allocation, should continue to exercise the *primary* responsibility in both of these areas and thus provide a *balanced* management control system." H.R.Rep. No. 92–911, at 96 (1972) (emphasis added). In fact, even in the reading most favorable to the states' authority, this language implies that states should have control over water-resource allocation *only* where they have an EPA approved § 402 program and a water-resource-allocation program. *See id.* (recognizing "primary responsibility" for states which have "an approved program ... under [§]402" and "a program for water resource allocation"); *cf. Cent. Hudson Gas & Elec. Corp. v. U.S. E.P.A.,* 587 F.2d 549, 552 (2d Cir.1978) ("In recognition of 'the primary responsibilities and rights of States,' the [CWA] allows the States to assume control of the administration of the NPDES permit program, provided their own programs meet minimum federal standards." (citation omitted) (quoting 33 U.S.C. § 1251(b))). Where a state has neither, this language implies that the federal government should exercise primary responsibility. *See* H.R.Rep. No. 92–911, at 96 (1972) (recognizing Congress's intent to "avoid duplication" but also recognizing the baseline need for a "management control system"); *cf. Mianus River Pres. Comm. v. Adm'r, E.P.A.,* 541 F.2d 899, 905 (2d Cir.1976) ("Such a system for the mandatory approval of a conforming State program and the consequent suspension of the federal program creates a *separate and independent* State authority to administer the NPDES pollution controls, in keeping with the stated Congressional purpose 'to recognize, preserve, and protect the primary responsibilities and rights of the States....' " (emphasis added) (quoting 33 U.S.C. § 1251(b))).[17]

[17] Although not material to resolution of these Motions, the Court

Fourth, these provisions and their general indications of congressional intent must be interpreted in the context of the specific, carefully designed balance between federal and state authority Congress created within the NPDES program—a balance that is entirely consistent with a "secondary" federal role. As discussed, § 402(b) provides that states may establish their own permit programs that, once established, supplant the federal NPDES program. *See* 33 U.S.C. § 1342(b) ("[T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law.... The Administrator shall approve each submitted program unless he determines that [the program does not meet certain requirements]."); *id.* § 1342(c)(1) ("[A]fter ... a State has submitted a program ... pursuant to subsection (b) ..., the Administrator shall suspend issuance of permits under subsection (a) ... as to those discharges subject to such program...."); *see also Wis. Res. Prot. Council v. Flambeau Mining Co.,* 727 F.3d 700, 703 (7th Cir.2013) ("Once the EPA has approved a state's

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notes that four states—Idaho, Massachusetts, New Hampshire, and New Mexico—and a number of other jurisdictions—including the District of Columbia and Puerto Rico—currently do not have an approved State NPDES program. *See U.S. E.P.A., NPDES State Program Status,* http://cfpub.epa. gov/npdes/statestats.cfm (last visited Mar. 25, 2014); *see also Akiak Native Cmty. v. U.S. E.P.A.,* 625 F.3d 1162, 1164 (9th Cir.2010) ("As of this time, 46 states ... have been authorized to administer the NPDES program.").

program, the EPA no longer has authority to issue NPDES permits under the CWA; at that point the state permitting authority is the only entity authorized to issue NPDES permits within the state's jurisdiction." (internal citation omitted)). But state programs still must comply with federal requirements ensuring that the permits are consistent with the CWA. *See* 33 U.S.C. § 1342(b) (permit-program guidelines); *id.* § 1342(c)(2) ("Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to [§]1314(i)(2)...."); *see also Natural Res. Def. Council, Inc. v. U.S. E.P.A.,* 859 F.2d 156, 173 (D.C.Cir.1988) ("[T]he CWA provides for state assumption of the NPDES permit program. It specifies some prerequisites to states' assuming permitting responsibilities, authorizes the Administrator to supplement them, and requires him to approve a state's application once satisfied that these standards have been met." (internal citations omitted)). If a proposed state program does not meet the requirements, or if an existing state program at any point fails to meet the requirements, the EPA Administrator must refuse to approve or must withdraw approval of the program if the state does not take sufficient corrective action. *See* 33 U.S.C. § 1342(c)(1) ("[A]fter ... a State has submitted a program ..., the Administrator shall suspend issuance of permits ... unless he determines that the State permit program does not meet the requirements of subsection (b) ... or does not conform to the guidelines issued under [§] 1314(i)(2)...."); *id.* § 1342(c)(3) ("Whenever the Administrator determines ... that a State is not administering a program approved under this section in accordance with requirements of this section, he

shall so notify the State and, if appropriate corrective action is not taken ... the Administrator shall withdraw approval of such program."); *see also Nat'l Ass'n of Home Builders,* 551 U.S. at 688–89, 127 S.Ct. 2518 ("After EPA has transferred NPDES permitting authority to a State, the Agency continues to oversee the State's permitting program."); *Wis. Res. Prot. Council,* 727 F.3d at 703 ("EPA retains supervisory authority over the state program and is charged with 'notify[ing] the State of any revisions or modifications [to the State's program] necessary to conform to [CWA] requirements or guidelines.' " (alterations in original) (quoting 33 U.S.C. § 1342(c)(1))). Moreover, under § 402(d), the EPA Administrator has authority to object to any permit issued under an approved state program. *See* 33 U.S.C. § 1342(d); *Nat'l Ass'n of Home Builders,* 551 U.S. at 689, 127 S.Ct. 2518 ("If a state permit is 'outside the guidelines and the requirements' of the CWA, EPA may object to it and block its issuance." (quoting 33 U.S.C. § 1342(d)(2))); *Iowa League of Cities v. E.P.A.,* 711 F.3d 844, 857 (8th Cir.2013) ("States are ... required to forward a copy of each permit application they receive to the EPA, which is afforded an opportunity to block the issuance of the permit.").

Finally, although one might read §§ 101(b) and 101(g) to reflect Congress's strong intent to elevate states' rights to manage their own water resources over other priorities, Congress also both effected and constrained this intent through provisions protecting states against the negative effects of unwanted interstate water pollution. It is true that Congress intended that states address interstate-pollution issues through "cooperative activities by the States for the prevention,

reduction, and elimination of pollution," including "uniform State laws" and "compacts between States for the prevention and control of pollution." 33 U.S.C. § 1253(a). However, perhaps recognizing that such cooperation would not solve every issue, it also passed specific provisions establishing a federal conflict-resolution role, "the primary purpose" of which "was to provide uniformity among the federal and state jurisdictions enforcing the NPDES program and prevent the 'Tragedy of the Commons' that might result if jurisdictions [could] compete for industry and development by providing more liberal limitations than their neighboring states." *Costle,* 568 F.2d at 1378. Under the previously discussed NPDES-program provisions, in particular, "Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress," such that "the EPA itself [could] issue permits if a stalemate between an issuing and objecting State develop[ed]." *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 326, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981); *see also id.* ("The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process."). Moreover, this understanding of the NPDES program and the CWA in general is consistent with § 510(1), which provides that nothing in the CWA "shall ... preclude or deny the right of any State ... to adopt or enforce ... any standard or limitation respecting discharges of pollutants, or ... any requirement respecting control or abatement of pollution," but that any such standard, limitation, or requirement cannot be "less stringent" than any standard, limitation, or prohibition established by the CWA. 33 U.S.C. § 1370(1). In other

words, the CWA respects states' rights by sometimes removing a federal regulatory ceiling, but it also protects states' rights by maintaining a federally enforced floor.

In addition to provisions related to the statute's conflicting purposes, other statutory provisions also address but ultimately do not resolve the textual ambiguity. On the one hand, certain provisions support the argument that Congress did not intend to regulate water transfers because it conceptualized pollution associated with water transfers the same way it conceptualized pollution associated with "nonpoint sources," which the CWA does not regulate under § 301(a). *See* 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" as an "addition ... from [a] point source"). First, in § 304(f) of the Act—a section which EPA argues "is focused primarily on addressing pollution sources outside the scope of the NPDES program," (EPA Mem. At 26)—Congress provided that

> [t]he Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, [and other entities] ... information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint source of pollutants, and (2) processes, procedures, and methods to control pollution resulting from ... (F) changes in the movement, flow, or circulation of any navigable waters or ground

> waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

33 U.S.C. § 1314(f)(2). EPA interprets this provision—which references "changes in the movement, flow, or circulation of any navigable waters"—"to reflect an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program." (EPA Mem. 27). But EPA concedes that § 304(f) "does not address nonpoint sources of pollution exclusively," and thus it also concedes that this section "does not resolve the ambiguity of the specific terms under [§§]301 and 501 [sic] at issue here." (*Id.* at 26–27)

Second, EPA argues that "NPDES permits are not generally required for other activities" that might implicate water-pollution control, including "hydroelectric dams," "movements of water through reservoir systems," and "nonpoint sources such as runoff." (*Id.* at 25.) According to EPA, the CWA instead "encourages the states to develop local programs, which may include techniques such as land-use requirements, to control various sources of pollution." (*Id.*) In addition to § 304(f), the provisions relating to these programs include § 102(b), 33 U.S.C. § 1252(b) (state programs using reservoir planning to provide for streamflow-regulation-related storage); § 208(b)(2)(F), *id.* § 1288(b)(2)(F) (state programs using land-use planning to address certain nonpoint pollution sources); § 309, *id.* § 1329 (state programs addressing

nonpoint source pollution); and § 401, *id.* § 1341 (state-certification requirement for federally issued licenses and permits). These provisions thus represent parts of the "complex framework of federal-state cooperation which includes, but is certainly not limited to, the NPDES permitting program." (EPA Mem. 25.)

On the other hand, although Congress has previously passed specific exemptions to the NPDES program, it has never passed an exemption addressing water transfers. Thus, in § 402(*l*), entitled "[l]imitation on [NPDES] permit requirement," Congress provided that EPA "shall not require a permit," nor shall it "directly or indirectly[ ] require any State to require such a permit," for "discharges composed entirely of return flows from irrigated agriculture," and for "discharges of stormwater runoff" from certain sources. 33 U.S.C. §§ 1342(*l*)(1)-(2). Moreover, in § 404, Congress created a separate permit program that applies specifically to "discharge[s] of dredged or fill material into the navigable waters at specified disposal sites," *id.* § 1344(a), even though those materials also fall under the general definition of "pollutant" and thus would otherwise be subject to the NPDES permit program, *see id.* § 1362(6) (defining "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, ... rock, sand, cellar dirt and industrial, municipal, and agricultural waste"). Three regulatory NPDES-program "exclusions" are based on these statutory exemptions. *See* 40 C.F.R. §§ 122.3(f) (excluding "[r]eturn flows from irrigated agriculture"), 122.3(e) (excluding "[a]ny introduction of pollutants from ... storm water runoff"), 122.3(b) (excluding "[d]ischarges of dredged or fill material ... which are regulated under

[§]404"). To some extent, one could therefore infer from Congress's failure to include an express statutory exemption for water transfers that Congress did not intend to exempt them. *See Hillman v. Maretta,* —— U.S. ——, 133 S.Ct. 1943, 1953, 186 L.Ed.2d 43 (2013) ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (internal quotation marks omitted)); *United States v. Pettus,* 303 F.3d 480, 485 (2d Cir.2002) (same); *cf. Mich. Citizens for an Indep. Press v. Thornburgh,* 868 F.2d 1285, 1293 (D.C.Cir.1989) ("For example, if Congress banned the importation of apples, oranges, and bananas from a particular country, the canon of *expressio unius est exclusio alterius* might well indicate that Congress *did not* intend to ban the importation of grapefruits. In that event, an agency decision to ban grapefruits would be contrary to Congress' specific intent.").

In the face of ambiguity at *Chevron* step one, the Court's task is not to resolve it, but rather to determine whether Congress unambiguously resolved it. Here, the Court has already found that the statutory text, by itself, does not resolve the issue. Now, it further finds that a holistic analysis of the statute does not help clarify the statutory text. It therefore agrees with EPA that "the overall statutory context and legislative history do not resolve, but rather reinforce, the[ ] textual ambiguities," (EPA Reply 14), and thus it also agrees with EPA and the Eleventh Circuit that "the 'broader context of the statute as a whole' [leaves] ambiguous whether the NPDES program was intended to apply to water transfers," (EPA Mem. 27

(quoting *Friends I,* 570 F.3d at 1225).) Accordingly, because "[t]he only certainty that [the Court] can discern from the statutory scheme is that it is unclear," it proceeds to *Chevron* step two. *Adirondack Med. Ctr. v. Sebelius,* 740 F.3d 692, 700 (D.C.Cir.2014).[18]

C. Chevron Step Two

Because Congress did not answer the precise question whether a water transfer constitutes an "addition" of pollutants "to navigable waters," the Court considers the CWA to contain a "delegation[ ] of authority to the agency to fill the statutory gap in reasonable fashion." *Brand X,* 545 U.S. at 980, 125 S.Ct. 2688; *see also Mead,* 533 U.S. at 229, 121 S.Ct. 2164 (recognizing that *Chevron* deference applies where "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result" (internal quotation marks omitted)); *Chevron,* 467 U.S. at 843–44, 104 S.Ct. 2778 ("If

[18] The Court notes that Intervenor–Defendants offer other arguments in favor of interpreting the CWA not to prohibit water transfers, including one based on the Rule of Lenity, one based on the Tenth Amendment's "clear statement rule," and one based on the doctrine of constitutional avoidance. (*See* SFWMD Mem. 22–25; Western States' Mem. of Law in Supp. of Cross–Mot. for Summ. J. & Resp. to Pls.' Mots. for Summ. J. (Dkt. No. 171) 5, 9; Western Water Providers' Mem. of Law in Supp. of Cross–Mot. for Summ. J. & Resp. to Pls.' Mots. for Summ. J. (Dkt. No. 188) 15; Western States' Mem. of Law in Reply to Pls.' Opp'n to Their Cross Mot. for Summ. J. (Dkt. No. 204) 4–5.) Even if these arguments helped to reduce the statutory ambiguity, however, none of them indicates that Congress unambiguously answered the precise question at issue. The Court therefore need not resolve these arguments before proceeding to step two.

Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). Here, EPA has been "called upon to balance two legislative policies in tension"—which is "precisely the paradigm situation *Chevron* addressed," *Mich. Citizens for an Indep. Press,* 868 F.2d at 1293; *see also City of Arlington,* 133 S.Ct. at 1873 (describing "archetypal *Chevron* questions" as those "about how best to construe an ambiguous term in light of competing policy interests"). In such a situation, where "[f]illing the [ ] gap[ ] ... involves difficult policy choices," deference is appropriate because "agencies are better equipped to make [these choices] than courts." *Brand X,* 545 U.S. at 980, 125 S.Ct. 2688. *Chevron* 's high level of deference is generally thus "justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (internal quotation marks, citations, and alterations omitted); *see also Brand X,* 545 U.S. at 1003, 125 S.Ct. 2688 (upholding agency action where agency "use[d] ... its expert policy judgment to resolve ... difficult questions"); *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778 (deferring to agency interpretations "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters

subjected to agency regulations"); *cf. United States v. Shimer,* 367 U.S. 374, 383, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961) ("If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

"But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder,* —— U.S. ——, 132 S.Ct. 476, 483–84, 181 L.Ed.2d 449 (2011); *see also Brand X,* 545 U.S. at 980, 125 S.Ct. 2688 (noting that agencies must resolve statutory ambiguities in a "reasonable fashion"). Therefore, to help courts ensure that an interpretation is permissible, an agency must "provide a reasoned explanation for its action." *Judulang,* 132 S.Ct. at 479; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (noting that "it is the agency's responsibility, not [a court's], to explain its decision," and rejecting an agency interpretation where "the agency ha[d] failed to supply the requisite 'reasoned analysis' "); *Vill. of Barrington,* 636 F.3d at 660 ("At *Chevron* step two we defer to the agency's permissible interpretation, but only if the agency has offered a reasoned explanation for why it chose that interpretation."); *Cablevision Sys. Corp. v. F.C.C.,* 570 F.3d 83, 92 (2d Cir.2009) ("An administrative agency has a duty to explain its ultimate action."); *Ne. Md. Waste Disposal Auth. v. E.P.A.,* 358 F.3d 936, 949 (D.C.Cir.2004) (noting the "fundamental requirement of nonarbitrary

administrative decisionmaking: that an agency set forth the reasons for its actions"); *cf. Brand X,* 545 U.S. at 1000–01, 125 S.Ct. 2688 (deferring to agency interpretation where agency "provided a reasoned explanation" for the interpretation). Furthermore, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself," *State Farm,* 463 U.S. at 50, 103 S.Ct. 2856, and a court "may not supply a reasoned basis for the agency's action that the agency itself has not given," *id.* at 43, 103 S.Ct. 2856 (internal quotation marks omitted).[19]

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[19] In disputing whether the Court should analyze the Water Transfers Rule under *State Farm,* the Parties are like two ships passing in the night. Because *State Farm* identifies certain factors relevant to whether an agency's action is "arbitrary and capricious" under the APA, those same factors are relevant to whether EPA's action is "arbitrary and capricious" under *Chevron* step two. *See Am. Petroleum Inst. v. U.S. E.P.A.,* 216 F.3d 50, 57 (D.C.Cir.2000) ("The second step of *Chevron* analysis and *State Farm* arbitrary and capricious review overlap, but are not identical."); *Arent v. Shalala,* 70 F.3d 610, 616 (D.C.Cir.1995) (applying *State Farm* analysis at *Chevron* step two because "whether the [agency's] discharge of ... authority was reasonable ... falls within the province of traditional arbitrary and capricious review under [the APA]"); *Dovid v. U.S. Dep't of Agric.,* No. 11–CV–2746, 2013 WL 775408, at *6 (S.D.N.Y. Mar. 1, 2013) (applying *State Farm* factors at *Chevron* step two). Whether this is a case where the step-two analysis and the APA are "the same," *see Judulang,* 132 S.Ct. at 483 n. 7 ("Were we to [apply *Chevron* step two], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance." (internal quotation marks omitted)), is irrelevant, because it is certainly a case where the Court analyzes an agency's action and questions whether that action was reasonable.

EPA argues that *State Farm* does not apply here because it is not required to undertake a detailed scientific or technical analysis of the environmental impacts of water transfers. (*See* EPA Reply 2–3, 5.) That may be true, but EPA's obligation to

Courts have found the requisite "reasoned explanation" lacking and have refused to defer to agency interpretations in a number of circumstances. For example, an agency cannot "entirely fail[ ] to consider an important aspect of the problem," which includes the factors Congress deemed relevant to the decision. *Id.; see also Gen. Am. Transp. Corp. v. I.C.C.,* 872 F.2d 1048, 1053 (D.C.Cir.1989) (noting that step two "require[s] [courts] to determine whether the [agency], in effecting a reconciliation of competing statutory aims, has rationally considered the factors deemed relevant by the [statute]"). Or, if an agency chooses not to consider an arguably important aspect of the problem, it must explain, at the very least, the reasons for its decision not to consider it. *See Massachusetts v. EPA,* 549 U.S. 497, 534, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (rejecting EPA action in part because "EPA ha[d] offered no reasoned explanation for its refusal to decide" an issue). The agency thus also has a duty to consider alternative policies and explain why it chose one option over others. *See State Farm,* 463 U.S. at 48, 103 S.Ct. 2856 ("At the very least this alternative way of achieving the objectives of the Act should have been addressed

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provide a reasoned explanation for its decision requires it to undertake *some* kind of analysis—scientific, technical, or otherwise—and it is the Court's job, at step two, to determine whether that analysis was sufficient. Here, EPA chose to undertake a statutory—or, in its words, "legal"—analysis. (*See* AR 1428 at 8 ("This rulemaking is based on a legal analysis of the [CWA] as a whole, not a scientific analysis of water transfers.").) Assuming that this choice was appropriate, EPA still had to apply the analysis in a reasonable fashion.

and adequate reasons given for its abandonment.").

Aside from what the agency does not consider or chooses not to adopt, the agency must also "ground its reasons for action ... in the statute," and thereby demonstrate that the interpretation it did choose is consistent with statutory purposes. *Massachusetts,* 549 U.S. at 535, 127 S.Ct. 1438; *see also Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.,* 470 U.S. 116, 126, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985) (acknowledging deference to EPA interpretation at step two "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress"); *Vill. of Barrington,* 636 F.3d at 660 ("[C]onsidering only the rationales the [agency] actually offered in its decision, [the court] determine [s] whether [the agency's] interpretation is 'rationally related to the goals of' the statute." (quoting *AT & T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 388, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999))); *Chem. Mfrs. Ass'n v. EPA,* 217 F.3d 861, 866 (D.C.Cir.2000) (asking, at step two, whether EPA's interpretation was "a permissible construction of the statute, *i.e.,* whether it [was] reasonable and consistent with the statute's purpose" (citation and internal quotation marks and citations omitted)); *Continental Air Lines, Inc. v. Dep't of Transp.,* 843 F.2d 1444, 1449 (D.C.Cir.1988) ("[R]easonableness in this context is to be determined by reference ... to the compatibility of th [e] interpretation with the Congressional purposes informing [it]."); *cf. Chevron,* 467 U.S. at 863, 104 S.Ct. 2778 (deferring to EPA interpretation where "EPA ha[d] advanced a reasonable explanation for its conclusion that the regulations serve[d] the environmental objectives" of the statute); Laurence H.

Silberman, *Chevron—The Intersection of Law & Policy,* 58 Geo. Wash. L.Rev. 821, 827 (1990) (arguing that a court may invalidate an agency interpretation at step two if a party "establish[es] that the agency's construction is inconsistent with the structure and purpose of the statute and therefore impermissible").

Moreover, the agency must actually answer the precise question left open by a statute's ambiguity. *See Lopez v. Terrell,* 654 F.3d 176, 182 (2d Cir.2011) ("Although the framework of deference set forth in *Chevron* applies to an agency interpretation contained in a regulation, where the regulation identified by the agency does not speak to the statutory ambiguity at issue, *Chevron* deference is inappropriate." (citations, internal quotation marks, and alterations omitted)). And it must do so in a "rational" way. *See State Farm,* 463 U.S. at 43, 103 S.Ct. 2856 ("[T]he agency must ... articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation marks omitted)). The agency therefore must employ a rational methodology. *See Judulang,* 132 S.Ct. at 485 ("If the BIA proposed to narrow the class of deportable aliens eligible to seek ... relief by flipping a coin ... we would reverse the policy in an instant."); *Vill. of Barrington,* 636 F.3d at 660 ("If an agency fails or refuses to deploy [its] expertise—for example, by simply picking a permissible interpretation out of a hat—it deserves no deference."). It must apply that methodology in a way that is logical and internally consistent. *See Zhao v. U.S. Dep't of Justice,* 265 F.3d 83, 95 (2d Cir.2001) ("[A]pplication of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as

to be arbitrary and capricious."); *Iavorski v. U.S. I.N.S.,* 232 F.3d 124, 133 (2d Cir.2000) ("When Congress has not directly addressed an issue, our review is not merely for minimum rationality but requires that the administrative agency articulate a logical basis for its judgment." (internal quotation marks omitted)); *cf. Brand X,* 545 U.S. at 981, 125 S.Ct. 2688 ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]."); *Huntington Hosp. v. Thompson,* 319 F.3d 74, 79 (2d Cir.2003) ("[A]n agency ... cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.' "). And it has "a duty" to "examine" and to "justify" the "key assumptions" underlying its interpretation. *Appalachian Power Co. v. E.P.A.,* 135 F.3d 791, 818 (D.C.Cir.1998) ("EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule and therefore ... EPA must justify that assumption even if no one objects to it during the comment period." (internal quotation marks omitted)).

Finally, even if an agency provides a reasoned explanation, the Court still must reject an interpretation that is "manifestly contrary to the statute." *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778. Thus, "where Congress has established an ambiguous line, [an] agency can go no further than the ambiguity will fairly allow." *City of Arlington,* 133 S.Ct. at 1874. And courts therefore must reject an agency's action that "go[es] over the edge of reasonable interpretation" and "completely nullifies textually applicable provisions meant to limit [the agency's] discretion."

Whitman v. Am. Trucking Assocs., 531 U.S. 457, 485, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001); *see also Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of Fed. Reserve Sys.,* 838 F.2d 627, 632 (2d Cir.1988) ("Though the classification of congressional intent as clear or ambiguous will sometimes be in the eye of the beholder, courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity.").

With these principles in mind, the Court turns to an analysis of the Water Transfers Rule under the *Chevron* framework.

1. EPA's Answer to the Precise Question

When it promulgated the Water Transfers Rule, EPA explained that "[t]he legal question addressed by [the] rule is whether a water transfer as defined in the new regulation constitutes an 'addition' within the meaning of [§] 502(12)." 73 Fed.Reg. at 33,700. This question, in turn, depends on the answers to two sub-questions. First, what is an "addition ... to navigable waters"? Second, does a water transfer, as defined by the rule, fall within that definition? The first question is effectively the "precise question" the Court analyzed at step one. And although the answer to the second question depends, in large part, on the answer to the first question, it is nevertheless an independent question that, as will become clear, relies on ambiguity in the term "navigable waters."

To answer the first question, EPA initially reaffirmed its "longstanding position ... that an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source." *Id.* at 33,701; *see also id.* at 33,700 (noting the D.C. Circuit's "agree[ment] with EPA that the term 'addition' may reasonably be limited to situations in which 'the point source itself physically introduces a pollutant into a water from the outside world' " (quoting *Gorsuch,* 693 F.2d at 175)). At a high level of generality, this is substantively the same interpretation of "addition" the Second Circuit endorsed in *Catskills I:* "EPA's position, upheld by the *Gorsuch* and *Consumers Power* courts, is that for there to be an 'addition,' a 'point source must *introduce* the pollutant into navigable water from the outside world.' *We agree with this view*...." 273 F.3d at 491 (citation omitted) (second emphasis added) (quoting *Gorsuch,* 693 F.2d at 165). The Second Circuit ultimately rejected EPA's interpretation in that case, however, because it differed with EPA's definition of "outside world," as the full quotation makes clear:

> We agree with this view *provided that* "outside world" is construed as any place outside the particular water body to which pollutants are introduced. Given that understanding of "addition," the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a "discharge" that demands an NPDES permit.

Id. (emphasis added). Thus, EPA adopted the Water Transfers Rule, at least in part, to express—authoritatively—its disagreement with the Second Circuit's interpretation, and to clarify its own interpretation of "outside world." As EPA explained, it "does not agree with [the *Catskills I*] understanding of the term 'outside world'.... Rather, EPA believes that an addition of a pollutant under the Act occurs when pollutants are introduced from *outside the waters being transferred*." 73 Fed.Reg. at 33,701 (emphasis added). In other words, from the perspective of an individual waterbody, EPA disagreed with an interpretation that considered other waterbodies to be part of the "outside world," and it adopted an interpretation that implicitly created a binary distinction between "navigable waters" as a whole and the "outside world."

Having adopted this interpretation, EPA proceeded to consider the question whether a water transfer would constitute an addition of a pollutant from the outside world. Referencing § 502(7)'s definition of "navigable waters" as "the waters of the United States," 33 U.S.C. § 1362(7), the final rule defines a "water transfer," in part, to mean "an activity that conveys or connects waters of the United States." 40 C.F.R. § 122.3(i). In the preamble, EPA explained that, "[to] be exempt from the requirement to obtain an NPDES permit" under the Water Transfers Rule, "the water being conveyed must be a water of the U.S. prior to being discharged to the receiving waterbody.... Additionally, the water must be conveyed from one water of the U.S. to another water of the U.S." 73 Fed.Reg. at 33,699 (footnote omitted). But in the context of EPA's outside-world interpretation of § 502(12), this interpretation

raises the question whether a water enters the outside world during the transfer itself—i.e., when it leaves a navigable waterbody and is *conveyed* to another water—and thus whether it is possible for a conveyed water to meet EPA's requirement that it be a navigable water "prior to being discharged to the receiving waterbody." For example, if one conveyed water by building a canal to connect two navigable waters, it is conceivable that the canal could be considered a "navigable water," such that the transferred water never leaves the "navigable waters" or enters the outside world during the conveyance. *See SFWMD,* 541 U.S. at 102, 124 S.Ct. 1537 (accepting parties' assumption that a canal was a "navigable water"). But if, instead, one conveyed the water through a "pipe" or a "tunnel" or any other "discrete conveyance" that the CWA would otherwise define to be a "point source," 33 U.S.C. § 1362(14), it is not entirely clear whether the water would enter the outside world under EPA's interpretation when it left the navigable waterbody.

In the context of this issue, EPA adopted a "status-based" concept of "water" to accompany its outside-world concept of "navigable waters." Under this interpretation, "water" has a "status," such that it is either part of "navigable waters" or part of the "outside world." Accordingly, "when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and ... the water never loses its status as 'waters of the United States,' ... nothing is added to those waters from the outside world" because "the pollutants in transferred water are already *in* 'the waters of the United States' before, during, and after

the water transfer." (AR 1428 at 25.)[20] Or, as EPA put it in the preamble to the final rule, "pollutants moved from the donor water into the receiving water, which are contained in navigable waters throughout the transfer, would not be 'added' by the [transferrer] and would therefore not be subject to NPDES permitting requirements." 73 Fed.Reg. at 33,705 n. 10.

As with EPA's outside-world interpretation, competing interpretations of the scope of "navigable waters"—or, more specifically, "water"—surfaced in an apparent disagreement between two circuit court opinions. In *Consumers Power,* the Sixth Circuit upheld EPA's interpretation that a hydropower-generating facility in Lake Michigan did not require an NPDES permit for pollutants contained in temporarily impounded water, in part because it agreed that "the Lake water [did] not lose its status as navigable water simply because it [was] removed from the Lake" by the facility. 862 F.2d at 589. In its view, because the facility "merely change[d] the movement, flow, or circulation of navigable waters when it temporarily impound[ed] waters ... in a storage reservoir," the facility "[did] not alter their character as waters of the United States." *Id.* In *Dubois,* by

[20] This language also appears in the preamble to the final rule in the form of an excerpt from the Government's Brief in *Friends I. See* 73 Fed.Reg. at 33,701. In the context of that excerpt, EPA noted that "the United States has taken the position" quoted in the language, but it did not expressly adopt that position as its own. *Id.* The Court cites, instead, to the identical (and unattributed) language from EPA's responses to comments in the administrative record because it is only in that context that EPA appears to adopt this language as directly representative of its own views.

contrast, the First Circuit disagreed with the Forest Service's determination that a ski resort did not require an NPDES permit for a discharge of one "distinct" navigable water into another. 102 F.3d at 1299. It based its determination, in large part, on its finding that, where the water passed through "pipes" during the transfer, the water "[left] the domain of nature and [was] subject to private control rather than purely natural processes. As such, it [had] lost its status as waters of the United States." *Id.* at 1297.

In the Water Transfers Rule, EPA sided with the Sixth Circuit. Adopting its logic, it declared that, "[b]ecause water transfers simply change the flow, direction or circulation of navigable waters, they would not themselves cause the waters being moved to lose their status as waters of the United States." 73 Fed.Reg. at 33,705 n. 10. But then EPA went a step further and clarified when a water *can* "lose" its status—finding, specifically, that such a loss occurs when the "water is withdrawn from waters of the U.S. for an intervening industrial, municipal or commercial use." *Id.* at 33,704 n. 8. According to EPA, "[t]he reintroduction of the intake water and associated pollutants from an intervening use through a point source is an 'addition' and has long been subject to NPDES permitting requirements" because such a reintroduction "physically introduces pollutants from the outside world." *Id.* at 33,704. Thus, under the Water Transfers Rule, which defines a "water transfer," in full, to be "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," 40 C.F.R. § 122.3(i), "[a] discharge of a pollutant associated with a water transfer resulting from an

intervening ... use ... would require an NPDES permit as any discharge of a pollutant from a point source into a water of the U.S. would," 73 Fed.Reg. at 33,704. EPA clarified, however, that "a water pumping station, pipe, canal, or other structure used solely to facilitate the transfer of the water is not an intervening use." *Id.* This, in turn, supported its definition of "activity"—as in a "water transfer ... activity" under the Water Transfers Rule—to mean "any system of pumping stations, canals, aqueducts, tunnels, pipes, or other such conveyances constructed to transport water from one water of the U.S. to another water of the U.S." *Id.* Therefore, as defined in the rule, water transfers do not cause waters to lose their "status" as "navigable waters," and thus the discharge of transferred water into a receiving waterbody is not an "addition" from the "outside world."

Because the validity of the Water Transfers Rule depends on the validity of the answers to both of these questions—one addressing "addition ... to navigable waters," and one addressing "navigable waters" alone—the Court will address each question separately. In so doing, it will determine, for each, whether EPA has "provide[d] a reasoned explanation for its action," *Judulang,* 132 S.Ct. at 479, and whether EPA's action is "manifestly contrary to the statute," *Mead,* 533 U.S. at 227, 121 S.Ct. 2164.

2. "Addition ... to Navigable Waters"

a. EPA's Explanation

Sometimes, to understand something found

downstream, it helps to examine the source. For the rationale underlying EPA's interpretation of "addition ... to navigable waters" in the Water Transfers Rule, this means analyzing the 2005 Klee Memorandum, which represented EPA's first attempt at formalizing its interpretation. Addressing "[t]he precise legal question ... whether the movement of pollutants from one navigable water to another by a water transfer is the 'addition' of a pollutant potentially subjecting the activity to the [NPDES] permitting requirement," the Memorandum concluded that the CWA does not prohibit such an activity. (AR 5 at 2–3.) Although it recognized that "focusing solely on the term 'addition' is one approach to interpreting the statute," it ultimately concluded that "the better approach ... takes a holistic view and also gives meaning to those statutory provisions where Congress expressly considered the issue of water resource management, as well as Congress' overall division of responsibility between State and federal authorities under the statute." (*Id.* at 13.) The "holistic approach" was warranted "here in particular because the heart of this matter is the balance Congress created between federal and state oversight of activities affecting the nation's waters," and thus "[l]ooking at the statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources." (*Id.* at 5.)

Applying this holistic approach, the Klee Memorandum never directly analyzed the text of either § 301(a) or § 502(12). Instead, it based its interpretation on an analysis of many of the same provisions the Court analyzed at step one. Thus, the

Memorandum noted that, "[w]hile the statute does not define 'addition,' sections 101(g), 102(b), 304(f) and 510(2) provide a strong indication that the term 'addition' should be interpreted in accordance with those more specific sections of the statute." (*Id.* at 7.) Based on this analysis, it concluded that,

> [i]n light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its discussion of changes in the movement, flow or circulation of any navigable waters as sources of pollutants that would not be subject to regulation under [NPDES], it is reasonable to interpret "addition" as not generally including the mere transfer of navigable waters.

(*Id.*) The Memorandum also found further support for its interpretation in other parts of the statute and its legislative history that the Court discussed in its step-one analysis, including provisions of the Act representing Congress's "general[ ] inten[t] that pollutants be controlled at the source whenever possible," and excerpts from the aforementioned House Report. (*Id.* at 7–9 (citing 33 U.S.C. §§ 1252(b), 1288(b)(2)(F), 1329, 1341; H.R.Rep. No. 92–911, at 96, 109 (1972)).)

In *Catskills I,* the Second Circuit gave little deference to EPA's interpretation of the CWA because "EPA's position had [not] been adopted in a rulemaking or other formal proceeding," but instead was "based on a series of informal policy statements made and consistent litigation positions taken by the EPA over

the years, primarily in the 1970s and 1980s." 273 F.3d at 490. But this was no longer true in *Catskills II,* because the Second Circuit had the opportunity to consider the Klee Memorandum as a formal expression of EPA's position. Nevertheless, because the memorandum did not qualify for *Chevron* deference under the Supreme Court's holding in *Mead,* the Second Circuit applied the same level of deference to EPA's position as it applied in *Catskills I* and rejected EPA's interpretation for the same reasons it articulated in that case. *See Catskills II,* 451 F.3d at 82 (deferring to EPA's interpretation "according to its 'power to persuade' " (quoting *Mead,* 533 U.S. at 235, 121 S.Ct. 2164)). The Second Circuit's decision not to accord *Chevron* deference to the Klee Memorandum was consistent with its decision not to accord such deference in *Catskills I,* which decision it based on its conclusion that EPA's position "lack[ed] the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference." *Catskills I,* 273 F.3d at 491.

Perhaps in recognition of the lower level of deference usually accorded to interpretive memoranda, the Memorandum itself noted that EPA "intend[ed] to initiate a rulemaking process to address water transfers." (AR 5 at 3.) That process formally began in June 2006, when EPA published the "[NPDES] Water Transfers Proposed Rule." *See* 71 Fed.Reg. 32,887 (June 7, 2006). Notably, EPA recognized in the preamble that the "proposed rule [was] based on the legal analysis contained in" the Klee Memorandum, which it referred to as an "interpretive memorandum." *Id.* at 32,889. In fact, the acknowledgment that the proposed rule was "based on" the Klee Memorandum

is somewhat of an understatement, because much, if not most, of the language in the preamble to the proposed rule is almost identical to language in the Klee Memorandum. [21] Indeed, aside from the apparently obligatory "General Information" and "Statutory and Executive Order Reviews" sections, the only part of the preamble that went beyond the exact same substantive analysis contained in the Klee Memorandum was a section entitled "Designation Authority." There, EPA noted that, in conceptualizing the proposed rule, it considered adopting "an additional provision allowing States to designate particular water transfers as subject to the NPDES program on a case-by-case basis." *Id.* at 32,892. "Under this approach, the permitting authority would have the discretion to issue a permit on a case-by-case basis if a transfer would cause a significant impairment of a designated use and no State authorities are being implemented to adequately address the problem." *Id.* at 32,892–93. Such an impairment "would occur when, as a result of the water transfer, the designated use of

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[21] The Court does not find it necessary to conduct a detailed comparative analysis between the two documents. Nevertheless, it notes that even a cursory comparison reveals multiple "similarities" (to be generous) between them. Examples of language in the preamble that is highly similar to language in the Klee Memorandum include the first four paragraphs of the "Background" section, *compare* 71 Fed.Reg. 32,888–89, *with* AR 5 at 1, 3–4; all but the first and fourth paragraphs—which contained, respectively, a brief summary of the Klee Memorandum and a single sentence generally outlining the preamble's analytical framework—of the twenty-paragraph-long "Rationale" section, *compare* 71 Fed.Reg. at 32,889–91, *with* AR 5 at 2 n. 3, 4–9; and the second, sixth, seventh, and eighth paragraphs, and most of the fourth paragraph, in the "Scope of [the] Proposed Rule" section, *compare* 71 Fed.Reg. at 33,891–92, *with* AR 5 at 18 & n. 18, 19 & n. 19.

the receiving water could no longer be maintained." *Id.* at 32,893. Ultimately, however, EPA decided "not [to] propos[e] to establish designation authority," but it was nevertheless "interested in the programs States have to address water quality impacts from water transfers, how they are being implemented, and what is the best way to fill any gaps in how States address those impacts currently." *Id.*

After publishing the proposed rule, EPA navigated it through the notice-and-comment-rulemaking process, during which it received and responded to many comments addressing various aspects of the proposed rule. (*See* AR 1428.) Eventually, almost two years after it published the proposed rule, EPA issued a final rule that it described as "nearly identical to the proposed rule." 73 Fed.Reg. at 33,699.[22] But this was also an understatement because, not only was the final rule nearly identical to the proposed rule, but much of the language in many sections of the final rule's preamble was also nearly identical to various parts of the proposed rule's preamble—which, again, was nearly identical in many respects to parts of the Klee Memorandum. [23] EPA thus employed the same

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[22] According to EPA, the rule was only "nearly" identical, but not actually identical, because "[m]inor changes ha[d] been made for clarity." 73 Fed.Reg. at 33,699. Apparently, the "minor change" in question was from the proposed rule's definition of "water transfer" to mean "an activity that conveys waters of the United States to another water of the United States" to the final rule's definition of that term to mean "an activity that conveys or connects waters of the United States." 40 C.F.R. § 122.3(i).

[23] Again, without conducting a detailed analysis, the Court notes many comparative similarities between the final-rule preamble and the proposed-rule preamble, including the first, second, and fourth paragraphs, and most of the third paragraph, in the nine-paragraph-long "Background and Definition of Water Transfers"

"holistic analysis" it used in the Klee Memorandum and analyzed the same statutory provisions and excerpts of legislative history to support the same conclusion it adopted in the Klee Memorandum—namely, that "Congress generally did not intend to subject water transfers to the NPDES program." *Id.* at 33,703. "Interpreting the term 'addition' in [the] context [of its holistic analysis], EPA conclude[d] that water transfers, as defined by [the Water Transfers Rule], do not constitute an 'addition' to navigable waters to be regulated under the NPDES program." *Id.* at 33,701.

Despite the strong similarities between language used in the final rule and in both the proposed rule and the Klee Memorandum, there are a number of material differences between the final rule and its interpretive antecedents. For example, in the "Public Comment" section, EPA responded directly to general categories of public comments it received during the notice-and-comment process. In responses to certain comments arguing that the Water Transfers Rule would conflict with existing interpretations of NPDES and other provisions of the CWA, EPA asserted that the rule would not affect any of these existing interpretations

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section, *compare* 73 Fed.Reg. at 33,698–700, *with* AR 5 at 1–2 & n. 2, 3–4; the final thirteen paragraphs of the nineteen-paragraph-long "Statutory Language and Structure" subsection of the "Rationale" section, *compare* 73 Fed.Reg. at 33,700–03, *with* AR 5 at 4–8; all five of the substantive paragraphs in the "Rationale" section's "Legislative History" subsection, *compare* 73 Fed.Reg. at 33,703, *with* AR 5 at 8–9; and even parts of three paragraphs in the newly added "Public Comment" section, *compare* 73 Fed.Reg. at 33,703–06, *with* AR 5 at 5, 18–19 (containing similarities in paragraphs three, ten, and twelve).

or programs. *See id.* at 33,703 (responding to comments that the rule could interfere with water-quality-standards programs by addressing that argument only as it applies to certain kinds of waste-treatment systems and subsequently asserting that the rule "does not affect the permitting of such facilities"); *id.* (responding to comments that the rule is inconsistent with the § 404 permitting program for dredged or fill material by asserting that the rule "has no effect on the 404 permit program"); *id.* at 33,705 (responding to comments that the rule might subject certain hydroelectric operations to NPDES permitting requirements by asserting that the rule "does not affect the longstanding position of EPA and the Courts that hyrdroelectric dams do not generally require NPDES permits"). And in responses to other comments directly challenging EPA's interpretation, EPA sometimes rejected those comments based on an assertion that states are free to regulate water transfers even where the federal government chooses not to regulate. Thus, in the preamble's sole paragraph addressing concerns "that water transfers may have significant impacts on the environment, including (1) the introduction of invasive species, toxic blue-green algae, chemical pollutants, and excess nutrients; (2) increased turbidity; and (3) alteration of habitat (e.g., warm water into cold water or salt water into fresh water)," EPA responded that the Water Transfers Rule "does not interfere with any of the states' rights or authorities to regulate the movement of waters within their borders," that "[s]tates currently have the ability to address potential in-stream and/or downstream effects of water transfers through their [Water Quality Standards (WQS)] and [Total Maximum Daily Load (TMDL)] programs," and that "[n]othing in [the rule]

affects the ability for states to establish WQS appropriate to individual waterbodies or waterbody segments." *Id.* at 33,705. Finally, in the section of the preamble that addressed EPA's designation-authority proposal, EPA disagreed with comments supporting the proposal and reaffirmed its decision not to adopt it. *See id.* at 33,706. Among the comments EPA identified as supporting the proposal were comments arguing that the proposal "would be helpful in instances where the transfer involves interstate waters because NPDES permits would provide a tool to protect receiving water quality—especially in situations in which water quality standards differed in two relevant states." *Id.* EPA also noted that "several states" submitted comments citing "three reasons for supporting this approach," namely

> (1) The designation option is consistent with Congress's general direction against unnecessary federal interference with state allocation of water rights and states' flexibility on handling water transfers; (2) states would be unable to require NPDES permits for water transfers on a case-by-case basis in the absence of the designation option; and (3) some water transfers should be considered discharges of pollutants, so it is important to retain NPDES authority in these cases.

Id. "After considering these comments," EPA "decided not to include a mechanism ... for the permitting authority to designate water transfers on a case-by-case basis as needing an NPDES permit," *id.,* and it

based its decision on two rationales. First, its decision was "consistent with EPA's interpretation of the CWA as not subjecting water transfers to" NPDES permitting requirements. *Id.* Second, as it stated when it rejected comments addressing the possible negative environmental impacts of the rule, EPA again asserted that "states currently have the ability to address potential in-stream and/or downstream effects of water transfers through their WQS and TMDL programs and pursuant to state authority preserved by section 510, and [the] final rule does not have an effect on these state programs and authorities." *Id.*

In promulgating the Water Transfers Rule, therefore, EPA relied entirely on a "holistic approach" to statutory interpretation that it applied to answer the narrow question whether Congress intended to regulate water transfers under the NPDES program. Applying this approach, it focused almost exclusively on the statutory provisions supporting the CWA's states' rights goals. And, declining to require NPDES permits for water transfers or to adopt the designation-authority option, it ultimately concluded that the rule was "within [its] authority and consistent with the CWA." 73 Fed.Reg. at 33,703. For multiple reasons, the Court finds EPA's analysis to be arbitrary and capricious.

b. Flawed Methodology

As discussed, EPA used a "holistic approach" to determine whether Congress intended to regulate water transfers under the NPDES program. Logically, its rationale proceeds in three parts. First, EPA concluded, based on "the language, structure, and

legislative history of the statute," "that Congress generally did not intend to subject water transfers to the NPDES program." *Id.* at 33,703. Second, because Congress did not intend to regulate water transfers under the NPDES program, "water transfers ... do not constitute an 'addition' to navigable waters." *Id.* at 33,701 ("Congress generally did not intend to subject water transfers to the NPDES program. Interpreting the term 'addition' in that context, EPA concludes that water transfers, as defined by [the] rule, do not constitute an 'addition' to navigable waters to be regulated under the NPDES program."); *see also id.* at 33,701–02 ("In light of Congress' clearly expressed policy ..., it is reasonable to interpret 'addition' as not including the mere transfer of navigable waters."); *id.* at 33,703 ("Congress generally did not intend to subject water transfers to the NPDES program. Interpreting the term 'addition' in that context, EPA concludes that water transfers, as defined by [the] rule, do not constitute an 'addition' to navigable waters to be regulated under the NPDES program."). Third, because water transfers do not constitute an "addition" under § 502(12), they do not constitute a prohibited "discharge of a pollutant" under § 301(a), and therefore they do not require an NPDES permit. *See id.* at 33,699 ("[EPA] 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."). EPA's rationale thus depends on the logical inference in the second part that congressional intent not to regulate water transfers under the NPDES program necessarily implies that Congress did not consider water transfers to be "additions" under § 502(12) that would therefore be prohibited under § 301(a).

This inference fails for a number of a reasons. By its own terms, § 301(a) provides that "the discharge of any pollutant by any person shall be unlawful" "[e]xcept as in compliance with [§ 301] and [§§]1312, 1316, 1317, 1328, 1342, and 1344." 33 U.S.C. § 1311(a). The NPDES program—referenced in § 301 as "[§]1342," *see id.*—is thus only one of many provisions that regulate discharges made unlawful under § 301(a). For example, under § 302, the Administrator *must* establish effluent limitations where he or she determines that "discharges of pollutants ... would interfere with the attainment or maintenance of ... water quality in a *specific portion* of the navigable waters." *Id.* § 1312(a) (emphasis added). And under § 404, the Secretary of the Army Corps of Engineers "may issue permits ... for the discharge of dredged or fill material into the navigable waters." *Id.* § 1344(a).[24] Thus, the conclusion that Congress intended to exempt water transfers from the NPDES program does not establish that water transfers are not "discharges" under § 301—or, more specifically, "additions" under § 502(12)—because Congress still might have intended to make water transfers unlawful under § 301(a) for the purposes of other statutory provisions. Logically, because the NPDES program is a subset of the provisions covered by § 301(a)'s ban, EPA's conclusion that an intent to exempt from § 402 implies an intent to exempt from § 301(a) relies on a fallacious

[24] Although the Supreme Court has held that the term "discharge" used in § 404 is "broader" than the phrase "discharge of a pollutant" used in § 301, *see S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370, 376, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006), the statute still defines " 'discharge' when used without a qualification [to] include[ ] a discharge of a pollutant," 33 U.S.C. § 1362(16).

contrapositive inference.[25] Put differently, even if EPA could use § 301(a) to create an NPDES exemption, it cannot use NPDES to create a § 301(a) exemption.

EPA compounded this problem further when it promulgated the rule. Section 404 establishes a permit program specifically for discharges of "dredged or fill material." *See id.* § 1344. Such discharges are prohibited under § 301(a), which bars "the discharge of any pollutant," *id.* § 1311(a), where "pollutant" is further defined to include "dredged spoil," *id.* §

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[25] In logical terms, "if *A,* then *B*" implies "if not *B,* then not *A*"—a categorical proposition known as the "contrapositive"—only if, under the former proposition, *A* necessarily implies *B.* But if *A* does not imply *B,* then "not *B*" cannot necessarily imply "not *A*" because elements within category *A* might not exist within category *B. See, e.g., Xpedior Creditor Trust v. Credit Suisse First Bos. (USA), Inc.,* 309 F.Supp.2d 459, 462 n. 1 (S.D.N.Y.2003) (describing the "contrapositive" as, "[i]f 'if X then Y' is true, then 'if not Y then not X' is also *necessarily* true," so that "if 'If you didn't pay us, then you didn't get an allocation' is true, then so is 'If you did get an allocation, then you paid us' "); *cf. In re Zarnel,* 619 F.3d 156, 167–68 (2d Cir.2010) (noting that, "if a case exists under [the Bankruptcy Code], the district court ... has jurisdiction over it," and then noting that "[t]he contrapositive of this statement ... is also true," namely that "if the court has no jurisdiction, then there is no case under the Bankruptcy Code"). *See generally* William T. Parry & Edward A. Hacker, Aristotelian Logic 233–36 (1991) ("Contraposition of a standard categorical proposition is an immediate inference in which the conclusion contains the terms of the premiss, negated and in reverse order, and has the same quality."). Here, the contrapositive inference fails because regulation under § 301(a) does not necessarily imply regulation under NPDES—in other words, *A* does not imply *B*—and thus an exemption under NPDES cannot imply an exemption under § 301(a).

1362(6). EPA recognized that " 'dredged spoil' ... by its very nature comes from a waterbody," and thus many commenters were concerned "that the [Water Transfers Rule] implies that dredged material never requires a permit unless the dredged material originates from a waterbody that is not a water of the U.S." 73 Fed.Reg. at 33,703. Indeed, under EPA's interpretation of "addition," a transfer of dredged spoil from one water to another might not be unlawful under § 301(a) in certain circumstances, meaning that its limitation on the scope of § 301(a) also necessarily limits the scope of § 404's permit program. EPA responded to this concern, however, by stating that it "believe[d] that [the Water Transfers Rule] will not have an effect on the 404 program." *Id.* It further explained that, "[b]ecause Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in [§]301, [the] rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit." *Id.* But Congress also explicitly forbade discharges of *pollutants* except as in compliance with the provisions cited in § 301, and the rule clearly has an effect on the § 402 permit program. The Court thus fails to see EPA's explanation as anything other than a recognition that its narrow focus on § 402 is insufficient to support its general interpretation of § 301(a).

Even assuming that EPA answered the broader question whether Congress intended to regulate water transfers under § 301(a) as a whole, its methodology still fails to support its interpretation of "addition" in § 502(12). First, because there are multiple ambiguities in § 502(12), EPA did not explain why

congressional intent not to regulate under § 301(a) necessarily implies a resolution of the ambiguity within "addition ... to navigable waters." Indeed, EPA's own analysis supports the argument that Congress might have considered water transfers to be non-point sources. *See* 73 Fed.Reg. at 33,702 (identifying multiple statutory provisions indicating Congress's "general [ ] inten[t] that pollutants be controlled at the source wherever possible."); *id.* ("[S]ection 304(f) ... reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program."). In this context, it might be more reasonable to conclude that, if Congress did not intend to regulate water transfers under § 301(a), it did so because they do not constitute an "addition of [a] pollutant to navigable waters *from [a] point source.*" 33 U.S.C. § 1362(12) (emphasis added). But EPA summarily rejected this interpretation without explanation. (*See* AR 1428 at 11 ("Nor, as some commenters suggested, is EPA defining a water transfer as a non-point source. For the reasons described in the preamble ... EPA is interpreting the statutory term 'addition' ... in a manner that does not include the flow of water through a water transfer.").)

Second, to the extent that EPA's non-point-source arguments are based on a supportable inference, they still fall short of supporting EPA's interpretation of "addition." The first argument—i.e., that "pollution from transferred waters is more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source," 73 Fed.Reg. at 33,702—fails to leave the port, because

whether it is more appropriate to use other statutory provisions—or even other statutes—to regulate water transfers does not answer the precise question whether Congress intended *this* provision of *this* statute to regulate water transfers. Relatedly, EPA recognized the weakness in its argument that "Congress generally intended that pollutants be controlled at the source whenever possible" when it conceded that "point sources need only convey pollutants into navigable waters to be subject to the Act." 73 Fed.Reg. at 33,702 n. 7 (citing *SFWMD,* 541 U.S. at 105, 124 S.Ct. 1537 ("[A] point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters'...."). If it is true that the Act controls discharges of pollutants away from the original source, then EPA has still failed to answer whether the Act controls discharges of pollutants in water transfers.

The second argument—based on EPA's interpretation of § 304(f)(2)—also fails, but for different reasons. In the preamble to the rule, EPA conceded that "[m]ere mention of an activity in [§]304(f) does not mean it is exclusively nonpoint source in nature." *Id.; see also id.* ("[S]ection 304(f) does not exclusively address nonpoint sources of pollution...."). It did cite legislative history implying that "nonpoint sources" include "natural and manmade changes in the normal flow of surface and ground waters." *Id.* at 33,703 (internal quotation marks and emphasis omitted) (quoting H.R.Rep. No. 92–911, at 109 (1972)). But its "holistic" analysis of the statute and legislative history arbitrarily ignored at least two contrary indications of congressional intent. First, in citing only to the House Report, EPA ignored the Senate Report discussing §

304(f), which explained that the "non-point sources" referenced in the statute "[i]ncluded ... activities such as agriculture, forestry, mining, construction, disposal of material in wells, and salt water intrusion." S.Rep. No. 92–414, at 52 (1972), 1972 U.S.C.C.A.N. 3668, 3718. This list tracks precisely the sources listed in § 304(f)(2)(A)-(E), but it conspicuously omits the source listed in § 304(f)(2)(F), on which EPA entirely relies. *See* 33 U.S.C. § 1314(f)(2). The Conference Report on the final bill did not address this issue, leaving the apparent inconsistency between the two reports unresolved. *See* S.Rep. No. 92–1236, at 124 (1972), 1972 U.S.C.C.A.N. 3776, 3802, (Conf.Rep.). Second, in the context of subsections (A) and (B) of § 304(f)(2), which refer to "agricultural ... activities" and "mining activities," respectively, *see* 33 U.S.C. §§ 1314(f)(2)(A)-(B), EPA fails to explain why Congress would specifically exempt types of pollution associated with these activities from the NPDES program despite their presence in § 304(f). *See* 33 U.S.C. § 1342(*l*)(1) ("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture ...."); *id.* § 1342(*l*)(2) ("The Administrator shall not require a permit under this section ... for discharges of stormwater runoff from mining operations...."). EPA's exemption-by-association argument for § 304(f) thus fails because it actually appears that Congress considered exemptions to be necessary for at least some of the listed activities.

Taken together, this analysis demonstrates that EPA's interpretation was not supported by a reasoned explanation because it chose a flawed methodology from the start. To resolve the ambiguity within § 502(12), it asked questions that were too narrow and

thus could not logically support EPA's conclusion. *See State Farm,* 463 U.S. at 44, 103 S.Ct. 2856 (rejecting agency interpretation, in part, because its "path of analysis was misguided and the inferences it produced [were] questionable"). For this reason alone, EPA is not entitled to deference because it did not actually answer the precise question at issue. *See Lopez,* 654 F.3d at 182 ("Although the framework of deference set forth in *Chevron* applies to an agency interpretation contained in a regulation, where the regulation identified by the agency does not speak to the statutory ambiguity at issue, *Chevron* deference is inappropriate." (citations, internal quotation marks, and alterations omitted)); *Iavorski,* 232 F.3d at 133 ("When Congress has not directly addressed an issue, our review is not merely for minimum rationality but requires that the administrative agency articulate a logical basis for its judgment." (internal quotation marks omitted)).

c. Flawed Application of the Methodology

Even if EPA's methodology were logically sound, EPA's arbitrary and capricious application of the methodology provides an independent reason to reject its interpretation at step two. As the Court has explained, EPA chose to apply a "holistic approach" to interpreting the statute because "the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters" and the tension within that balance between the CWA's purpose "to protect water quality" and its "recogni[tion] [of] the delicate relationship between the CWA and State and local programs." 73 Fed.Reg. at 33,701. At step one, EPA acknowledged

that the statute does not clearly address how to interpret § 502(12) in light of that balance. (*See* EPA Mem. 20, 22 (concluding that "[t]raditional tools of statutory construction ... do not resolve the statutory ambiguity regarding the term 'navigable waters,' " and that these tools "do not resolve the statutory ambiguity regarding the term 'addition' ").) Therefore, EPA's interpretation deserves deference in direct proportion to the extent that it "use[d] ... its expert policy judgment to resolve [the] difficult question[ ]" introduced by these seemingly competing statutory goals. *See Brand X,* 545 U.S. at 1003, 125 S.Ct. 2688; *see also Chevron,* 467 U.S. at 844, 104 S.Ct. 2778 (deferring to agency interpretations "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations").

In the face of two statutory purposes supporting conflicting interpretations of the statute, EPA expressly stated that it "resolve[d]" the "conflicting approaches" by searching for "indices of Congressional intent." *See* 73 Fed.Reg. 33,701 ("To resolve the confusion created by these conflicting approaches, the Agency has looked to the statute as a whole for textual and structural indices of Congressional intent on the question whether water transfers that do not themselves introduce new pollutants require an NPDES permit."). It further justified its decision to employ a so-called "holistic approach" when it noted that "[l]ooking to the statute as a whole is necessary to ensure that the analysis herein is consonant with

Congress's overall policies and objectives in the management and regulation of the nation's water resources." *Id.* However, when it employed this approach, it focused exclusively on certain of the provisions and pieces of legislative history and concluded that "the language, structure, and legislative history of the statute all support the conclusion that Congress generally did not intend to subject water transfers to the NPDES program." *Id.* at 33,703. In so doing, it entirely ignored other provisions of the statute that evidence contrary congressional intent, including §§ 101(a), 302(a), 403(a), and the provisions of § 402 that both establish the NPDES programs' specific federal-state balance and exempt certain kinds of pollution but do not exempt water transfers—all of which the Court discussed in its step-one analysis. *See id.* at 33,700 ("[T]oday's rule appropriately *defers to congressional concerns* that the statute not *unnecessarily burden water quality management activities* and excludes water transfers from the NPDES program." (emphases added)). Then, having interpreted Congress's intent based on its one-dimensional analysis, EPA claimed that the Water Transfers Rule "simply clarif [ies]" or "simply codif[ies]" Congress's intent, such that the rule, in EPA's view, is properly characterized as an expression of the statute's true meaning. *See id.* at 33,706–07 (describing the regulation as "*simply codifying* the Agency's longtime positions that *Congress did not generally intend* for the NPDES program to regulate the transfer of one water of the United States into another water of the United States" (emphases added)); *id.* at 33,707 (same); *id.* ("Today's rule *clarifies* that *Congress did not generally intend* for the NPDES program to regulate the transfer of waters of the

United States into another water of the United States." (emphases added)); *id.* at 33,708 ("Today's rule would *simply clarify Congress' intent* that water transfers generally be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA." (emphasis added)); *id.* (same). Finally, EPA used its imbalanced reading of the statute to reject competing interpretations, responding multiple times to reasonable counter-interpretations with the assertion that those interpretations were inconsistent with EPA's previously determined view of Congress's intent. *See id.* at 33,703–04 ("EPA disagrees that Congress generally intended water transfers to obtain NPDES permits. EPA believes that this action will add clarity to an area in which judicial decisions have created uncertainty, and ... concludes that Congress generally intended to leave the oversight of water transfers to authorities other than the NPDES program.").

The Court finds EPA's decision to rely exclusively on one statutory goal while largely ignoring the other to be arbitrary and capricious for a number of reasons. First, it is internally inconsistent with the methodology EPA deemed best to apply to the statute. For example, when it described its "holistic approach," EPA noted that that approach requires that "*each* part or section should be construed in connection with *every other* part or section so as to produce a *harmonious whole.*" 73 Fed.Reg. 33,701 (emphases added) (internal quotation marks omitted). Moreover, in its Memoranda of Law in this Action, EPA asks the Court to reject Plaintiffs' interpretations of the CWA, in part, because those interpretations "focus

exclusively on the CWA's objective of reducing or eliminating pollution of the 'navigable waters,' [and thus] simply ignore the CWA's other stated policies." (EPA Mem. 23; *see also id.* at 19 (accusing Plaintiffs of "ignor[ing] other aspects of the CWA's regime"); EPA Reply 14 ("[I]t would be inappropriate to focus exclusively on the CWA's objective of reducing or eliminating pollution ... and ignore the CWA's other stated policies.").) Finally, at the hearing on these Motions, EPA's description of the holistic approach that it supposedly employed did not reflect the approach that it actually employed:

> THE COURT: [I]n evaluating the purpose, the holistic approach and whether or not the [Water Transfers Rule] is consistent with the purpose of the [CWA], how do you ignore the impact on certain bodies of water from the [rule]?
>
> [EPA]:.... I would say [that] the purposes in the [CWA] are in tension. So EPA's resolution of this was a resolution of the competing policy tensions between [§§]101(a) and 101(b) and (g). So it's different from the scenario where there's an agreed purpose of the statute and something technical is happening that has to scrutinize it.

(Hr'g Tr. at 58.) In other words, EPA tries to have it both ways by claiming that it deserves deference for employing its holistic approach and then failing actually to employ that approach and resolve the "competing policy tensions." (*Id.*)

Second, even if EPA's methodology were internally consistent—such that it supported EPA's decision to ignore entirely certain statutory provisions—this

approach would be inconsistent with EPA's congressionally delegated authority under the CWA, which requires EPA to interpret the statute in the context of both of its goals—including, specifically, its environmental goals—and to provide a reasoned explanation justifying its interpretation in light of those goals. *Massachusetts,* 549 U.S. at 535, 127 S.Ct. 1438 (holding, in the Clean Air Act context, that EPA "must ground its reasons for action ... in the statute"); *Chem. Mfrs. Ass'n,* 217 F.3d at 866 (asking, at step two, whether EPA's interpretation was "a permissible construction of the statute, *i.e.,* whether it [was] reasonable and consistent with the statute's purpose" (citations and internal quotation marks omitted)); *cf. Chem. Mfrs. Ass'n,* 470 U.S. at 126, 105 S.Ct. 1102 (deferring to EPA interpretation of CWA "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress"); *Chevron,* 467 U.S. at 863, 104 S.Ct. 2778 (deferring to EPA interpretation where "EPA ha[d] advanced a reasonable explanation for its conclusion that the regulations serve[d] the environmental objectives" of the statute). And if there were any doubt that EPA was under a duty to interpret the CWA in light of the statute's purposes, EPA conclusively resolved that doubt when it grounded its decision to employ a holistic analysis in the "necess[ity] [of] ensur[ing] that the analysis ... is consonant with Congress's overall policies and objectives." 73 Fed.Reg. 33,701; *see also* 71 Fed.Reg. 32,889 (same). (*See also* AR 5 at 5 (same).) In this context, EPA's argument that the CWA "does not require a cost benefit balancing" of the scientific impacts of water transfers, (Hr'g Tr. 58–59), is a red herring, because while it may be true that the statute does not require such an

analysis in this case, it still requires, at the very least, consideration of whether the interpretation would serve the statute's environmental goals, or, alternatively, a reasoned explanation for not taking those goals into account. The Court thus finds that EPA's interpretation lacks the requisite reasoned explanation because it was "not so much a balance of conflicting policy goals as the acceptance of one without any real consideration of the other." *Nat'l Ass'n of Regulatory Util. Comm'rs v. I.C.C.,* 41 F.3d 721, 728 (D.C.Cir.1994); *cf. Catskills II,* 451 F.3d at 84–85 (classifying the CWA as a "complex statute[ ]" with "seemingly inconsistent goals that must be balanced," and rejecting EPA's approach, which "tip[ped] the balance toward the allocation goals").

Third, even if EPA argued that it is entitled to accord disproportionate weight to one statutory purpose and to accord almost no weight to a competing purpose, in choosing this one-sided balance, EPA still must provide a reasoned explanation for its choice. *See Massachusetts,* 549 U.S. at 534–35, 127 S.Ct. 1438 (finding EPA action to be arbitrary and capricious because EPA failed to provide a "reasoned justification for declining to form a scientific judgment" and failed to offer a "reasoned explanation for its refusal to decide" an issue, and holding that "EPA must ground its reasons for ... inaction in the statute"). Here, EPA's "justification" for ignoring the environmental side of the balance was based on its unexplained predetermination that that side of the balance did not matter. (*See* AR 1428 at 31 ("EPA recognizes that water transfers may connect waterbodies of differing water chemistry and quality[ ].... As the legal analysis presents in the preamble to the rule, the language,

structure, and legislative history of the CWA indicate that Congress did not intend to leave oversight of water transfers to the NPDES program. Rather[,] Congress intended to leave oversight of water transfers, and any potential environmental effects they may have, to water resource management agencies and the States in cooperation with Federal authorities.")).[26]

Therefore, in light of the foregoing, the Court finds that EPA applied its chosen methodology in a way that was internally inconsistent and was not sufficiently explained in light of EPA's self-imposed and statutory duty to consider multiple and competing statutory goals. It thus rejects EPA's interpretation at step two based on this independent ground. *See Vill. of Barrington,* 636 F.3d at 660 ("[C]onsidering only the rationales the [agency] actually offered in its decision, [the court] determine[s] whether [the agency's] interpretation is 'rationally related to the goals of' the statute." (quoting *Iowa Utils. Bd.,* 525 U.S. at 388, 119

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[26] The Court notes that EPA did provide one rationale that might have justified its decision to ignore the statute's environmental goals. In response to comments expressing concern over the environmental impacts of water transfers, EPA asserted that it "believes that most of the thousands of water transfers in the United States do not result in any substantial impairment." (AR 1428 at 31.) This assertion is entirely unsupported, however, by *any* kind of analysis—scientific, technical, legal, or otherwise—that would allow the Court to accept this as a reasoned explanation for EPA's decision entirely to discount this argument. An agency gets no deference for its "beliefs." *See State Farm,* 463 U.S. at 52–53, 103 S.Ct. 2856 (rejecting agency's finding where there was "no direct evidence" in the record to support that finding).

S.Ct. 721)); *Zhao,* 265 F.3d at 95 ("[A]pplication of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious."); *Chem. Mfrs. Ass'n,* 217 F.3d at 866 (asking, at step two, whether EPA's interpretation was "a permissible construction of the statute, *i.e.,* whether it [was] reasonable and consistent with the statute's purpose" (citations and internal quotation marks omitted)).

d. Flawed Conclusions

Finally, even if EPA had chosen a reasoned methodology, and even if it had applied it in a reasoned fashion, the Court would still reject EPA's interpretation at step two because EPA failed to support its ultimate conclusion in two ways. First, it failed to consider whether other alternatives—specifically, regulating water transfers under NPDES and adopting a designation-authority option—were consistent with the reasons it gave for excluding water transfers from NPDES regulation. And second, it failed to demonstrate how the option it did choose was consistent with its analysis of congressional intent

i. Failure To Consider Alternative Policies

In choosing to exclude water transfers from the NPDES program based on its analysis of congressional intent, EPA failed to consider whether regulating water transfers under the NPDES program would have also been consistent with that intent. As the Court discussed at step one, an interpretation supporting water-transfer regulation under NPDES is one of two permissible interpretations of the CWA,

even in the context of the lone provisions EPA cited in support of its decision. Thus, although §§ 101(b) and 101(g) establish Congress's general policies "to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources," and not to "supersede[ ], abrogate[ ] or otherwise impair[ ]" states' authority "to allocate quantities of water within [their] jurisdiction," both of these provisions also implicitly contemplate that the federal government might have a *secondary* role in both regulating and supporting states' resource-management rights. 33 U.S.C. §§ 1251(b), 1251(g). Furthermore, the NPDES program itself can be seen as an expression of the specific federal-state balance Congress wished to create in light of these policy statements. Specifically, as the Court has discussed, under NPDES, a state may assume primary responsibility to issue NPDES permits if it establishes a program that meets baseline federal standards. *See Wis. Res. Prot. Council,* 727 F.3d at 703 ("Once the EPA has approved a state's program, the EPA no longer has authority to issue NPDES permits under the CWA; at that point the state permitting authority is the only entity authorized to issue NPDES permits within the state's jurisdiction." (citation omitted)); *Natural Res. Def. Council,* 859 F.2d at 173 ("[T]he CWA provides for state assumption of the NPDES permit program. It specifies some prerequisites to states' assuming permitting responsibilities, authorizes the Administrator to supplement them, and requires him to approve a state's application once satisfied that these standards have been met." (citations omitted)). But EPA retains a supervisory and congressionally mandated role in overseeing those

state programs and enforcing those baseline standards. *See Nat'l Ass'n of Home Builders,* 551 U.S. at 688–89, 127 S.Ct. 2518 ("After EPA has transferred NPDES permitting authority to a State, the Agency continues to oversee the State's permitting program."); *Wis. Res. Prot. Council,* 727 F.3d at 703 ("EPA retains supervisory authority over the state program and is charged with 'notify[ing] the State of any revisions or modifications [to the State's program] necessary to conform to [CWA] requirements or guidelines.' " (alterations in original) (quoting 33 U.S.C. § 1342(c)(1))). Therefore, in the specific context of NPDES permits, EPA's citations to §§ 101(b) and 101(g) do not provide a sufficient reasoned explanation for its decision not to require NPDES permits for water transfers because such a permit requirement might be entirely consistent with the goals expressed in those provisions.

In addition to failing to explain why it chose not to regulate water transfers under NPDES, EPA also failed to provide a reasoned explanation for its decision to reject the designation-authority option. As discussed, this proposal would have allowed EPA, on a case-by-case basis, to designate certain water transfers as requiring an NPDES permit. In this way, the designation-authority option was somewhat of a compromise between the "total regulation" approach EPA rejected and the "minimal regulation" approach it ultimately chose.

In the preamble to the final rule, EPA acknowledged that many states supported the option because it was "consistent with Congress's general direction against unnecessary federal interference with state allocation

of water rights and states' flexibility on handling water transfers" while allowing EPA to "retain NPDES authority" in cases where "states would be unable to require NPDES permits ... in the absence of the designation option." 73 Fed.Reg. 33,706. But EPA, "[a]fter considering these comments, ... decided not to include a [designation-authority] mechanism." *Id.* Notably, it justified its decision on two grounds. First, it stated the truism that its decision to reject the option was "consistent with EPA's interpretation of the CWA as not subjecting water transfers to [NPDES] permitting requirements." *Id.* Second, it asserted that the Water Transfers Rule "does not have an effect" on states' "current[ ] ... ability to address potential in-stream and/or downstream effects of water transfers through their WQS and TMDL programs and pursuant to state authorities preserved by section 510." *Id.*

Once again, EPA's explanation is insufficient to support its conclusion. First, EPA cannot bootstrap the reasonableness of its decision to reject the designation-authority option by asserting that it is consistent with an interpretation that is insufficiently justified, in part, because of EPA's unreasonable decision to reject the designation-authority option. Second, EPA did not address the states' comments to the effect that the designation-authority option would be entirely consistent with the congressional purposes EPA relied on in promulgating the rule, as it would conceivably allow states to manage water resources without "*unnecessary* federal interference" while also preserving federal oversight to ensure that states could manage those resources without unnecessary *state* interference. Third, EPA never explained how

states, post Water Transfer Rule, can address interstate pollution effects "through their WQS and TMDL programs" or "pursuant to state authorities preserved by section 510," given that states do not have authority to require other states to adhere to effluent limitations or state-based regulations. *See Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 490–91, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) ("While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders.... [A]n affected State does not have the authority to block the issuance of [a] permit [issued by another state] if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator.... Also, an affected State may not establish a separate permit system to regulate an out-of-state source. Thus the [CWA] makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program." (citations omitted)); *id.* at 487, 107 S.Ct. 805 ("[W]hen a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located.").

The insufficiency of EPA's rationale became especially apparent at oral argument, where the attorney for the State of Colorado, representing State Intervenor–Defendants, conceded that, absent federal regulation over water transfers, a state's only recourse to address interstate pollution would be through interstate

compacts or common-law nuisance claims:

> THE COURT: Let's say Colorado's use of the waters within its borders adds pollutants to New Mexico, whatever water transfer process it has. Now the poor folks in New Mexico are saying this is why the federal government enacted the [CWA]. Now we're having pollutants added to our waters because of Colorado's use and that's arguably exactly where the federal government comes in....
>
> ....
>
> What are New Mexico's remedies in my hypo?
>
> MS QUILL: A common law nuisance claim under state law, not under federal law.
>
> THE COURT: So New Mexico sues Colorado in a New Mexico court.
>
> ....
>
> They have to win in court. Is that their only remedy?
>
> MS QUILL: I think it's the main judicial remedy. I also think that the [CWA] encourages interstate compacts where EPA takes the lead in assisting states.
>
> THE COURT: What does that mean? Mediation? ....
>
> MS QUILL: If worse comes to worse and states can't play nice, they still have the state common law nuisance claim.
>
> THE COURT: That will take how many years?
>
> ....

> .... So the poor folks in New Mexico have to drink dirty water until this case makes its way up to the courts?
>
> MS QUILL: That's a good point. There are thousands and thousands of water transfers in the West. Just because a permit requirement would impose very serious cost limitations on some of these ... projects, it doesn't mean that there is this parade of horribles that is out there. We have thousands of water transfers just within Colorado. And there are none of them that have risen to the level of killing fish and killing people and hurting crops....
>
> THE COURT: Is the answer to my question that the good people in New Mexico have to drink dirty water until this case makes it up through the courts?
>
> ....
>
> .... So it's really bad water, and EPA has no[ ] role and the federal court has no[ ] role, and people have to sue under common law ...?
>
> MS QUILL: EPA does have a role and they're supposed to encourage states to work together and[ ] ... to mediate.
>
> THE COURT: So EPA, Colorado decides not to return their calls, we're going to win this court case, we don't have to listen to the EPA, we can just ignore them.
>
> MS QUILL: In the context of water transfers, yes.

(Hr'g Tr. 98–102.) In other words, EPA's decision appears to relegate states to interstate compacts and state-court common-law nuisance claims to solve

interstate-pollution problems. And, in this context, EPA fails to explain how its decision is consistent with Congress's specific intent that the NPDES program would provide a forum for resolving these disputes, *see City of Milwaukee,* 451 U.S. at 326, 101 S.Ct. 1784, and with Congress's intent—in § 101(g)—that EPA "co-operate with State and local agencies to develop *comprehensive solutions* to prevent, reduce and eliminate pollution in concert with programs for managing water resources," 33 U.S.C. § 1251(g).

In sum, EPA's failure to consider reasonable alternative policy choices that would have been consistent—indeed, possibly more consistent—with its interpretation of the statute renders its ultimate policy choice arbitrary and capricious. *See State Farm,* 463 U.S. at 51, 103 S.Ct. 2856 (rejecting agency action where agency chose one policy option "without any consideration whatsoever" of an "alternative within the ambit of the existing standard"); *id.* at 47, 103 S.Ct. 2856 (noting that agency's acceptance of one conclusion "[did] not cast doubt on" the viability of an alternative conclusion, and that, "[a]t the very least th[e] alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment"). The Court, therefore, rejects EPA's interpretation at step two on this independent ground.

ii. Failure To Support the Chosen Policy

In addition to finding that EPA failed to consider and reject alternative options consistent with its analysis, the Court also finds that EPA failed to explain how its chosen policy option was consistent with the statutory

goals it identified. In general, EPA noted that "[w]ater transfers are an integral part of water resource management," that "they embody how States and resource agencies manage the nation's water resources and balance competing needs for water," and that they "physically implement State regimes for allocating water rights, many of which existed long before enactment of the [CWA]." 73 Fed.Reg. 33,703. In this context, multiple times in the preamble, it acknowledged Congress's intent that the federal government not "unnecessarily" or "unduly" burden or interfere with states' water-management activities. *See id.* at 33,700 (asserting that the rule "appropriately defers to congressional concerns that the statute not *unnecessarily burden* water quantity management activities" (emphasis added)); *id.* at 33,701–02 ("In light of Congress' clearly expressed policy not to *unnecessarily interfere* with water resource allocation ..., it is reasonable to interpret 'addition' as not including the mere transfer of navigable waters." (emphasis added)); *id.* at 33,702 ("Congress ... made clear that the [CWA] is to be construed in a manner that does not *unduly interfere* with the ability of States to allocate water within their boundaries." (emphasis added)); *id.* ("[S]ection 101(g) ... establishes in the text of the Act Congress's general direction against *unnecessary Federal interference* with State allocations of water rights." (emphasis added)); *id.* ("Because subjecting water transfers to a federal permitting scheme could *unnecessarily interfere* with State decisions on allocations of water rights, [§ 101(g)] provides additional support for the Agency's interpretation." (emphasis added)); *id.* ("[Section 501(2)] supports the notion that Congress did not intend administration of the CWA to *unduly*

interfere with water resource allocation." (emphasis added)).

Based on these statements, one could infer that the Water Transfers Rule is consistent with this purpose because requiring NPDES permits for water transfers would "unnecessarily" or "unduly" interfere with state authority. However, in the context of EPA's duty to provide a reasoned explanation for its resolution of the statutory ambiguity, its failure to articulate why water-transfer regulation is an "unnecessary" interference "[did] not so much answer the question as ask it." *Shays v. FEC,* 414 F.3d 76, 101 (D.C.Cir.2005) (rejecting a 120–day bright-line rule where agency failed to explain why it was "reasonably close" but not "so distant" from an ambiguous statutory deadline). And where the Water Transfers Rule actually preserves some federal regulatory authority—specifically, where it requires permits for water transfers that "subject[ ] the transferred water to [an] intervening ... use," and where "pollutants [are] introduced by the water transfer activity itself to the water being transferred," 40 C.F.R. § 122.3(i), EPA's failure to explain why those regulations are necessary or are not undue interferences is equally arbitrary. *See also* 73 Fed.Reg. 33,704 ("A discharge of a pollutant associated with a water transfer resulting from an intervening ... use, or otherwise introduced to the water by a water transfer facility itself would require an NPDES permit as any discharge of a pollutant from a point source into a water of the U.S. would."). EPA has thus drawn a regulatory line that excludes certain types of water transfers from the NPDES program but includes others based on an implicit, never-discussed determination of what it means to be a "necessary"

regulation.

Absent a reasoned explanation for drawing the line in this manner, the line appears to be arbitrary. For example, under the Water Transfers Rule, "[a] discharge of a pollutant associated with a water transfer resulting from an intervening ... use ... would require an NPDES permit as any discharge of a pollutant from a point source into a water of the U.S. would." *Id.* "In these situations," EPA explained, "the reintroduction of water and that water's associated pollutants physically introduces pollutants from the outside world and, therefore, is an 'addition' subject to NPDES permitting requirements." *Id.* Consistent with EPA's interpretation of "addition," therefore, the Water Transfers Rule requires an NPDES permit for *all* of the pollutants present in water that is withdrawn and then *reintroduced* into navigable waters, even if those pollutants were present before the water was put to an intervening use—i.e., while it was part of navigable waters. *See id.* ("The fact that some of the pollutants in the discharge from an intervening use may have been present in the source water does not remove the need for a permit.").[27] In certain circumstances, water that is withdrawn, used,

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[27] EPA did note that, "under some circumstances, permittees may receive 'credit' in their effluent limitations for such pollutants." 73 Fed.Reg. at 33,704 (citing 40 C.F.R. § 122.45(g)). But the specific provision EPA cited includes a requirement that "[c]redit shall be granted *only if* the discharger demonstrates that the intake water is drawn from *the same body of water into which the discharge is made.*" 40 C.F.R. § 122.45(g)(4) (emphasis added). In other words, this provision does not apply to water transfers, which by definition involve two distinct bodies of water. *See* 40 C.F.R. § 122.3(i) (defining a "water transfer" to mean "an activity that conveys or connects *waters*" (emphasis added)).

reintroduced, and transferred may have an impact on a recipient waterbody that is functionally identical to the impact from water that is transferred without being subject to an intervening use to the extent that the exact same pollutants existed in the water both before and after the use. But EPA did not explain its decision to exempt states from NPDES-permit requirements in one scenario (no intervening use) while "burdening" them with a "necessary" NPDES-permit requirement in another (intervening use), even when both scenarios could effectively yield an identical result (recipient-waterbody pollution). And where the amount of pollution in transferred water changes during an intervening use, the Water Transfers Rule appears to require permits for all of the pollutants in the reintroduced water that preexisted the intervening use, even if pollutants were *removed* during the intervening use such that the water transfer functionally results in a *net decrease* in the total amount of pollution in navigable waters. *See id.* (noting that "water ... withdrawn to be used as ... drinking water ... has been subjected to an intervening use").[28] But EPA again failed to explain why requiring NPDES permits for water transfers that *reduce*

[28] In the preamble, EPA explained that, as applied to drinking water, the Water Transfers Rule would require an NPDES permit for "waste material from the treatment process" that "originated in the withdrawn water," was "removed to make the water potable," and then is "discharged into waters of the U.S." 73 Fed.Reg. at 33,705. But a discharge of the "purified water" into navigable waters, like a discharge of the waste water, would also require an NPDES permit for any pollutants not removed during the purification process, because that water "has been subjected to an intervening use," such that "it is no longer a water of the U.S." *Id.* at 33,704–05.

pollution in navigable waters are "necessary" impositions on the states. Perhaps EPA *could have* explained why its intervening-use exception was consistent with its policy against "undue interference" with state authority. But the Court finds that the administrative record "is insufficient to permit [the] [C]ourt to discern [EPA's] reasoning or to conclude that [EPA] has considered all relevant factors" related to this issue, and the Court "may not itself supply a reasoned basis for [EPA's] action that the agency itself has not given." *Brodsky v. U.S. Nuclear Regulatory Comm'n,* 704 F.3d 113, 119 (2d Cir.2013) (internal quotation marks omitted).

In addition to failing to demonstrate that the Water Transfers Rule is consistent with EPA's favored statutory purpose, EPA also failed to demonstrate that the rule would not frustrate that purpose in the context of the interstate effects of water pollution. It is entirely conceivable that Congress's "policy ... to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources," and "to allocate quantities of water within [their] jurisdiction[s]," comprehends a federal regulatory role that protects states from the effects of downstream pollution. 33 U.S.C. §§ 1251(b), 1251(g). As discussed, the NPDES program itself is a significant component of this role. *City of Milwaukee,* 451 U.S. at 326, 101 S.Ct. 1784 (noting that, in NPDES, "Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress," such that "the EPA itself

[could] issue permits if a stalemate between an issuing and objecting State develop[ed]"). Moreover, EPA acknowledged that it received comments from many states opposing the rule on the grounds that it might undermine their "interest in using their NPDES authority to prevent potential water quality impairments caused by water transfers." 73 Fed.Reg. 33,707. And, in responses to comments in the administrative record, EPA further acknowledged the specific comments addressing the fact that

> water quality standards vary from state-to-state and water transferred from one state could meet standards for that state and yet degrade the quality of the waters of the state downstream of a water transfer. Some commenters expressed concern that without federal regulation, States downstream of a water transfer will have no ability to prevent harm to the water of their State from an upstream transfer.... One commenter argued that Federal oversight through the NPDES program would provide a mechanism for equilibrating states' standards and a forum for resolving interstate disputes.

(AR 1428 at 32.)

But EPA did not directly address this argument in the preamble to the final rule, and its response to comments in the administrative record only *appears* to address it:

> EPA appreciates the commenters' concerns. Today's rule codifies EPA's longstanding practice of not requiring NPDES permits for water transfers and does not promote adding pollution to any waters....
>
> .... [T]here are other laws such as the Non–Indigenous Aquatic Nuisance Prevention and Control Act of 1990 ... which are designed to prevent the introduction of, and to control the spread of, invasive species in waters of the United States.
>
> EPA acknowledges that invasive species can cause significant harm and that the spread of invasive species should generally be prevented. However, EPA believes that regulation of invasive species in water transfers is not appropriate under the NPDES program. Since water transfers are not additions they are not a discharge that would be covered under the NPDES program.

(*Id.* at 32–33.) It thus appears that EPA relied on the presumed validity of its interpretation to justify its decision not to address an issue, consideration of which was necessary to establish the validity of its interpretation. In other words, it put the motor before the boat. Moreover, EPA's narrow focus on invasive species—and its identification of an entirely different statute that addresses this narrow problem—ignores other types of pollution—for example, chemical pollution—that might comprise an equal or greater component of the interstate-pollution threat. Finally, even assuming EPA could appropriately address this issue by focusing on invasive species alone, its identification of another statute that addresses this problem does not answer the question whether *this* statute addresses the problem. Applying this logic,

EPA could ignore numerous provisions of the CWA that indicate Congress's clear intent to use the statute—and, in particular, effluent limitations and NPDES permits—to protect species from waterborne threats. *See, e.g.,* 33 U.S.C. § 1251(a)(2) (describing a "national goal" to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife"); *id.* § 1312(a) (establishing EPA's authority to impose effluent limitations where "discharges of pollutants ... would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure ... the protection and propagation of a balanced population of shellfish, fish and wildlife"); *id.* § 1311(h)(2) (allowing EPA to issue NPDES permit modifying effluent limitation for a publicly owned treatment works "if the applicant demonstrates," *inter alia,* that "the discharge of pollutants ... will not interfere ... with the attainment or maintenance of that water quality which assures ... the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife"); *id.* § 1311(m)(2) (mandating that an NPDES permit's effluent limitations in a certain context "shall be sufficient ... to assure the ... protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms"); *id.* § 1344(c) (allowing EPA to revoke disposal-site designation under § 404 if EPA determines "that the discharge of [dredged or fill] materials into [an] area will have an unacceptable adverse effect on ... shellfish beds and fishery areas (including spawning and breeding areas), [or] wildlife").

Therefore, in addition to finding that EPA did not

provide a reasoned explanation for its decision in the context of its duty to balance the statute's competing goals, the Court also finds that EPA failed to explain how its action was consistent with and why it does not frustrate the one goal it did consider. *See State Farm,* 463 U.S. at 43, 103 S.Ct. 2856 (requiring an agency to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks omitted)).

e. Friends I

Taken together, the foregoing analysis demonstrates that, for multiple reasons, the Court rejects EPA's interpretation as arbitrary and capricious for failure to provide a reasoned explanation to support a number of critical choices and determinations EPA made, either implicitly or explicitly, when it adopted the Water Transfers Rule. And although the Court conducted this analysis with reference to the specific issues that EPA failed to explain, it also notes, in general, that the primary flaw underlying EPA's entire analysis is that EPA effectively attempted to use *Chevron*-step-one arguments to justify its interpretation at step two. Indeed, EPA employed the exact same "holistic approach" to statutory interpretation in both the Water Transfers Rule and in the step-one analysis in this case. (*See* EPA Mem. 19–20, 22–27 (analyzing the CWA's "broader statutory context, including [its] structure, purpose, and legislative history," and acknowledging the "multiple goals" within the statute (citing 33 U.S.C. §§ 1251(b), 1251(g), 1288(b)(2)(F), 1314(f), 1329, 1370)).) But in this case, unlike in the Water Transfers Rule, EPA

concluded that "the overall statutory context and legislative history do not resolve, but rather reinforce, these textual ambiguities." (EPA Reply 14; *see also* EPA Mem. at 20 ("Traditional tools of statutory construction ... do not resolve the statutory ambiguity regarding the term 'navigable waters'...."); *id.* at 27 ("Section 304(f) does not resolve the ambiguity of the specific terms under [§§]301 and 501 [sic] at issue here."); *id.* ("[T]his Court ... should ... conclude that the broader context of the statute as a whole left ambiguous whether the NPDES program was intended to apply to water transfers...." (internal quotation marks omitted)).) The Court agrees with EPA at step one that the statute is ambiguous. However, in the context of what EPA acknowledges are two permissible interpretations, it cannot explain its choice of one of those interpretations by arguing only that the interpretation was permissible, because permissibility alone is not a sufficient reasoned explanation. *See Vill. of Barrington,* 636 F.3d at 660 ("If an agency fails or refuses to deploy [its] expertise—for example, by simply picking a permissible interpretation out of a hat—it deserves no deference.").

Indeed, it is primarily for this reason that this Court respectfully disagrees with the Eleventh Circuit's decision in *Friends I.* In that case, the court upheld the Water Transfers Rule in a challenge brought by many of the Environmental Intervenor–Plaintiffs against Intervenor–Defendant SFWMD. *See Friends I,* 570 F.3d at 1228. Because EPA was not a party to the case, the court applied *Chevron* deference to the rule in the context of SFWMD's argument "based on the 'unitary waters' theory," which it described as holding that "[a]n addition [of pollutants to navigable waters]

occurs ... only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." *Id.* at 1217. The court noted that this theory "ha[d] a low batting average," in that "it ha[d] struck out in every court of appeals where it ha[d] come up to the plate," *id.* at 1217–18 (citing *Catskills II,* 451 F.3d 77); *N. Plains Res. Council,* 325 F.3d 1155; *Catskills I,* 273 F.3d 481; *Dubois,* 102 F.3d 1273; *Dague,* 935 F.2d 1343, and that "[e]ven the Supreme Court ha[d] called a strike or two on the theory," *id.* at 1218 (citing *SFWMD,* 541 U.S. 95, 124 S.Ct. 1537). But despite recognizing that "all of the existing precedent and the statements in [an Eleventh Circuit] vacated decision [were] against the unitary waters theory," the court gave EPA a home run when it became "the first court to address ... whether the regulation [was] due *Chevron* deference," and decided that it was. *Id.*

Although this Court agrees with the Eleventh Circuit that the statute is ambiguous at step one, it departs from that court's conclusion because that court attributed to EPA an interpretation that it did not actually adopt, and it otherwise failed to consider whether EPA provided a reasoned explanation for its interpretation. Most telling is the court's language describing its analysis. At step one, the court found that "[t]here are two reasonable ways to read" the statute, *id.* at 1227, one of which was "[SFWMD's] unitary waters theory," *id.* at 1223. Then, at the beginning of its step-two analysis, the court defined the question to be "whether the EPA's regulation, which accepts the unitary waters theory that transferring pollutants between navigable waters is not an 'addition ... to navigable waters,' is a

permissible construction of that language." *Id.* at 1227 (alteration in original). Finally, after concluding that "EPA's construction [of the statute] is one of the two readings we have found reasonable," the court held that "EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the language." *Id.* at 1228. In other words, the court found that, because the statute permitted the interpretation, EPA's choice of that interpretation was *per se* reasonable.

Yet, under *Chevron,* courts defer to an agency's action only to the extent that it is consistent with its "delegation[ ] of authority ... to fill [a] statutory gap in a *reasonable fashion.*" *Brand X,* 545 U.S. at 980, 125 S.Ct. 2688 (emphasis added). Thus, it is the court's task to "examin[e] the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Judulang,* 132 S.Ct. at 484. Indeed, the Eleventh Circuit's step-two approach renders step two almost entirely unnecessary, because if the question at step one is framed as whether the statute is ambiguous enough to support the agency's interpretation, then the analysis effectively ends at step one if the fact that the agency chose the interpretation is enough to trigger deference. In other words, at step two, courts cannot infer permissible means from permissible ends—it is instead their duty independently to analyze the means. *See id.* (noting the "important" role courts play "in ensuring that agencies have engaged in reasoned decisionmaking").

In addition to short-circuiting the step-two analysis, the Eleventh Circuit also relied on the incorrect assumption that EPA actually adopted one of the two

readings the court had found to be permissible at step one. The record reflects that nowhere in the Klee Memorandum, the proposed rule, the administrative record, or the final rule does EPA adopt the unitary waters theory. In fact, to the extent EPA mentions the theory at all—which occurs only in the Klee Memorandum and in EPA's responses to comments in the administrative record—it merely notes the existence of the theory and the Supreme Court's disagreement with it in *SFWMD.* (*See* AR 5 at 14 n. 14 (noting the Supreme Court's recognition in *SFWMD* that "the unitary waters theory could be viewed as inconsistent with statutory provisions focusing on protection of individual water bodies, and that the theory was potentially inconsistent with [certain] NPDES regulations," but concluding that the Memorandum's "interpretation reflects EPA's consideration of the [Supreme] Court's concerns"); AR 1428 at 39 ("EPA acknowledges that the Supreme Court's majority opinion in [*SFWMD*] expresses some questions about the 'unitary waters' theory.... [The Water Transfers Rule] provides a clear expression of the Agency's views following the standard informal rulemaking procedures.").) Moreover, after EPA published the Klee Memorandum, Klee herself expressly disclaimed EPA's reliance on that theory in a voicemail to Peter Nichols, counsel for Western Water Providers—the transcript of which is part of the administrative record—wherein she stated that EPA "[was] not basing the interpretation or the memorandum on the unitary waters theory but instead [was] looking at a statutory construction based argument looking at [§§ 101(g)] and [304(f)] and the statute as a whole rather than simply trying to focus solely on the term addition." (AR 1414 at 56 fig. 33.)

The Eleventh Circuit thus incorrectly attributed an interpretation to EPA that it did not expressly adopt in the rule.

In response, EPA argues that the Eleventh Circuit's decision was nevertheless correct because it upheld EPA's interpretation as *consistent* with the unitary waters theory. At the hearing, EPA attempted to explain its position with regard to the theory:

> THE COURT: Is EPA embracing unitary water?
>
> [EPA]: It's not the word we use in the rule, but we think the Eleventh Circuit accurately described our position.
>
> THE COURT: Let's be clear. Are you embracing unitary water or not?
>
> ....
>
> [EPA]: It's substantively the same as the theory in our rule.
>
> THE COURT: Is that a yes?
>
> [EPA]: That's a yes.

(Hr'g Tr. 74.) EPA later explained that "the problem with the words [']unitary waters['] is that they seem to mean different things to different people," and that, ultimately, the theory the Eleventh Circuit attributed to EPA "is the theory embodied in the [Water Transfers Rule]." (*Id.* at 129.)

To be clear, the specific interpretation EPA adopted in the Water Transfers Rule is that "an addition of a pollutant under the Act occurs when pollutants are

introduced from *outside the waters being transferred.*" 73 Fed.Reg. at 33,701 (emphasis added). In isolation, this phrase is somewhat ambiguous, because if one interprets "waters" to mean the *bodies* of water involved in the transfer—i.e., the donor waterbody and the receiving waterbody, *see id.* at 33,699—then a water transfer still might result in a discharge of a pollutant, to the extent that water en route between the two bodies is not considered to be part of either waterbody, and thus it is introduced from outside both waterbodies because it was withdrawn. EPA's interpretation, therefore, depends on the subsidiary interpretation that transferred water retains its "status" as navigable while it is en route. Under this interpretation, water transfers do not result in "discharges of a pollutant" because "pollutants moved from the donor water into the receiving water ... are contained in navigable waters throughout the transfer." *Id.* at 33,705 n. 10. This interpretation is perhaps consistent with the unitary waters theory, as EPA argues, but it is not the same thing. And to the extent that EPA's interpretation relies on the assumption of the correctness of the unitary waters theory—or at least the aspect of that theory that it is impossible to "join" or "unite" two navigable waters in a way that causes a "discharge"—the Court rejects its interpretation because agencies deserve deference only for reasonably explained choices, and not for assumptions. The EPA's decision not to invoke the unitary waters theory thus dilutes the persuasive force of the Eleventh Circuit's holding in *Friends I. See Lin v. U.S. Dep't of Justice,* 416 F.3d 184, 192 (2d Cir.2005) ("[T]he Supreme Court has made clear that 'it will not do for a court to be compelled to guess as the theory underlying a particular agency's action; nor can a

court be expected to chisel that which must be precise from what the agency has left vague and indecisive.' ... Were courts obliged to create and assess ex-post justifications for inadequately reasoned agency decisions, courts would, in effect, be conscripted into making policy. Such an activity is, for myriad and obvious reasons, more properly the province of other bodies, particularly where ... the other body is an agency that can bring to bear particular subject matter expertise. Accordingly, we must reject [an agency's] entreaty to adjudicate by ex-post hypothesis." (some alterations omitted) (quoting *SEC v. Chenery Corp.,* 332 U.S. 194, 196–97, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947))); *see also Brodsky,* 704 F.3d at 119 ("[A] court ... may not itself supply a reasoned basis for the agency's action that the agency itself has not given." (internal quotation marks omitted)); *Matadin v. Mukasey,* 546 F.3d 85, 92 (2d Cir.2008) ("[A court] may not enforce [an agency's] order by applying a legal standard the [agency] did not adopt." (second and third alterations in original) (internal quotation marks omitted)); *Burgess v. Astrue,* 537 F.3d 117, 128 (2d Cir.2008) ("[A court] may not properly affirm an administrative action on grounds different from those considered by the agency." (internal quotation marks omitted)); *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.,* 482 F.3d 79, 101 (2d Cir.2006) ("[A court] may [not] construct support for an agency's conclusion when the agency has not pointed to evidence on the record favoring its decision."); *Snell v. Apfel,* 177 F.3d 128, 134 (2d Cir.1999) ("A reviewing court may not accept ... counsel's *post hoc* rationalizations for agency action." (internal quotation marks omitted)).[29]

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[29] In *National Railroad Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992), the Supreme

3. "Navigable Waters"

Thus far, the Court has focused entirely on EPA's interpretation of "addition ... to navigable waters" in § 502(12). However, the Water Transfers Rule separately adopted an interpretation of "navigable waters"—namely, its "status-based" interpretation—that deserves an independent analysis. To recap, this interpretation contained two parts. First, it interpreted "navigable waters" such that water would be considered part of "navigable waters"—or, as the statute also defines it, "the waters of the United States," 33 U.S.C. § 1362(7)—as long as it retained its "status" as a "navigable water" or "water of the United

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Court recognized an exception to the rule applied in these cases, deferring to an interpretation that was not explicitly invoked but was a "necessary presupposition" of the agency's overall interpretation. *See id.* at 420, 112 S.Ct. 1394 ("[T]he fact that the [agency] did not in so many words articulate its interpretation of the [statutory phrase] does not mean that we may not defer to that interpretation, since the only reasonable reading of the [agency's] opinion, and the only plausible explanation of the issues that the [agency] addressed after considering the factual submissions by all of the parties, is that the [agency's] decision was based on the proffered interpretation."). Here, as the Court has already explained, the unitary waters theory is at best *consistent* with the Water Transfers Rule, but it is in no way a "necessary presupposition" of the rule, nor is it the "only reasonable reading" of the interpretation embodied in the rule or the "only plausible explanation" of EPA's decision to promulgate the rule in this way. Moreover, EPA's disavowal of the unitary waters theory after it issued the Klee Memorandum demonstrates that, whatever EPA now argues, it has acknowledged that the theory is not the basis for the rule.

States." (*See* AR 1428 at 25 ("[W]hen a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water ... never loses its status as 'waters of the United States,' ... nothing is added to those waters from the outside world.").) Second, it interpreted the scope of "navigable waters" within this status-based interpretation to include waters that have been withdrawn from navigable bodies of water but have not been subjected to an "intervening use." *See* 73 Fed.Reg. at 33,704 & n. 8 (noting that "if water is withdrawn from waters of the U.S. for an intervening ... use, the reintroduction of the intake water and associated pollutants is an 'addition' subject to NPDES permitting requirements," but clarifying that "a water pumping station, pipe, canal, or other structure used solely to facilitate the transfer of the water is not an intervening use"). Again, the question is whether EPA provided a reasoned explanation for its interpretation and whether it is consistent with the statute.

The answer, in both respects, is no. First, because EPA employed only its holistic approach to justify the rule, all of the above-discussed shortcomings of EPA's rationale underlying its outside-world interpretation of "addition" apply equally to its status-based interpretation of "navigable waters." But, the Court could also reject it on the independent ground that EPA explicitly admitted that it did not consider this issue. In its explanation of what it takes to "constitute a 'water transfer' under [the] rule," EPA stated that "the water being conveyed must be a water of the U.S. prior to being discharged to the receiving waterbody." 73 Fed.Reg. at 33,699 (footnote omitted). Then, in a footnote attached to the phrase "water of the U.S."

within that statement, EPA acknowledged that "[w]aters of the U.S. are defined for purposes of the NPDES program in [40 C.F.R. § 122.2] and *this rulemaking does not seek to address what is within the scope of that term.*" *Id.* at 33,699 n. 2 (emphasis added). But EPA actually did "address what is within the scope of that term" because it adopted an interpretation of "navigable waters" that expanded the scope of that phrase to include any water that has the "status" of "navigable water." And it further expanded the scope of that interpretation when it clarified that water withdrawn from a navigable waterbody loses its status only when subjected to an "intervening use." In this context, the Court cannot say that EPA "focuse[d] fully and directly upon the issue" such that it deserves deference for its interpretive regulation. *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 173–74, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007) (holding, in the context of an "interpretive regulation" adopted through notice-and-comment-rulemaking procedures, that, "[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination"). To the contrary, it is difficult to defer to an interpretation that EPA apparently did not even recognize that it had adopted.[30]

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[30] EPA's analysis in the preamble to the final rule and its litigating position in this case confirm the Court's conclusion that it failed to address this issue, because nowhere in the preamble or in any of EPA's Memoranda of Law—which both focus entirely

Furthermore, the interpretation itself must be rejected because it is "manifestly contrary to the statute." *Mead,* 533 U.S. at 227, 121 S.Ct. 2164. The statute defines "navigable waters" to mean "the waters of the United States," 33 U.S.C. § 1362(7), but nowhere does it define "water" as a concept that exists independent of a navigable body of water. Moreover, to the extent that "navigable waters" implies the existence of a singular "navigable water"—or, that "waters of the United States" implies a singular "water of the United States"—the singular version of the term must be defined in reference to the plural. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise ... words importing the plural include the singular...."). Applying this principle, it is clear that a "navigable water" or a "water of the United States" must be an

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on "addition ... to navigable waters"—does EPA discuss any ambiguity as to the "scope" of "navigable waters." In fact, the Court notes that the Klee Memorandum and the preamble to the proposed rule fail entirely even to mention EPA's status-based interpretation of navigable waters, *see* 71 Fed.Reg. 32,887, (*see* AR 5), except for one sentence in the Klee Memorandum that references the First Circuit's discussion of the concept in *Dubois,* (*see* AR 5 at 12). Without deciding whether the final rule—which relies, in large conceptual part, on the status-based interpretation that EPA explained for the first time in the preamble to the rule—was a "logical outgrowth" of the proposed rule, or whether the final rule "deviates too sharply from the proposal" such that "affected parties [were] deprived of notice and an opportunity to respond to the proposal," *Time Warner Cable Inc. v. F.C.C.,* 729 F.3d 137, 169–70 (2d Cir.2013) (internal quotation marks omitted), the Court simply notes that EPA's failure to appreciate the actual implications of its interpretation is yet another reason why the Court moves further away from *Chevron* on the "spectrum" of deference. *See Mead,* 533 U.S. at 228, 121 S.Ct. 2164.

individual body of water, and not liquid water that exists outside of a waterbody. First, "waters" ordinarily means "bodies" of water. *See* Webster's Third New Int'l Dictionary 2581 (2002) (defining "waters" to mean "the water occupying or flowing in a *particular bed* " (emphasis added)). The ordinary meaning of "navigable" confirms this interpretation, because only a body of water can be "navigable," not the liquid water itself. *See id.* at 1509 (defining "navigable" to mean "capable of being navigated" and, more specifically, "deep enough and wide enough to afford *passage to ships* " (emphasis added)). Second, the statute defines navigable waters as "the waters of the United States, *including the territorial seas.*" 33 U.S.C. § 1362(7). In this sense, the phrase "waters of the United States" is "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams,* 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Thus, if the term "waters" "includ[es] the territorial seas," the term itself must generally refer only to things that are like "seas," i.e. other bodies of water. Third, EPA's regulatory interpretation of "waters of the United States" lists multiple examples of bodies of water to define the term "waters," including "lakes, rivers, streams ..., or natural ponds." 40 C.F.R. § 122.2. Fourth, interpreting water to be "navigable" while outside of a navigable body of water would conflict with EPA's explanation of the rule, because where EPA would require permits for pollutants added to the transferred water, the permit covers the addition of pollutants, not to the transferred water itself, but to the receiving waterbody. *See* 73 Fed.Reg. at 33,705 ("[W]here water transfers

introduce pollutants to water passing through the structure *into the receiving water,* NPDES permits are required." (emphasis added)). In other words, under EPA's status-based interpretation, if EPA considered transferred water to be "navigable," it *should* require an NPDES permit for the discharge into the transferred water, regardless of whether it was ultimately transferred to a navigable waterbody. Instead, it requires the permit for the discharge into the receiving water, implying that the transferred water is not, itself, navigable. Finally, the Court's interpretation—that liquid water is only "navigable" when it exists inside a navigable waterbody—is consistent with the First Circuit's decision in *Dubois,* because, in that case, the water "lost its status as waters of the United States" when it "le[ft] the domain of nature," i.e., when it left the navigable waterbody. 102 F.3d at 1297. Thus, for all of these reasons, interpreting a "water of the United States" to refer to liquid water outside of a body of water would be contrary to the statutory term "navigable waters."

After an opportunity for reconsideration, EPA might attempt to save its interpretation by clarifying that, instead of "water" having a status as "navigable," a "body" of water can have that status, and then by interpreting water-transfer conveyances as defined in the rule to be navigable waterbodies. This interpretation, however, might also fail, because of the statute's prohibition of "discharges of [a] pollutant" where that prohibition applies to "any addition of any pollutant to navigable waters *from any point source.*" 33 U.S.C. §§ 1311(a), 1362(12) (emphasis added). The statute's definition of a "point source," which generally "means any discernible, confined and discrete

conveyance," specifically includes "any pipe, ditch, channel, tunnel, [or] conduit." 33 U.S.C. § 1362(14). Thus, where the Water Transfers Rule defines NPDES-excluded water-transfer activities to include "any system of pumping stations, canals, aqueducts, tunnels, pipes, or other such conveyances," a status-based interpretation of these conveyances considering them to be "navigable waters" would exclude from NPDES regulation point-source pollutant discharges that Congress clearly intended to regulate. It may be true that "certain water-bodies could conceivably constitute both a point source and a ['water.']" *Rapanos v. United States,* 547 U.S. 715, 772, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (Kennedy, J., concurring in the judgment); *see also id.* at 807, 126 S.Ct. 2208 (Stevens, J., dissenting) (joining this section of Justice Kennedy's concurrence without comment). *But see id.* at 735, 126 S.Ct. 2208 (plurality opinion) ("The [statute] thus conceive[s] of 'point sources' and 'navigable waters' as separate and distinct categories."). But in classifying something as a "navigable water," the Supreme Court has been clear that "the qualifier 'navigable' is not devoid of significance," *id.* at 731, 126 S.Ct. 2208 (plurality opinion), and "the traditional term 'navigable waters'—even though defined as 'the waters of the United States'—carries *some* of its original substance," *id.* at 734, 126 S.Ct. 2208 (plurality opinion). *See also id.* at 779, 126 S.Ct. 2208 (Kennedy, J., concurring the judgment) ("[T]he word 'navigable' in the Act must be given some effect."); *SWANCC,* 531 U.S. at 172, 121 S.Ct. 675 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its

authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.").

In *Rapanos v. United States,* the Supreme Court wrestled with the precise significance to give that term, resulting in a 4–1–4 judgment applying three different approaches to deciding whether to uphold the Army Corps of Engineers' determination that four wetlands lying "near ditches or man-made drains that eventually empty into traditional navigable waters[ ] constitute[d] 'waters of the United States' within the meaning of the [CWA]."[31] 547 U.S. at 729, 126 S.Ct. 2208 (plurality opinion). A plurality of four justices, led by Justice Scalia, held that the fields were not "navigable waters," because, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes.... [and] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Id. at 739, 126 S.Ct. 2208 (alterations and some internal quotation marks omitted). It thus rejected the Corps' contrary interpretation as "impermissible" under *Chevron. See id.* Conversely, four dissenting justices, led by Justice Stevens, voted

[31] Because the case involved whether § 404 permits were required, the Court reviewed the Corps' interpretation of "navigable waters," instead of EPA's. *See Rapanos,* 547 U.S. at 723–24, 126 S.Ct. 2208 (plurality opinion).

> to uphold the Corps' determination that the wetlands at issue constituted "navigable waters." Finding, initially, that "the fundamental significance of the [CWA]" in terms of congressional intent was " 'clearly to establish an all-encompassing program of water pollution regulation,' " the dissent deferred to the Corps' interpretation "[b]ecause there is ambiguity in the phrase 'waters of the United States' and because interpreting it broadly to cover [the] ditches and streams [at issue] advance[d] the purpose of the Act" by "properly control[ling] water pollution." *Id.* at 804, 126 S.Ct. 2208 (Stevens, J., dissenting) (quoting *City of Milwaukee,* 451 U.S. at 318, 101 S.Ct. 1784 (1981)).

Justice Kennedy, concurring in the judgment, applied a different standard than the other eight justices. Although he disagreed with the plurality's requirements of both "permanent standing water or continuous flow" and "a continuous surface connection to other jurisdictional waters," *id.* at 769–75, 126 S.Ct. 2208 (Kennedy, J., concurring in judgment), he also disagreed with the dissent to the extent that it, in his view, "read[ ] a central requirement out [of the Act]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance," *id.* at 778–82, 126 S.Ct. 2208. Instead, he held that "the Corps must establish a *significant nexus* on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries," a showing that he characterized as "necessary to avoid unreasonable applications of the statute" in light of the "potential overbreadth of the Corps' regulations." *Id.* at 782, 126 S.Ct. 2208 (emphasis added). He further explained that "[t]he required nexus must be assessed in terms

of the statute's goals and purposes," which he identified as " 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.' " *Id.* at 779, 126 S.Ct. 2208 (quoting 33 U.S.C. § 1251(a)). And he explained that a water would "come within the statutory phrase 'navigable waters' " under the significant-nexus standard if it could be shown that the water "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' " *Id.* at 780, 126 S.Ct. 2208. Because he found that "neither the agency nor the reviewing courts properly considered the issue" under what he found to be the correct standard, *id.* at 783, 126 S.Ct. 2208, he voted to "remand for consideration whether the specific wetlands at issue possess[ed] a significant nexus with navigable waters," *id.* at 787, 126 S.Ct. 2208. He thus concurred in the judgment to the extent that his opinion, like the plurality's, vacated the judgments below because those judgments had found that the waters at issue were "navigable waters" under different standards. *See id.* at 757, 126 S.Ct. 2208 (plurality opinion) (vacating judgments below); *id.* at 787, 126 S.Ct. 2208 (Kennedy, J., concurring in judgment) (vacating judgments below).

It appears, after *Rapanos,* that the "precise reach of the [CWA] remains unclear." *Sackett v. E.P.A.,* ––– U.S. ––––, 132 S.Ct. 1367, 1375, 182 L.Ed.2d 367 (2012) (Alito, J., concurring); *see also Rapanos,* 547 U.S. at 758, 126 S.Ct. 2208 (Roberts, C.J., concurring) ("It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the [CWA]. Lower courts and regulated entities will now have to feel

their way on a case-by-case basis."). However, many of the types of conveyances contemplated by the Water Transfers Rule would not be considered a "navigable water" under any of the three standards used in *Rapanos.* Under the plurality's standard, which adhered more closely to traditionally navigable bodies of water, "highly artificial, manufactured, enclosed conveyance systems—such as ... mains, pipes, hydrants, machinery, ... [or a] system of waterworks—likely do not qualify as 'waters of the United States,' " because "ordinary usage does not treat ... elaborate, man-made enclosed systems as 'waters' on a part with 'streams,' 'rivers,' and 'oceans.' " *Rapanos,* 547 U.S. at 736 n. 7, 126 S.Ct. 2208 (plurality opinion) (citations and some internal quotation marks omitted). Under Justice Kennedy's standard, the determination would be made on a case-by-case basis and would depend both on the specific characteristics of the water at issue and would be "assessed in terms of the statute's goals and purposes," which he discussed with reference solely to the statutory goal of " 'restor[ing] and maintain[ing] the ... integrity of the Nation's waters.' " *Id.* at 779, 126 S.Ct. 2208 (Kennedy, J., concurring in judgment) (quoting 33 U.S.C. § 1251(a)). And although the dissent applied a broader standard than Justice Kennedy did, it still implicitly agreed with his conclusion that an agency may broaden the reach of "navigable waters" if the broader interpretation "advances the purpose of the Act," which is "to properly control water pollution." *Id.* at 804, 126 S.Ct. 2208 (Stevens, J., dissenting). Thus, where EPA defines a "water-transfer activity" to include "any system of pumping stations, canals, aqueducts, tunnels, pipes, or other such conveyances," 73 Fed.Reg. at 33,704, it is clear that the plurality

opinion's interpretation of "navigable waters" would explicitly exclude these conveyances, Justice Kennedy's opinion would prohibit a blanket determination that these conveyances, in general, constitute "navigable waters," and both Justice Kennedy and the dissent would exclude these conveyances to the extent that they allow transfers of pollution to a navigable water in conflict with the statutory goal of "restor[ing]" and "maintain[ing]" water quality and "control[ling]" water pollution within bodies of water.

Because the Supreme Court in *Rapanos* analyzed the meaning of "navigable waters" in the context of *Chevron* deference, its definition of that phrase is binding on this Court and on the EPA. *See Brand X,* 545 U.S. at 985, 125 S.Ct. 2688 (finding that neither a court nor an agency were bound by a prior court decision where the prior court "was not presented with a case involving potential deference ... pursuant to the *Chevron* doctrine" (internal quotation marks omitted)). Therefore, because EPA may expand the scope of "navigable waters" only within the limits identified in *Rapanos,* and because it appears in this case that the Water Transfers Rule goes beyond those limits, the Court rejects EPA's interpretation.

D. Remand or Vacatur

"If the record before the agency does not support the agency action[or] if the agency has not considered all relevant factors ..., the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985). However, where, as here, in

part, a court concludes "that the statutory text ... forecloses" a final rule, the rule "cannot stand," and the court should vacate the rule to the extent that it exceeds the agency's statutory authority. *Nat'l Cotton Council of Am. v. U.S. E.P.A.,* 553 F.3d 927, 940 (6th Cir.2009) (vacating EPA rule promulgated as an "exception" to the NPDES program and codified at 40 C.F.R. § 122.3(h) after finding that the text of the CWA "forceclose[d]" the rule at *Chevron* step two).

In determining whether to vacate or to remand the an agency rule based on the agency's failure to provide a reasonable explanation, the D.C. Circuit has identified two relevant factors to consider, including "whether (1) the agency's decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly." *N. Air Cargo v. U.S. Postal Serv.,* 674 F.3d 852, 860–61 (D.C.Cir.2012).[32] Here, although the Court has found that EPA's justification does not hold water, it cannot say that it maintains such "serious doubts" that would weigh against a remand. Moreover, the second factor appears to be a wash, because although Western Water Providers and Western States argue that vacating the rule would result in "prohibitively expensive" compliance costs,

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[32] As another court has noted, "[t]he Second Circuit has not discussed the standard for determining whether vacatur is appropriate" in a similar circumstance, "but it has shown a willingness to look to the law of other circuits—particularly the D.C. Circuit—for guidance on the issue." *Natural Res. Def. Council v. U.S. E.P.A.,* 676 F.Supp.2d 307, 312 n. 5 (S.D.N.Y.2009) (citing *Riverkeeper, Inc. v. E.P.A.,* 475 F.3d 83, 96 (2d Cir.2007)).

(*see* Western States' Mem. of Law in Supp. of Cross–Mot. for Summ. J. & Resp. to Pls.' Mots. for Summ. J. (Dkt. No. 171) 13; Western Water Providers' Mem. of Law in Supp. of Cross–Mot. for Summ. J. & Resp. to Pls.' Mots. for Summ. J. (Dkt. No. 188) 6, 12–13), Environmental and State Plaintiffs argue that water transfers may result in serious disruption to the environment, (Envtl. Pls.' Mem. 31–35; State Pls.' Mem. 25–31). Therefore, the Court will remand the Water Transfers Rule and give EPA a chance to reexamine and reevaluate some new ideas.

III. Conclusion

In light of the foregoing analysis, the Court grants Plaintiffs' and Intervenor–Plaintiffs' Motions for Summary Judgment, denies Defendants' and Intervenor–Defendants' Motions and Cross-motions for Summary Judgment, vacates the Water Transfers Rule to the extent it is inconsistent with the statute—and in particular the phrase "navigable waters" as interpreted in *Rapanos* and in this Opinion—and remands the Water Transfers Rule to the extent EPA did not provide a reasoned explanation for its interpretation. The Clerk of the Court is respectfully directed to terminate the pending Motions. (*See* Dkt. Nos. 136, 142, 148, 158, 165, 167, 170, 174.) The Clerk is also directed to terminate the case captioned *Catskill Mountains Chapter of Trout Unlimited, Inc. et al. v. United States Environmental Protection Agency et al.,* Nos. 08–CV–5606 (KMK), 08–CV–8430 (KMK).

SO ORDERED.

United States Court of Appeals
For the Second Circuit
New York, New York 10007

April 18, 2017

By the Court:

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., et al.,
Plaintiffs-Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,
Consolidated Plaintiff-Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, SIERRA CLUB,
Intervenor Plaintiffs-Appellees,

Nos. 14-1823, 14-1909, 14-1991, 14-1997 and 14-2003 v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellants-Cross Appellees,

STATES OF COLORADO, STATE OF NEW MEXICO, STATE OF ALASKA, ARIZONA DEPARTMENT OF WATER RESOURCES, STATE OF IDAHO, STATE OF NEBRASKA, STATE OF NORTH DAKOTA, STATE OF NEVADA, STATE OF TEXAS, STATE OF UTAH, STATE OF WYOMING,

CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL UTAH WATER CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER, BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION, CITY OF BOULDER [COLORADO], CITY OF AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT, IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, KANE COUNTY [UTAH] WATER CONSERVANCY DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION, SALT LAKE & SANDY [UTAH] METROPOLITAN WATER DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER AUTHORITY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS, ACTING BY AND THROUGH ITS ENTERPRISE COLORADO SPRINGS UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS, CITY OF NEW YORK,

Intervenor Defendants-Appellants-Cross Appellees,

NORTHERN COLORADO WATER CONSERVANCY DISTRICT,

Intervenor Defendant,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Intervenor Defendant-Appellant-Cross Appellant.

Petitions for Rehearing En Banc were filed by counsel for the appellants on March 6, 2014, in appeal nos. 14-1823, 14-1909, 14-1991, 14-1997 and 14-2003. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.
Accordingly,

IT IS ORDERED that the petitions for hearing en banc are **DENIED**.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Clean Water Act, 33 U.S.C. § 1251(a)

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.]

33. U.S.C. § 1342(a)(1)

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

33 U.S.C. § 1344(a)

(a) Discharge into navigable waters at

specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1362(12)

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Water Transfers Rule, 40 C.F.R. § 122.3(i)

The following discharges do not require NPDES 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.