14-1823(L)

14-1909(con), 14-1991(con),
14-1997(con), 14-2003(con)

To Be Argued By:
DANIEL E. ESTRIN

United States Court of Appeals
for the
Second Circuit

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

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF 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, AND ENVIRONMENT FLORIDA

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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

Plaintiffs-Appellees,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, SIERRA CLUB,

Intervenor Plaintiffs-Appellees,

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

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,

Intervenor Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, 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, and Environment Florida, hereby disclose that 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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PRELIMINARY STATEMENT

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, and Environment Florida (collectively, "CMCTU"), respectfully submit this brief in opposition to the appeals filed by the EPA, the City of New York ("the City"), and the other Appellants herein.

SUMMARY OF THE ARGUMENT

This is the third time that the first five named Plaintiffs-Appellees on whose behalf this brief is submitted have appeared before this Court to argue the same issue: whether the plain, unambiguous requirements of sections 301 and 402 of the Clean Water Act ("CWA or "the Act") demand a National Pollutant Discharge Elimination System ("NPDES") permit to transfer pollutants from one body of water, through a point source, into another distinct body of water, where the pollutants contained in the source water would never reach the receiving water but for the point source transfer. The first two times, this Court answered this question with a unanimous and resounding "yes." *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 489 (2d Cir. 2001) ("*Catskills*

I"), *adhered to on recon.*, 451 F.3d 77, 84-85 (2d Cir. 2006) ("*Catskills II*"), *cert. denied*, 549 U.S. 1252 (2007). EPA, the City, and the other Defendants-Appellants apparently hope that "*Catskills III*" will be their charm.

Under EPA's Water Transfers Rule ("Final Rule"), salt water may be transferred directly into fresh water streams, sediment-laden water may be diverted into clear drinking water reservoirs, warm waters may be pumped into cold water habitats, chemical laden waters may be dumped into waters employed in farm and ranch irrigation, and invasive species may be spread into waters not yet infested—all without the public health, environmental and economic safeguards provided by an NPDES permit. JA 525-26.

Despite the fact that such unpermitted discharges of harmful pollutants would fly in the face of the section 301(a) discharge prohibition and the Act's bedrock objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251,—and in spite of this Court's prior holdings in *Catskills I* and *II* that polluted water transfers fall within the plain meaning of a "discharge of pollutants" that demands an NPDES permit—EPA argues[1] that the result this time will be different because this Court must now view EPA's action through the lens of *Chevron, U.S.A., Inc. v. Natural Res. Def.*

[1] The City's legal arguments parrot those advanced by EPA. CMCTU's responses to EPA's arguments throughout this brief are thus intended to also address the identical arguments advanced by the City.

Council, Inc., 467 U.S. 837, 842-43 (1984). However, as CMCTU will demonstrate below, the Final Rule fails under both steps of *Chevron*, and must be vacated as both contrary to the plain, unambiguous requirements of CWA section 301(a), and as an arbitrary and capricious interpretation that is manifestly contrary to the Act.

In support of its *Chevron* arguments, EPA insists that instead of following this Court's own clear *Catskills* precedent, the Court should adopt the Eleventh Circuit's reasoning in *Friends of the Everglades v. South Florida Water Management District*, which disagreed with this Court's finding that the statutory meaning of "addition" is plain. 570 F.3d 1210, 1227-28 (11th Cir. 2009) ("*Friends I*"). However, as the district court correctly found, the *Friends I* court erred when it (1) "attributed to EPA an interpretation that it did not actually adopt" (the "unitary waters theory"), and (2) improperly subsumed *Chevron's* step two analysis into *Chevron* step one and "failed to consider whether EPA provided a reasoned explanation for its interpretation." SPA 105.

Finally, the positions advanced by the other three groups of Defendants-Appellants—none of which purport to rely upon *Chevron* deference—do not merit serious consideration. South Florida Water Management District ("SFWMD") incredibly argues that the CWA clearly and unambiguously ***prohibits*** the regulation of polluted water transfers under the NPDES permit program. *See*

SFWMD Br. 7-10. This argument is certainly foreclosed by this Court's holdings in *Catskills I* and *II* that the plain and ordinary meaning of the Act's discharge prohibition *requires* NPDES permit coverage for polluted water transfers.

The Western States and Providers argue that CWA regulation of water quality through the NPDES program is necessarily unconstitutional or otherwise illegal whenever such regulation has the potential to affect states' water allocation rights. *See* Western States' Br. 12-18; Western Providers' Br. 26. This argument is also foreclosed by *Catskills II*, which rejected the contention that the CWA advances states' rights at the expense of federal primacy. *Catskills II*, 451 F.3d at 84.

This Court should decide these appeals as follows: (1) find (for a third time) that CWA section 301(a) plainly prohibits the point source discharge of polluted water from one water body into another distinct water body unless authorized by an NPDES permit (and that the Final Rule thus fails as an *ultra vires* act under *Chevron* step one); and (2) affirm the district court's holding that the Final Rule fails under *Chevron* step two, because EPA (a) failed to provide a reasoned explanation for its action; (b) utilized flawed methodology; (c) erroneously applied its flawed methodology; (d) relied upon flawed conclusions; and (e) adopted a new "status-based" definition of "navigable waters" to include water that has been

withdrawn from navigable water bodies, in contravention of *Rapanos v. United States*, 547 U.S. 715 (2006).

ISSUES PRESENTED

1) **Whether** the "unitary waters theory," a rationale that EPA purports to have adopted on appeal, is entitled to judicial deference as a "reasonable" interpretation of the Act where this Court's previous holding in *Catskills II* rejected that theory as leading to "absurd results," *Catskills II*, 451 F.3d at 81 (citing *Catskills I*, 273 F.3d at 493)?

2) **Whether** the plain and unambiguous requirements of sections 301 and 402 of the Clean Water Act, under *Chevron* step one, grant EPA authority to exempt water transfers from an NPDES permit where the discharge of pollutants from one water body into another distinct water body would never reach the receiving water but for the point source discharge?

3) **Whether** the district court correctly determined that EPA's promulgation of the Final Rule was arbitrary, capricious, and manifestly contrary to the statute under *Chevron* step two, because EPA (1) failed to provide a reasoned explanation for its action; (2) utilized flawed methodology; (3) erroneously applied its flawed methodology; (4) relied upon flawed conclusions; and/or (5) adopted a new

"status-based" definition of "navigable waters" to incorporate water that has been withdrawn from navigable water bodies, in contravention of the Act and *Rapanos*?

ARGUMENT

I. The District Court Correctly Found That EPA Did Not Adopt the "Unitary Waters Theory" as Its Rationale for the Final Rule.

Before discussing the application of *Chevron* to the Final Rule, we must clear up a point of continuing confusion overhanging this entire dispute: whether EPA formally adopted the so-called "unitary waters theory" as its rationale for its Final Rule. EPA argues that it did, and that the theory is therefore entitled to *Chevron* deference as afforded by Eleventh Circuit in *Friends I.*

Not only did the Eleventh Circuit disagree with this Court's precedent in *Catskills I* and *II*, and erroneously find ambiguity in the statute, but it also incorrectly assumed that EPA had adopted the "unitary waters theory" as its rationale for the Final Rule. As we will show, and as the district court correctly found, EPA did not adopt the "unitary waters theory." SPA 105-06. Thus, the purported "EPA interpretation" that the Eleventh Circuit found to be "reasonable" and entitled to *Chevron* deference, *i.e.*, "accept[ing] the unitary waters theory,"

Friends I, 570 F.3d at 1227, was actually not EPA's rationale for the Final Rule at all.[2]

It is difficult to determine precisely how the Eleventh Circuit came to the erroneous conclusion in *Friends I* that EPA had adopted the "unitary waters theory" in the Final Rule. Initially, the court correctly identified the source of the unitary waters argument, stating that "[***SFWMD's***] central argument is based on the 'unitary waters theory.'" *Id*. at 1217 (emphasis added).[3] Then, after pointing out that the "unitary waters theory" had "a low batting average," and in fact had "struck out in every court of appeals where it ha[d] come up to the plate," *id*., the court noted that ***EPA*** had now promulgated the Final Rule. *Id*. at 1218.

This is where the court's error becomes apparent, for while the court refers throughout its opinion to ***SFWMD's*** unitary waters argument, it nowhere cited any basis for its erroneous assumption that ***EPA*** had actually adopted that theory. Instead, after incorrectly deciding that the CWA is ambiguous (*Chevron* step one), the court jumped to the conclusion that the Final Rule "accept[ed] the unitary waters theory," *id*. at 1227, without even pointing to where or how that rationale

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[2] Notably, because *Friends I* was an appeal from a citizen suit enforcement case (like *Catskills I* and *II*), and not an APA rule challenge, the Eleventh Circuit did not have the benefit of the administrative record to inform its *Chevron* review.

[3] *See also Friends I*, 570 F.3d at 1223 ("Under the Water District's unitary waters theory…"). The "Water District" referred to is SFWMD, an Intervenor Defendant-Appellant in these consolidated appeals.

was adopted by EPA. The court then erroneously deferred to "EPA's construction [as] one of the two [reasonable] readings…found." *Id.* at 1228. However, because EPA never actually adopted the "unitary waters theory," the Eleventh Circuit erroneously deferred not to the rationale adopted by EPA in its rulemaking (which is what triggers *Chevron*), but rather to arguments advanced by counsel for various parties in the *Friends I* litigation.

It is well-established that courts may not defer to arguments or rationales proffered by agencies or other parties in litigation that were not expressly adopted by the agency. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Catskills I*, 273 F.3d 491 ("[A] position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference.").

The evidence in the administrative record that EPA did not adopt the "unitary waters theory" as its rationale is overwhelming. First, of course, is a review of the Final Rule itself, including its preamble, which does not contain the words "unitary waters " or "singular entity" (as the theory was referred to by the First Circuit in *Dubois v. United States Department of Agriculture*, 102 F.3d 1273, 1296 (1st Cir. 1996)), anywhere in its eleven-page text. SPA 123-34. In the Final

Rule's section, "Rationale for the Final Rule," SPA 126-29, one would reasonably expect to find an explicit adoption of the "unitary waters theory" if that was in fact EPA's rationale. At a minimum, one would expect EPA to state that it treats all waters of the United States as *one entity* in determining whether an addition of pollutants has occurred. However, no such adoption of this theory is found in the Final Rule. Instead, EPA relies exclusively upon its supposed "holistic" reading of the statute, which purportedly allows it to divine that "Congress generally did not intend to subject water transfers to the NPDES program." SPA 129.

To be sure, EPA hoped to have its proverbial cake and eat it too by providing a couple of vague, passing references to create enough confusion for the public or a court to believe that it adopted the rationale. However, these vague, passing references simply do not equate to EPA's express adoption of the theory for purposes of judicial review. *See, e.g.*, *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 412 (D.C. Cir. 2013) (rejecting "passing references" in rulemaking as falling "far short" of satisfying "EPA's fundamental obligation to set forth the reasons for its actions" (internal quotation marks omitted)).

For example, EPA referenced the theory (without actually calling it unitary waters) in a quote from a brief filed by the Department of Justice ("DOJ") on behalf of the United States in the *Friends I* litigation. SPA 127 ("In pending litigation, on the other hand, the United States has taken the position that…"). On

examination, however, all this quotation did was describe what DOJ had argued to a court in an earlier case. EPA never expressly adopted DOJ's argument as its own rationale for the rulemaking.[4]

Any potential confusion about whether EPA adopted the "unitary waters theory" as its rationale for the Final Rule is quickly dismissed by EPA's guidance document entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" ("2005 Interpretive Memorandum") and the agency's communications with stakeholders in August 2005.[5] As a reminder, the 2005 Interpretive Memorandum was released by EPA in the shadow of the Supreme Court's *Miccosukee* opinion issued the prior year, in which the Court had cast significant doubt upon the viability of the "unitary waters theory." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107-08 (2004).

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[4] EPA also states generally that it "believes that ***an*** addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred," SPA 127 (emphasis added). While appearing to touch upon the concept of unitary waters (again, without calling it that), EPA never explicitly adopted the theory as its rationale for the Final Rule. Moreover, it is uncontested that ***an*** addition of pollutants occurs when they are first introduced; the relevant question is whether a subsequent point source transfer of those pollutants to a distinct water body constitutes ***another*** addition of pollutants to that distinct receiving water body.

[5] The Final Rule explicitly states that it "is consistent with EPA's June 7, 2006, proposed rule, which was based on [the] August 5, 2005, interpretive memorandum." SPA 123.

In its 2005 Interpretive Memorandum, EPA explained its actual rationale for the statutory interpretation that it would later codify in the Final Rule, and relied exclusively upon its purported "holistic" reading of the statute. JA 271-89. The agency insisted that this "holistic" approach allowed it to reach its conclusions regarding a general congressional intent not to regulate polluted water transfers through the NPDES program. JA 274-80. EPA then addressed *Miccosukee*, and clarified that the agency had decided, in light of the "Court's concerns" about the viability of the "unitary waters theory," to abandon that theory. While obviously cautious with its wording, EPA explained that:

> The [*Miccosukee*] Court stated that the unitary waters theory could be viewed as inconsistent with statutory provisions focusing on protection of individual water bodies….***The present Agency interpretation reflects EPA's consideration of the Court's concerns***.

JA 284, n.14 (emphasis added). In other words, by August 2005, EPA had "considered" the "concerns" the Supreme Court had expressed in *Miccosukee* and determined to abandon the "unitary waters theory" as its rationale for its statutory interpretation and subsequent rulemaking. EPA opted ***instead***[6] to advance its purported "holistic" reading of the statute described in the 2005 Interpretive Memorandum as its sole rationale for the Final Rule.

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[6] The word "instead" is significant, as discussed below.

If this explicit "walk-away" from the "unitary waters theory" in the 2005 Interpretive Memorandum fails to convince the Court that EPA did not adopt the "unitary waters theory," EPA expressly acknowledged as much in a communication with Western Water Providers. On August 3, 2005, just two days before the 2005 Interpretive Memorandum was released, Ann Klee, EPA's General Counsel and the co-author of the 2005 Interpretive Memorandum, left this telephone message for Peter Nichols, Esq.:[7]

[7] Mr. Nichols is counsel of record to the Western Providers in these consolidated appeals.

P	TO: Peter Nichols	DATE: 8/3/05	TIME: 1:07 PM
H	FROM: Ann Klee	PHONE NUMBERS:	
O	OF: EPA		

N	M	Hi Peter, Ann Klee at EPA. I just wanted to follow up. I talked to Mark Limbaugh
E	E	I guess the day before yesterday or yesterday and he mentioned that you two had
	S	talked and I just wanted to circle back and tell you know that we are on track to file
M	S	a brief on Friday in the Miccosukee litigation. It will be based on a memo that Ben
E	A	Grumbles and I are going to be jointly signing as an agency interpretation on the
M	G	question of whether or not water transfers require NPDES permits. He mentioned
0	E	that you had expressed some concern about where we would be on unitary waters.

We are not basing the interpretation or the memorandum on the unitary waters theory but instead are looking at a statutory construction based argument looking at 101g and 304f and the statute as a whole rather than simply trying to focus solely on the term addition and conclude, as you might expect, that the agency's view that the better interpretation of the entire statute is that Congress did not intend for water transfers to require NPDES permits. We do have some discussion of the case law, including the Miccosukee decision and the language of meaningful distinctness and what we think that might mean. And, the other thing that the statement does is that it indicates that the agency will initiate a rulemaking to address this issue. So, we are hoping that it will at least signal the court that if they don't give a Chevron deference which we would certainly like but recognize that this is more in the nature of an interpretive rule that it should proceed cautiously since the agency will be proceeding with a rulemaking. So, I would be happy to talk about it further but it probably won't be ready until Friday. We are still working on word smithing and we have been through several different approaches which is part of why it has has taken so long. I appreciate all of the help you have given along the way. Hope this is helpful. I will be out in Texas but if you want to call Steve Nugeborn on Friday he can get you a PDF version of the memo once it is signed.

Thanks.

JA 1134; JA 442-43, Fig. 33. Thus, Klee expressly answered in response to Nichols's "concern" about where EPA "would be on unitary waters," that EPA was "not basing the interpretation or the memorandum on the unitary waters theory but ***instead***" decided to take the holistic approach. *Id.* (emphasis added). Klee's statement demonstrates beyond any doubt that by August 2005, EPA had decided in light of *Miccosukee* not to adopt the "unitary waters theory" as the rationale for

its position that polluted water transfers do not trigger the CWA discharge prohibition or require NPDES permits.

Notably, this Court recognized in *Catskills II* that EPA's "holistic reading" of the CWA and the "unitary waters theory" are not one and the same. After discussing the "unitary waters theory" and how the Court had rejected it in *Catskills I* because it would lead to an "absurd result," *Catskills II*, 451 F.3d at 81, the Chief Judge Walker characterized EPA's then-recent 2005 Interpretive Memorandum:

> The EPA interpretation argues that, ***rather than*** primarily focusing on the meaning of the word "addition," as we did in *Catskills I,* a ''holistic'' view of the statute that takes this intent into account is appropriate.

Id. at 82 (emphasis added).

As the above discussion and record evidence demonstrate, EPA did not, in fact, adopt the "unitary waters theory" as its rationale for the Final Rule. *Friends I* is thus fatally flawed. This Court should follow its own *Catskills* (and *Dague*[8]) precedent, and decline EPA's invitation to follow the Eleventh Circuit's legally and factually erroneous reasoning.

[8] "The Second Circuit held that water transferred between two navigable bodies of water…constituted a 'discharge of a pollutant.'" JA 18-19 (citing *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991)); *see infra* Section II.A.

II. *Chevron* Step One: The Act Unambiguously Prohibits the Transfers of Polluted Water Between Distinct Water Bodies Without an NPDES Permit.

The Final Rule exceeds the scope of EPA's permissible rulemaking authority under the familiar *Chevron* framework. When reviewing administrative rulemaking, a court must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. If a statute's language is unambiguous, courts "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. Although agencies may promulgate rules to fill gaps left by Congress, there can be "no gap for the agency to fill and thus no room for agency discretion" without ambiguity in the subject statutory language. *United States v. Home Concrete & Supply, L.L.C.*, 132 S. Ct. 1836, 1843 (2012) (internal citations and quotations omitted). Here, the prohibition against discharges found in section 301(a) is plain and unambiguous, leaving no gap for EPA to legally fill.

To determine whether the language of the statute is ambiguous, the court's inquiry must progress in the following sequence: (1) examine the plain meaning; (2) look to the entire statutory context; and then, (3) analyze legislative intent. *See Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007). Courts must also apply the canon of statutory construction that "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) (internal citation

omitted). Thus, the Final Rule must not create or be interpreted in a way that produces absurd results. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2455 (2014) ("[I]n order to make those provisions apply to greenhouse gases in a way that ***does not produce absurd results***, the EPA effectively amended the Act." (emphasis added)).

A. Prior Judicial Rulings, Including This Court's *Catskills* Rulings, Are Dispositive of This Issue.

EPA attempts—as it must—to brush off this Court's *Catskills* opinions as irrelevant to its present consideration of the Final Rule, EPA Br. 32-34, but it cannot avoid the fact that this Court has twice interpreted the very same statutory language that the Final Rule purports to reinterpret. In both *Catskills* opinions, this Court found that the ordinary meaning of the statute plainly requires NPDES permits for point source transfers of polluted water between distinct water bodies. That statutory language has not changed—and nothing in EPA's rulemaking can change—the plain and ordinary meaning of the word "addition" as it has twice been interpreted by this Court.

In *Catskills I*, Chief Judge Walker explained that "the crux of this appeal is the meaning of 'addition,' which the Act does not define." 273 F.3d at 486. In reviewing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ("*Gorsuch*"), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d

580 (6th Cir. 1988) ("*Consumers Power*"), he agreed with those cases that for there to be an "addition" of pollutants, a point source must introduce pollutants from the "outside world," which this Court "construed as ***any place outside the particular water body to which pollutants are introduced***." *Catskills I*, 273 F.3d at 491 (emphasis added).

The Chief Judge then explained that given the ordinary meaning 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). Later in the opinion, the Court expressly found:

> ***Given the ordinary meaning of the CWA'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. *See Dubois,* 102 F.3d at 1296-97. 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."***
>
> *　　　　*　　　　*
>
> In any event, none of the statute's broad purposes sways us from what we find to be the ***plain meaning of its text....We find that the textual requirements of the discharge prohibition in § 1311(a) and the definition of "discharge of a pollutant"' in § 1362(12) are met here.***

Catskills I, 273 F.3d at 493-94 (emphasis added).

This Court was later asked by the City to reconsider its *Catskills I* holding in light of the Supreme Court's *Miccosukee* opinion and the 2005 Interpretive Memorandum. In *Catskills II*, this Court made even more definite that its statutory interpretation was based on the plain meaning of the CWA. First, the Court confirmed that its ruling in *Catskills I* was based on an "***express permit requirement*** for water transfers that result in the addition of pollutants." *Catskills II*, 451 F.3d at 81 (emphasis added). Then, concluding that the City was "basically serv[ing it] a warmed-up argument that [it] rejected in *Catskills I*," this Court concluded that neither *Miccosukee* nor the 2005 Interpretive Memorandum raised any compelling or cogent reasons for reconsideration. *Id*. at 82. The Court's analysis concluded:

> In the end,…[the City's] ''holistic'' arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for…"any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). It is the meaning of the word "addition" upon which the outcome of *Catskills I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context.…The City and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.

Catskills II, 451 F.3d at 84-85.

According to EPA, this Court's prior holdings interpreting the exact same statutory language at issue in this appeal should be paid little mind, because this Court must now view the question through "the lens" of *Chevron*.[9] *See* EPA Br. 32-34. EPA's argument that this Court should ignore its own precedent misses the mark, however, because whatever powers the administrative rulemaking process may provide to a federal agency, it certainly does not provide a magic wand by which EPA could have miraculously converted what this Court ***twice*** found to be the plain meaning of the Act's discharge prohibition into the vague and uncertain language necessary for EPA to possibly prevail at *Chevron* step one.

EPA's attempt to overrule this Court's plain meaning judicial determinations via a conflicting interpretation in the Final Rule is also foreclosed by *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). *Brand X* establishes that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. EPA argues that *Brand X* does not apply here because *Catskills I* and *II* did

[9] In the preamble to the Final Rule, EPA acknowledged that its interpretation is "at odds with" at least three Courts of Appeals, including this Court. SPA 126, n.4. EPA attempted to justify its effort to overrule these courts by noting that they did not view "the question of statutory interpretation through the lens of *Chevron* deference." *Id.*

not apply *Chevron* deference (owing to the fact that the Final Rule had not yet been adopted); however, *Brand X* explicitly does ***not*** require that the prior judicial construction be made in the *Chevron* context. Rather, it solely requires that "judicial precedent hold[] that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Id.* at 982-83.

In *Miccosukee*, the Supreme Court also examined the question of whether a polluted water transfer required an NPDES permit, and indicated disfavor for the "unitary waters theory." While it remanded the case because the record was not clear as to whether the subject waters were meaningfully distinct, the Court telegraphed that the "unitary waters theory" would likely not be well received:

> [S]everal NPDES provisions might be read to suggest a view contrary to the unitary waters approach. For example, under the Act, a State may set individualized ambient water quality standards by taking into consideration "the designated uses of the navigable waters involved." 33 U.S.C. § 1313(c)(2)(A). Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body. § 1313(d). This approach suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.
>
> …The "unitary waters" approach could also conflict with current NPDES regulations. For example, 40 CFR § 122.45(g)(4) (2003) allows an industrial water user to obtain "intake credit" for pollutants present in 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….

Miccosukee, 541 U.S. at 107-08. Chief Judge Walker later discussed *Miccosukee* in *Catskills II*, and noted:

> Miccosukee cited with approval our "soup ladle" analogy and the distinction between inter- and intra-basin transfers. 541 U.S. at 109–10. The Court remanded the case to the district court to determine whether the water bodies in question were ''two pots of soup, not one.'' *Id.*; *cf. S.D. Warren Co.,* 126 S. Ct. at 1850 n.6. This remand would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers.
>
> The City also reasserts the unitary-water theory of navigable waters. ***Our rejection of this theory in* Catskills I*, however, is supported by* Miccosukee*, not undermined by it*….Thus, *Miccosukee* did no more than note the existence of the theory and raise possible arguments against it.

Catskills II, 451 F.3d at 83 (emphasis added).

Then, last year in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013), the Supreme Court discussed *Miccosukee* and clarified its holding:

> In *Miccosukee,* polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir. We held that this 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 (internal citations omitted) (emphasis added).

Based upon the Supreme Court's understanding of its own holding in *Miccosukee*, the Final Rule must be viewed as virtually "dead in the water," since it relies upon an interpretation of the CWA that is utterly antagonistic to the Court's own understanding of *Miccosukee*. Contrary to the Court's statement in *L.A. County* 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,'" EPA's Final Rule posits that water transfers ***do not*** count as discharges of pollutants under the CWA ***even if*** they are between meaningfully distinct water bodies.[10]

While the Supreme Court was not asked to rule on the validity of the Final Rule in *Miccosukee* or *L.A. County*, its analysis of directly applicable law and facts demonstrates that it is extremely likely to find that the plain meaning of the CWA prohibits polluted water transfers between distinct water bodies without an NPDES permit.

B. The Act's Plain Meaning Unambiguously Prohibits Unpermitted Polluted Water Transfers.

This Court should vacate the Final Rule at *Chevron* step one even if it finds that its *Catskills* holdings are not binding upon it. To determine the plain meaning

[10] It is simply inexplicable that the City would cite *L.A. County* as providing support for its argument. *See* City Br. 50.

of the statute and whether EPA has rulemaking authority, this Court must first identify the "precise question at issue." *Chevron*, 467 U.S. at 842. In the preamble, EPA stated that the Final Rule's purpose is to clarify and determine "whether a water transfer as defined in the new regulation constitutes an '***addition***' within the meaning of section 502(12)." SPA 126 (emphasis added). However, as the district court correctly recognized, EPA broadened its analysis and defined the precise question as "whether a transfer of water and any pollutants contained therein is an '***addition'*** of those pollutant*s* ***'to navigable waters***.'" SPA 38 (emphasis added).

EPA thus conflated its interpretation of "addition" to include the broader phrase "addition…to navigable waters." *See* SPA 126 ("[T]oday's rule has been promulgated to address the question whether water transfers require NPDES permits."); *see also* EPA Br. 26 ("The textual analysis [for *Chevron* step one] begins with the phrase 'any addition…to navigable waters.'"). Therefore, to determine whether ambiguity creates a gap for EPA to fill, the court must analyze both "addition," and "addition" in conjunction with "navigable waters."

After determining that the relevant language is actually "addition...to navigable waters," the court's inquiry must then turn to the plain meaning of that phrase. Section 301(a) plainly states that "[e]xcept as in compliance with this [Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Congress defined "discharge of a pollutant" as "***any*** addition of ***any***

pollutant to navigable waters from ***any*** point source[.]" 33 U.S.C. § 1362(12) (emphasis added). While there are explicitly prescribed exemptions in section 502(14) from the CWA's broad prohibition of point source discharges, there is no exemption for polluted water transfers. The Final Rule directly contradicts the plain language of the CWA by impermissibly purporting to exempt these very discharges from the statutory prohibition.

Congress' ubiquitous use of the word "any" throughout section 301(a) clearly expresses its intent to regulate ***every*** point source discharge of pollutants to waters of the United States. The meaning of the term "any" is unambiguous. "Any" means "every, or all," which in the context of section 301(a)'s discharge prohibition, means every or all pollutants from every or all point sources. *American Heritage Dictionary* 81 (4th ed. 2006). The 1972 amendments that added section 301 established "a comprehensive program for controlling and abating water pollution." *Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981) (quoting *Train v. City of New York*, 420 U.S. 35, 37 (1975)). Congress intended that "[***e***]***very*** 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." *Milwaukee,* 451 U.S. at 318.

While the term "addition" is not defined in the CWA, the Supreme Court has explained that words that are "neither defined in the statute nor a term of art" must

be interpreted by their "ordinary or natural meaning." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006) (internal citations omitted) (interpreting "discharge" under the CWA); *see also L.A. Cnty.*, 133 S. Ct. at 713 (using a common, ordinary meaning to determine what constitutes an "addition" under the CWA). The ordinary and natural meaning of "add" is "to join or unite so as to increase in size, quantity, quality, or scope[.]" *American Heritage Dictionary* 19 (4th ed. 2006); *see also L.A. Cnty.*, 133 S. Ct. at 713. All parties to this appeal apparently agree with this definition, which is consistent with the Supreme Court's recent interpretation of "addition" in *L.A. County*. *See* SPA 42 (identifying all the parties' agreement on the ordinary definition and its consistency with the Supreme Court's interpretation).

As discussed above, this Court has repeatedly held that the CWA plainly prohibits polluted water transfers without an NPDES permit. *See Catskills II*, 451 F.3d at 81-82; *Catskills I*, 273 F.3d at 493; *see also Dague,* 935 F.2d at 1354-55. EPA's attempt to subvert this Court's prior interpretations of the plain meaning of section 301(a) should be rejected.

C. Only Congress May Exempt Point Source Discharges of Pollutants from the Section 301(a) Discharge Prohibition and the Section 402 NPDES Permit Requirement.

Where Congress intended to provide exemptions to section 301(a)'s plain, unambiguous discharge prohibition, it did so explicitly. Section 502 of the CWA

explicitly excludes two categories of discharges of pollutants from the general prohibition: water injected into a well to facilitate production of oil or gas and agricultural stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362(6), (14). Both of these statutorily exempt activities involve what would otherwise be prohibited discharges of polluted water. Since Congress specifically excluded these categories of discharges from the discharge prohibition and regulation under the NPDES program, under the canon of *expressio unius est exclusio alterius*, all other point source discharges of pollutants must be presumed to be encompassed within the discharge prohibition and NPDES permit requirements.

The Final Rule is an obvious attempt by EPA to unlawfully exempt a category of discharges from the NPDES permitting program without any explicit indication of congressional intent or authority. As the Supreme Court has emphasized, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). This canon of statutory construction has been applied in the specific context of EPA attempts to categorically exempt discharges of pollutants from the CWA permitting program. *See 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."); *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1021 (9th Cir. 2008) ("The analysis of the D.C. Circuit in *Costle*, with which we agree, is dispositive…. The only possible textual source of authority for exemptions…is section 402 of the CWA.").

EPA's own actions and statements unequivocally demonstrate its purpose and intent to exempt certain additions. In its brief, EPA describes the Final Rule as an exclusion when it explicitly states that the Final Rule "exclude[s] water transfers from the NPDES permit program." EPA Br. 14. Moreover, EPA did not codify the Final Rule in the "Definitions" section of its NPDES regulations, 40 C.F.R. § 122.2, as it would have were it truly just interpreting or clarifying an undefined statutory term. Rather, EPA codified the Final Rule as an "exclusion" from the NPDES permitting program in 40 C.F.R. § 122.3—an acknowledgement that the Final Rule is an attempt to exclude or remove statutorily covered discharges from the NPDES program by administrative fiat, rather than define an ambiguous term. 40 C.F.R. § 122.3; *see also* 40 C.F.R. § 122.2 (Section entitled "Definitions[]," fails to include any definition or explanation of "addition.").

Whatever authority EPA may have to issue interpretive regulations explicating undefined statutory terms, EPA clearly lacks the authority to amend the CWA by "interpretation." *See League of Wilderness Defenders v. Forsgren*, 309

F.3d 1181, 1190 (9th Cir. 2002) ("Allowing the EPA to contravene the intent of Congress, by simply substituting the word 'define' for the word 'exempt,' would turn *Costle* on its head."). In fact, EPA does not define or expand upon the meaning of "addition" at all throughout this rulemaking; instead, EPA simply "address[es] 'addition,'" JA 288, by stating what the term is *not*. *See* Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Envtl. L. Rep. 10770, 10784 n.141 (2014) (footnote and accompanying text).

At base, the Final Rule is just the latest in a long line of *ultra vires* attempts by EPA to categorically exempt classes of point source pollutant discharges from the CWA's broad discharge prohibition and NPDES permit requirements. *Nat'l Cotton Council of Am. v. EPA*, 533 F.3d 927, 940 (6th Cir. 2009) (EPA exceeded CWA authority by exempting certain pesticide applications to waters from NPDES); *Nw. Envtl. Advocates*, 537 F.3d at 1021; *Natural Res. Def. Council, Inc.*, 568 F.2d at 1377.

D. EPA's Contextual Analysis of the CWA and Its Legislative History Does Not Support a Finding of Ambiguity Necessary for Its Rulemaking.

EPA bases its finding of ambiguity in the CWA upon what it deems a "holistic" reading of the statute. SPA 127. However, "holistic" analysis to determine congressional intent requires just what it says—a "holistic" examination

of ***all*** the pertinent statutory provisions as well as a fair and accurate balance of ***all*** of the statute's goals and policies. Unfortunately, EPA's analysis failed to consider ***all*** of the Act. Instead, EPA points to four provisions[11] as evidence of congressional intent that polluted water transfers do not trigger the section 301(a) discharge prohibition, thus seeking to create ambiguity in the interpretation of "addition…to navigable waters." EPA leaned on sections 101(b), 101(g), 304(f), and 510(2) for support that Congress intended state water allocation and state sovereignty rights to override water quality concerns with respect to polluted water

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[11] Each of these provisions identified by EPA as purported indicators of ambiguity, except section 510(2), were added in 1977, five years after the Clean Water Act was originally enacted. The Senate Committee Report stated that these Amendments were intended to "exempt irrigation return flows from all permit requirements." H.R. Rep. No. 95-830, at 69 (1977) (Conf. Rep.), *reprinted in* 3 Legislative History of the Clean Water Act of 1977, Comm. Print of the S. Comm. on Env't and Pub. Works, at 253. Nowhere in the legislative history for the 1977 Amendments are water transfers mentioned, and, thus, these provisions clearly were not intended to exclude water transfers from NPDES permitting requirements. Furthermore, the 1977 amendments do not presumptively provide or inform the meaning of original, unmodified statutory provisions. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985) (The 1977 Amendments constitute "a major piece of legislation aimed at achieving 'interim improvements *within the existing framework*' of the [CWA]." (citing H.R. Rep. No. 95–139, at 1–2 (1977)) (emphasis added)). Thus, the provisions EPA cites to, that were part of the 1977 Amendments, cannot influence the meaning of the rest of the CWA or Congress' *original intent* to prohibit all discharges (including polluted water transfers) under section 301 unless expressly provided for in the language of the Amendment. The legislative history cited to throughout this brief further demonstrates that Congress explicitly stated that these amendments would not change or effect existing law, namely the section 301 discharge prohibition and the bedrock objective of the CWA.

transfers. EPA Br. 29-32. However, EPA completely "ignore[d] the remainder of the 200-page statute, consisting of over 500 subsections and over 800 paragraphs, ***most of which are unambiguously focused on promoting pollution control***" rather than state sovereignty. Miller, *supra*, at 10787 (emphasis added).

1. Subsections 101(b) & (g) of the CWA Do Not Limit the Reach of the NPDES Permitting Program or Subordinate Water *Quality* Regulation to Water *Quantity* Authority.

EPA relies on section 101(b) of the CWA to establish that Congress intended to "limit interference with traditional state control of water use and allocation." EPA Br. 29; *see also* SPA 128 ("[The CWA] also recognizes that the States have primary responsibilities with respect to the 'development and use (including restoration, preservation, and enhancement) of land and water resources.' CWA section 101(b)."). EPA cites this provision as evidence of "Congress's general direction against unnecessary Federal interference with State allocation of water rights." SPA 128. EPA then irrationally jumps to the conclusion that this secondary goal of state rights trumps the preservation and restoration of the chemical, physical, and biological integrity of waters of the United States. *Id.*

Section 101(g), upon which EPA also relies, states 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 this chapter." 33 U.S.C. § 1251(g) (emphasis added). Subjecting polluted water

transfers to NPDES permitting requirements does not supersede a state's ability to allocate quantities of water. Rather, it simply stipulates water quality requirements for point source discharges of pollutants. Section 101(g) is therefore not germane to the question of whether polluted water transfers are subject to NPDES permitting requirements. *See, e.g.*, *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) (defining section 101(g) as a mere "general policy statement" which could not nullify an express permitting provision even if the provision may seem inconsistent with the broadly stated purpose of the policy statement articulated in section 101(g)).

Furthermore, as the Supreme Court has held, "[s]ections 101(g) and 510(2) 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."[12] *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994).

This Court also considered the section 101 and 510 arguments in *Catskills II*, and rejected them, finding that EPA's "'holistic' arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply

[12] The Conference Report for the 1977 Amendments of the CWA explicitly states that section 101(g) "is not intended to change existing law." H.R. Rep. No. 95-830, at 52 (1977) (Conf. Rep.), *reprinted in* 3 Legislative History of the Clean Water Act of 1977, Comm. Print of the S. Comm. on Env't and Pub. Works, at 236; Miller, *supra*, at 10788.

overlook its plain language." *Catskills II*, 451 F.3d at 84. This Court should again reject EPA's effort to artificially create ambiguity in the statute by misrepresenting actual Congressional intent, which is evident from the "plain language" of the Act.

2. Section 304(f)'s Treatment of Water Transfers as Nonpoint Sources Does Not Constructively Exempt Water Transfers from the NPDES Permitting Program.

Section 304(f) of the Act compels EPA's Administrator to issue guidelines on nonpoint sources of pollution. This section lists several examples of activities which may be regulated as nonpoint sources, including agricultural runoff, construction activities, and "changes in…flow…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). EPA admits that this section of the CWA "does not explicitly exempt a discharge otherwise subject to the NPDES program from the permit requirement," EPA Br. 30 (internal quotation marks omitted), and goes on to state, not that this provision of the CWA creates ambiguity, but only that "[section 304(f)] ***supports*** an interpretation that Congress intended water transfers to be handled outside the NPDES program." *Id.* at 31 (emphasis added); *see also* SPA 128; H.R. Rep. No. 92–911, at 109 (1972) (noting that nonpoint sources *may* include "natural and manmade changes in the normal flow of surface and ground waters.").

This is a flawed reading of the statute. Nowhere in the CWA are "nonpoint sources" of pollution defined. Particularly, section 304 is not a definitional provision of the CWA. It is entitled, "Information and Guidelines." Subsection (f) is entitled, "Identification and evaluation of nonpoint sources of pollution; processes, procedures and methods to control pollution." § 1314(f). Nonpoint sources are left, then, to be understood as any source which is not a point source. Point sources are defined in section 502 as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure…from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Clearly, some of the listed categories of point sources overlap with the potential nonpoint sources listed in section 304. For example, "channel[s]" are listed as point sources in section 502, while "changes in…flow…caused by…channels" are listed as potential nonpoint sources in section 304. § 1314(f). Congress therefore would have contradicted itself to have written section 304 with the intention of broadly excluding all listed sources from NPDES permitting requirement as "nonpoint sources."

In *Catskills II*, this Court considered the very same section 304 arguments, and found that "[section] 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they ***also*** fall within the 'point source' definition." *Catskills II*, 451 F.3d at 84 (emphasis in original) (quoting

Miccosukee, 541 U.S. at 106 and rejecting argument that section 304(f) exempts flow diversion facilities from NPDES permitting requirements).[13] Once again, EPA attempts to revive arguments that this Court has already expressly rejected.

3. Section 510(2) Does Not Evince Congressional Intent to Exempt Regulation of Water Transfers Under Section 402.

Section 510(2) states that "[e]xcept as expressly provided in this chapter, nothing in this chapter shall…be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2). EPA asks this Court to read section 510(2) as an indication that Congress enacted this provision specifically to "avoid interference with state water allocation decisions," EPA Br. 30, which purportedly further demonstrates ambiguity as to whether polluted water transfers must be regulated pursuant to sections 301 and 402.

This argument must be rejected. First, the regulation of water transfers under the NPDES Program falls neatly within the plain meaning of section 510(2).

[13] Other courts have also considered and rejected EPA's section 304 argument. *See, e.g.*, *United States v. Earth Scis. Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("[I]t contravenes the intent of [the CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point. Therefore, we hold the district court erred in interpreting [304(f)] as enumerating nonpoint source exemptions from [CWA]…regulations. [C]ategories listed in § 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation.").

Specifically, the discharge prohibition, section 301(a), and the NPDES permitting requirement, section 402, for discharges of pollutants ***are*** "expressly provided in this chapter" (i.e., the Act), and therefore, fall outside the domain of section 510(2). 33 U.S.C. § 1370. Furthermore, even if this Court does not consider the applicability of NPDES permitting requirements to polluted water transfers to be *express*, reading this section to exclude polluted water transfers would be curtailing the CWA wherever any ambiguity arises that affects states' rights to control their water in any respect—whether quality or quantity. This absurd result would fly in the face of decades of judicial decisions carefully resolving ambiguities in the CWA that have an impact on states' jurisdictions over their waters.[14] *See, e.g.*, *PUD No. 1*, 511 U.S. at 720.

* * *

In sum, this Court should again "reject[] the contention that the provisions of the CWA reserving power to the states could overcome the express permit requirement for water transfers that result in the addition of pollutants," *Catskills*

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[14] Congress did not amend section 510 in 1977. Rather in its amendment of section 101(g), Congress explicitly stated its intention "to clarify [and not change] existing law to assure its effective implementation." H.R. Rep. No. 95-830, at 52 (1977) (Conf. Rep.), *reprinted in* 3 Legislative History of the Clean Water Act of 1977, Comm. Print of the S. Comm. on Env't and Pub. Works, at 236. Therefore, section 101(g) does not interfere with the original purpose of section 510, nor does it negate the explicit statement that section 510 applies solely "*except as expressly provided in this Act*." 33 U.S.C. § 1370.

II, 451 F.3d at 81, and again "find that the textual requirements of the discharge prohibition in § 1311(a) and the definition of 'discharge of a pollutant'…are met here." *Catskills I*, 273 F.3d at 494.

III. *Chevron* Step Two: The District Court Correctly Determined That the Final Rule Is Procedurally Defective, Arbitrary and Capricious in Substance, and Manifestly Contrary to the CWA.

Should this Court find that the language of the Act is ambiguous, and that the Final Rule passes muster under *Chevron* Step One, the Court must defer to the agency's interpretation established in the ensuing regulation "unless [its interpretation is] procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). While "the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency," *Chevron* deference is not a blind deference,[15] as the agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."). As a result, this Court's "inquiry must be searching and careful." *Natural Res. Def.*

[15] "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)).

Council v. EPA, 658 F.3d 200, 215 (2d Cir. 2011) (citation and internal quotation marks omitted).

An agency action is arbitrary and capricious when 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.

Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 498 (2d Cir. 2005) (quoting *State Farm*, 463 U.S. at 43). The Court's review requires "not merely…'minimum rationality' but [rather]…'a logical basis' for [the agency's] judgment." *Iavorski v. INS*, 232 F.3d 124, 133 (2d Cir. 2000). An agency's rationale that is riddled with "[u]nexplained inconsistenc[ies]" that fail to give "reasons for a reversal of policy" warrants "holding an interpretation to be…arbitrary and capricious." *Brand X*, 545 U.S. at 981. An agency does not deserve deference where it "pick[s] a permissible interpretation out of a hat" or raises an explanation for the first time as a litigation position. *Village of Barrington, III v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011); *see Bowen*, 488 U.S. at 213.

Furthermore, even if the agency's rationale is "reasoned," it does not merit deference where it is contrary to the statute or "inconsistent with the design and structure of the statute as a whole." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (citation and internal quotation marks omitted) (holding EPA's interpretation of

"air pollutant" to be an impermissible interpretation of the Clean Air Act as it would lead to absurd results). A court cannot uphold an agency's regulation where its interpretation is "manifestly contrary to the statute" by not being "'rationally related to the goals of' the statute." *Village of Barrington*, 636 F.3d at 660 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999)).

A. EPA's Only Adopted Rationale for the Final Rule Was Its Purported "Holistic" Interpretation of the Act.

As discussed above, the district court correctly concluded that EPA did not adopt the "unitary waters theory" as its rationale for the Final Rule. SPA 105-06. EPA instead relied only upon its purported "holistic" reading of the statute to conclude that Congress generally did not intend to regulate polluted water transfers through the NPDES permit program. *See supra* Section I. As a result, EPA's attempt to rely upon the "unitary waters theory" in its brief must be rejected as a *post hoc* justification. *Bowen*, 488 U.S. at 213; *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971).

As discussed below, EPA's adoption of its purported "holistic" approach to interpreting the Act was procedurally defective, arbitrary and capricious, and manifestly contrary to the CWA. EPA's *Chevron* step two arguments must therefore be rejected.

B. EPA's Purported "Reasoned" Explanation Is Impermissible as It Rests Upon the Conflation of Inconsistently Identified Statutory Ambiguity.

Where statutory language is silent or ambiguous, "the agency is charged with filling the 'gap left open' by the ambiguity." *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) (quoting *Chevron*, 467 U.S. at 866). "Agencies exercise discretion ***only*** in the interstices created by statutory silence or ambiguity," *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445 (emphasis added), and when "the regulation…does not speak to the statutory ambiguity at issue, *Chevron* deference is inappropriate." *Lopez v. Terrell*, 654 F.3d 176, 182 (2d Cir. 2011).

Supporting a "permissible" interpretation based on a "gap" in statutory language is significantly more challenging when the agency itself inconsistently explains which purportedly ambiguous "gap" it intends to "fill." The preamble to the Final Rule states that "[t]he legal question addressed…is whether a water transfer…constitutes an '***addition***' within the meaning of section 502(12)." SPA 126 (emphasis added). However, throughout its brief, EPA does not consistently describe what the purported ambiguous statutory language is, sometimes interpreting "waters"[16] and other times "addition…to navigable waters."[17] EPA's

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[16] *See, e.g.*, EPA Br. 27-28 ("The word 'addition' is not defined, and…the statutory term 'waters' is ambiguous….It is thus reasonable to construe 'addition

inability to explain precisely what ambiguous term it purports to define demonstrates the true nature of its rulemaking. The Final Rule is, in reality, not a "definition," but rather a categorical exemption of polluted water transfers from the section 301 discharge prohibition and section 402 NPDES program, an *ultra vires* act that has been consistently rejected by courts.[18]

C. The District Court Correctly Held That EPA's "Holistic" Approach Was "Arbitrary and Capricious" Due to Its Inherently Flawed Methodology.

The district court correctly held that EPA's "holistic" interpretation rationale for the Final Rule was arbitrary and capricious, as both EPA's methodology and application of that methodology were flawed. SPA 84-91. EPA claims statutory support for the Rule in its "holistic" interpretation of the Act's balance of federal and state power over activities affecting the nation's waters. Specifically, EPA relies on sections 101(b) and (g) (state sovereignty), 304(f) (nonpoint sources), and

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to…navigable waters'…as referring to those 'waters' collectively. The existence of multiple reasonable interpretations demonstrates the statute's ambiguity.").

[17] *See, e.g.*, EPA Br. 42 ("[I]n deciding between constructions of the ambiguous language 'addition…to navigable waters,' EPA carefully justified its decision based on what the [CWA] showed about Congress's intent and what EPA reasonably concluded were the pertinent policy concerns."); Oral Arg. Tr. 40, Dec. 19, 2013, ECF No. 219, JA 47 ("EPA would say [the difference of opinion lies in the] addition to navigable waters, but a lot of work is done on the navigable waters side of the phrase.").

[18] *See supra* Section II.C.

510(2) (state authority) for evidence of Congress' intent not to regulate water transfers under the NPDES program. SPA 128; *see* EPA Br. 36-42. But as the district court held, even if Congress allegedly intended for water transfers to be exempted from the NPDES permit program (which it clearly did not), that does not mean that Congress intended to exempt water transfers from other statutory provisions that fall within the purview of section 301(a). SPA 80; *see, e.g.*, 33 U.S.C. § 1344.

This Court has already rejected EPA's "holistic" attempt to use other statutory provisions to provide support for its rationale. *Catskills II*, 451 F.3d at 84 (finding EPA's "'holistic' arguments about the allocation of state and federal rights…simply overlook [the CWA's] plain language"). For all of the reasons previously discussed,[19] and in light of judicial interpretation, legislative history, and statutory construction, EPA's "holistic" reliance on sections 101(b) and (g), 304(f), and 510(2) to argue that the Final Rule is a permissible interpretation of the Act is an "[il]logical basis for [the agency's] judgment," *Iavorski*, 232 F.3d at 133, and thus arbitrary and capricious.

[19] *See supra* Section II.

D. The District Court Correctly Found That EPA's Application of Its Purported "Holistic" Approach Was "Arbitrary and Capricious" for Its Failure to Consider the Central Purpose of the Act.

This Court should affirm the district court's *Chevron* step two holding because EPA applied its "holistic" approach in an arbitrary and capricious manner by ignoring the central purpose of the CWA: to "restor[e] and maint[ain] the chemical, physical, and biological integrity of [the] Nation's waters." 33 U.S.C. § 1251(a). While this Court has acknowledged that "the CWA balances a welter of consistent and inconsistent goals," *Catskills II*, 451 F.3d at 81-82 (quoting *Catskills I*, 273 F.3d at 494) (internal quotations omitted), EPA chose to highlight some of the statute's provisions over others, and in doing so, did not "reconcil[e] conflicting policies…[with] a full understanding of the force of the statutory policy in the given situation." *Chevron*, 467 U.S. at 844.

EPA claims it "resolve[d]…these conflicting approaches [by looking]…to the statute as a whole for textual and structural indices of Congressional intent on…whether water transfers" should be regulated under the CWA. SPA 127. In truth, EPA's application of its approach "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…establish the NPDES programs' specific federal-state balance." SPA 86. By failing to analyze (or even acknowledge) other essential purposes and provisions of the CWA in its "holistic" analysis, EPA failed

to adopt "a permissible construction of the statute…[that is] reasonable and consistent with the statute's purpose." *Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000) (citation and internal quotation marks omitted).

1. The Final Rule Conflicts with the CWA's Objective by Subverting Water Quality Standards.

One of the hallmarks of the CWA is its achievement of improved water quality through a combination of technology-based and water-quality-based effluent limitations. The CWA requires that "wherever attainable," EPA pursue "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). To achieve this objective, Congress required that states establish water quality standards for each water body in the state. 33 U.S.C. § 1313; *see also* 40 C.F.R. pt. 131 (2014). These water quality standards are then used to develop water quality based permit limitations for individual water bodies. *See* 33 U.S.C. § 1312; *see also* 40 C.F.R. § 131.2. Once the states set water quality standards for individual bodies of water, section 303(d) requires that each state identify each water body segment that fails to meet the standards, and among other requirements, revise NPDES permits so that permit limitations will achieve water quality standards for those specific bodies of water. 33 U.S.C. § 1313(d)(4).

The Final Rule ignores these purposes of the CWA by exempting polluted water transfers between distinct water bodies even if one or both water bodies are listed as impaired under section 303(d). This obviously frustrates the fundamental purposes of establishing water quality standards and water quality based effluent limitations. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not…hide elephants in mouseholes."). Since the polluted water transfers contemplated by the Final Rule are all point sources by definition, a whole category of point sources that may discharge into impaired water bodies are no longer required to ensure that their discharges do not cause or contribute to such violations, or to meet total maximum daily load ("TMDL") pollutant allocations.

However, states are still required by section 303(d) to ensure, through point and nonpoint source programs, that section 303(d) designated water bodies meet water quality standards. As a result, other point and non-point sources will be required to adopt even more stringent effluent limitations to ensure the attainment or maintenance of water quality standards. Also, in situations where the unpermitted point source by itself causes a water quality standard violation, there may be ***no means*** to address the impairment.

In the preamble to the Final Rule, EPA acknowledged that many comments submitted expressed concern about the degradation of water quality through the introduction of invasive species, increased turbidity, alteration of habitat, etc. SPA 131. EPA failed to respond substantively to these comments, and instead simply claimed that states have the right to regulate the movement of waters. The agency made no attempt to actually discuss the merit of these comments or how they clearly fall within the purpose of the CWA to protect the integrity of the nation's waters. EPA's assertion that "most of the thousands of water transfers in the United States do not result in any substantial impairment….is entirely unsupported…by ***any*** kind of analysis—scientific, technical, legal, or otherwise." SPA 90 (emphasis in original) (internal quotations marks omitted). As the district court correctly stated, "[a]n agency gets no deference for its 'beliefs.'" *Id.* (quoting *State Farm*, 463 U.S. at 52-53). With the Final Rule, EPA voluntarily forfeits its congressionally-mandated charge of protecting water quality while completely ignoring the numerous environmental policy implications of its decision.

EPA's application of its "holistic" approach is "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." *Id.* at 88. This Court previously held that though "EPA would…tip

the balance toward the allocation goals[,]…[the Court] adhere[s] to the balance that Congress has struck and remains free to change." *Catskills II*, 451 F.3d at 85. This Court should affirm the district court's holding since "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (citation and internal quotation marks omitted).

2. EPA's Failure to Properly Consider Alternatives and Provide Support for Its Policy Demonstrate That the Rule Is "Arbitrary and Capricious."

The district court also correctly found that EPA's failure to reasonably explain why it discarded viable alternatives to a categorical exemption supported a determination that the Final Rule was arbitrary and capricious. SPA 91-97. One of the alternatives EPA could have implemented was the designation-authority option, whereby the EPA could designate certain water transfers as requiring NPDES permit on a case-by-case basis. This approach would provide a mechanism that would only regulate those water transfers that posed a risk to water quality. EPA rejected this alternative as being "[in]consistent with EPA's interpretation of the CWA as not subjecting water transfers to the permitting requirements of section 402." SPA 132. As the district court pointed out, EPA's reasoning is entirely circular; 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." SPA 94.

EPA also asserts that it rejected this option because "states currently have the ability to address potential in-stream and/or downstream effects of water transfers through their [water quality standards] and TMDL programs and pursuant to state authorities preserved by section 510." SPA 132. As discussed above, this explanation rings hollow since the exemption of water transfers from NPDES permitting will actually frustrate water quality standards and TMDL programs.

This practical effect of exempting polluted water transfers from NPDES permitting is to inequitably shift liability and costs. The Final Rule will thwart the accountability envisioned by Congress since untreated, highly polluted waters will be allowed to commingle with pristine waters, making it extremely difficult to ascertain who is responsible and to allocate responsibility for proportionate shares of pollutant contributions.

EPA criticizes the district court's conclusion that it did not adequately consider alternatives, stating that "*Chevron* does not require the agency to convince the courts that its chosen interpretation is the best; instead, the agency's interpretation must simply be among the permissible alternatives." EPA Br. 48. EPA's criticism misses the mark, however, as the concern identified by the district court's is not a disagreement over permissible alternatives, but rather over the

permissibility of EPA's alternative. This Court has held that an agency action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Waterkeeper Alliance*, 399 F.3d at 498. By dismissing the designation-authority option without substantive explanation, EPA clearly failed to consider the CWA's objective to restore and maintain water quality.

EPA also disregarded without explanation the suggested option of utilizing general permits to regulate polluted water transfers' impacts on water quality. If the likely impact of water transfers on water quality is as inconsequential as EPA "believes," then the burden of maintaining an NPDES general permitting system for such transfers should also be minimal. In situations where a water transfer would not be expected to cause violations of water quality standards, EPA (and states with delegated authority) could issue general NPDES permits as an alternative to individual permits to ease the administrative burden. *See* 40 C.F.R. § 122.28; *see also Miccosukee*, 541 U.S. at 108. As the district court highlighted, the fact that EPA ignored this option in its Rule and response to comments is conspicuous and arbitrary. SPA 99-103.

EPA claims that issuing NPDES permits for water transfers would be an "unnecessar[y] burden [on] water quantity management." *Id.* at 126. The agency, however, never provided a reasoned explanation for how burdening water quantity management where the water from the water transfer is subjected to an intervening

use is a *necessary* interference with states' rights, but water transfers not subject to an intervening use is *unnecessary*. *Id.* at 97-98.

Moreover, both the Supreme Court and this Court have rejected EPA's argument that increased administrative costs justify the failure to consider NPDES permitting of water transfers. In *Miccosukee*, the Court acknowledged arguments by some parties that covering water transfers under the NPDES program "would…raise the costs of water distribution prohibitively, and violate Congress' specific instruction [in section 101(g),]" but then noted that "it may be that such permitting authority is necessary to protect water quality." 541 U.S. at 108. The Court then suggested that general permits could be used to reduce administrative costs. *Id.* This Court has also "recognize[d] the incremental administrative burden [its] interpretation entails," but nevertheless, "[it] ha[s] little doubt that [the CWA]…permits the City to deliver drinking water to its citizens while furthering the CWA's goal 'to restore and maintain the chemical, physical, and biological of the Nation's waters.'" *Catskills II*, 451 F.3d at 87.

Accordingly, this Court should affirm the district court's holding that the Final Rule is arbitrary and capricious as "EPA did not provide a reasoned explanation for its decision in the context of its duty to balance the statute's competing goals…[and] failed to explain how its action was consistent with[,] and why it does not frustrate[,] the one goal it did consider." SPA 103.

E. The District Court Correctly Found That EPA Did Not Provide a Reasoned Basis for Its Disparate Interpretations of "Addition" with Respect to the CWA's Section 402 (NPDES) and 404 (Dredge-and-Fill) Permit Programs.

The district court correctly identified the inexplicable dichotomy between EPA's interpretations of the term "addition" with respect to its CWA section 402 and 404 permitting programs. SPA 80-82. The court noted that the CWA's permitting program under section 404 (dredge-and-fill permits) does not adopt a separate definition of "discharge of a pollutant" from that of the section 402 (NPDES) permitting program, *i.e.*, the definitional term "addition of [a] pollutant," is used ***only once*** in the CWA, to define "discharge of a pollutant" in section 502(12). 33 U.S.C. § 1362(12). The exact same discharge prohibition and "discharge of a pollutant" definition in CWA sections 301(a) and 502(12), respectively, establish the jurisdictional "trigger" for both the 402 and 404 permitting programs.

EPA regulations dictate that merely moving dredged material (e.g., mud, sediment) from one location to another ***within the very same water body, and regardless of whether the dredged material is ever removed from the water***, constitutes an "addition" of a pollutant prohibited by the Act unless in compliance with a permit issued pursuant to section 404. *See* 33 U.S.C. § 1344; *see generally* 40 C.F.R. § 232.2 (defining "discharge of dredged material" as including "[a]ny addition, including redeposit other than incidental fallback, of dredged material,

including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation"). Conversely, EPA mandates in the Final Rule that the movement of even heavily polluted water from one water body, through a point source and into a distinct, pristine water body, ***does not*** constitute an "addition" of a pollutant requiring an NPDES permit issued pursuant to section 402. 33 U.S.C. § 1342.

EPA cannot rationally interpret the same exact word (addition) in the same exact section of the statute (section 301(a), which incorporates the definition of "discharge of a pollutant" in section 502(12)), so disparately. Again, according to EPA, simply moving or "redepositing" dredged material within a single water body ***is*** an "addition" of a pollutant requiring a 404 permit, but transferring pollutants from one water body through a point source into another ***is not*** an "addition" of a pollutant requiring a 402 permit. How is this interpretation rational, let alone permissible? EPA's argument is facially absurd.

In *Clark v. Martinez,* 543 U.S. 371, 386-87 (2005), the Supreme Court held that courts cannot interpret a word or phrase in a particular statutory provision differently in different factual contexts. The Supreme Court reiterated its position that it is "[the Court's] obligation to maintain the consistent meaning of words in statutory text." *United States v. Santos*, 553 U.S. 507, 523 (2008); *see also*

Sorenson v. Sec'y of the Treasury of U.S., 475 U.S. 851, 860 (1986) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (citations and internal quotation marks omitted). Yet, EPA asks this Court to accept wildly inconsistent meanings of a single statutory term—"addition"—in the very same section of the CWA. Since the term "addition" is only used once in the CWA, EPA could not rationally interpret it to mean one thing for section 404 permits and another thing for section 402 permits, as it does in the Final Rule. *See* SPA 129.

F. The District Court Correctly Found EPA's Status-Based Definition of Navigable Waters to Be Manifestly Contrary to the Statute and Foreclosed by *Rapanos*.

The district court determined that the Final Rule relies upon a false premise: that when polluted water is transferred through a point source between distinct water bodies, the transferred water never loses its "status" as navigable waters. SPA 69. The district court explained that this conclusion might sometimes be correct, *e.g.*, if a canal were utilized to connect the distinct navigable water bodies. *Id.* at 68-69. The court then observed:

> 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.

Id. at 69. Ultimately, the district court correctly determined that the premise upon with the Final Rule is based—*i.e.*, that transferred waters never lose their "status" as waters of the United States regardless of the mode of conveyance—fails because it (1) is manifestly contrary to the statute, and (2) contravenes *Rapanos v. United States*. *Id.* at 119.

First, the district court correctly noted that the statutory terms "navigable waters" and "waters of the United States" clearly envision "bod[ies] of water, and not liquid water that exists outside a water body." *Id.* at 113. In other words, the molecules of water that exist in a navigable waterbody do not remain "navigable" after they have been withdrawn. If one took a glass of water from a navigable water body, would the water in the glass remain navigable? Of course, it would not. And the same can be said for waters withdrawn into manmade conveyance systems like the eighteen-mile underground Shandaken Tunnel in *Catskills I* and *II*. *See Rapanos*, 547 U.S. at 735-36 & n.7 ("[H]ighly artificial, manufactured, enclosed conveyance systems…likely do not qualify as 'waters of the United States.'"); *Dubois*, 102 F.3d at 1297 (when "water leaves the domain of nature and is subject to private control rather than purely natural processes," it loses "its status of waters of the United States").

Second, in *Rapanos*, the Supreme Court attempted to clarify the scope of the term "waters of the United States," which resulted in a "4-1-4 judgment applying

three different approaches" to this question. SPA 116. After analyzing the three tests adopted by the Justices, the district court determined that EPA's implicit definition of waters of the United States adopted in the Final Rule—which includes "any system of pumping stations, canals, aqueducts, tunnels, pipes or other such conveyances," *Id.* at 130, —would not be accepted by any of the three *Rapanos* approaches. *Id.* at 118. EPA's supposition that water transferred by such artificial means never loses "its status" as navigable waters is thus proved to be a legal fiction. And because *Rapanos* was decided by the Supreme Court under the *Chevron* framework, the district court correctly found the Supreme Court's definition of "waters of the United States" in *Rapanos* binding on the court and on EPA. *Id.* at 119.

IV. Brief Response to Miscellaneous Arguments.

EPA and the other Appellants advance various other ancillary and irrelevant arguments to support their appeals. Several need not be addressed, but two are so factually misleading that they merit a brief response.

A. EPA's Statutory Interpretation Adopted in the Final Rule Is Not as "Longstanding" as the Agency Would Have This Court Believe.

All of the Appellants argue, in one manner or another, that EPA's interpretation codified in the Final Rule is "longstanding," and/or that vacatur would somehow "expand" the NPDES program. EPA Br. 10; SFWMD Br. 2;

Western States Br. 20, 28. Yet, Appellants fail to address the fact that numerous former EPA officials submitted an *amicus* brief to the Supreme Court in *Miccosukee* in which they argued, *inter alia*, that:

> The Solicitor General's most obvious legal error lies in…the erroneous assumption that whether a point source discharge exists ***turns on the origins of the input into the point source rather than exclusively on the nature of the point source's output***….[T]he statutory definition of "discharge of a pollutant" clearly focuses exclusively on the latter. There is absolutely nothing within the plain meaning of Section 502(12)'s definition of "discharge of a pollutant" to suggest that it is legally relevant whether the waters in which those pollutants are being conveyed were previously "navigable."

Brief for Former Administrator Carol M. Browner of the EPA, et al. as Amici Curiae Supporting Respondents, *Miccosukee*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22793539, at *12-15 (emphasis added). The officials further discussed EPA's history of formal administrative decision-making in which EPA reached conclusions utterly contrary to the Final Rule. *See id*. at *8-12, *17-19. As the Supreme Court noted in *Miccosukee* (citing the very same *amicus* brief):

> Indeed, an amicus brief filed by several former EPA officials argues that the agency once reached the opposite conclusion. *See* Brief for Former Administrator Carol M. Browner et al. as *Amici Curiae* 17 (citing *In re Riverside Irrigation Dist.*, 1975 WL 23864 (Ofc. Gen. Coun., June 27, 1975) (irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters)).

Miccosukee, 541 U.S. at 107. This Court should thus not be fooled. EPA's exemption for polluted water transfers adopted in the Final Rule is not nearly as "longstanding" as the agency would have this Court believe.

B. The City's Attempted "Third Bite" at the *Catskills* "Apple" Is Unwarranted and Should Be Rejected.

The City spends much of its opening brief storytelling about its purported experience after this Court ruled that NPDES permit coverage was required for it to continue discharging pollutants (highly turbid water) from the Shandaken Tunnel into the Upper Esopus Creek, which was once a world-class trout stream. *See* City Br. 1, 4, 8-13, 21-23, 28-30, 35-37, 51-56. Not only is the City's diatribe utterly irrelevant to the questions of statutory interpretation before the Court, but much of it is also utterly unsupported by record evidence and just plain wrong.

CMCTU will resist the temptation to respond point-by-point to the City's misleading and speculative parade of horribles. Instead, we will simply note that after approximately fourteen years of litigation involving the City's turbid discharges into the Upper Esopus Creek from the Shandaken Tunnel, CMCTU has never asked a court to shut the tunnel down, notwithstanding the City's frequent violations of water quality standards and the resulting destruction of the trout fishery downstream from the tunnel.

In addition, the City has been allowed by New York Supreme Court to continue operating the Shandaken Tunnel for over six years after its NPDES permit was declared illegal in August 2008. Ultimately, the City's complaints come down to sheer speculation that it may, someday, actually have to implement technical measures to address its turbid discharges from the tunnel that have been despoiling the Upper Esopus Creek for decades. This would not be an injustice, but rather exactly what the CWA demands. This Court has twice found that the City's activities constitute the discharge of pollutants under the CWA. *Catskills II*, 451 F.3d at 86-87; *Catskills I*, 273 F.3d at 494. As such, the CWA compels the City to take action to ensure that it does not continue to cause or contribute to violations of water quality standards. This was precisely Congress' intent when it passed the CWA.

In sum, the vast majority of the City's claims about the Shandaken Tunnel litigation and the City's purported permitting problems are vehemently disputed, but irrelevant to the invalidity of the Final Rule. CMCTU respectfully refers the Court to the comments submitted to EPA by the original plaintiffs in the Catskills litigation. *See* JA 676-79.

CONCLUSION AND PRAYER FOR RELIEF

For all the foregoing reasons, CMCTU respectfully urges this Court to vacate the Final Rule on the grounds that (1) it is contrary to the plain, unambiguous requirements of the CWA and is thus an *ultra vires* act by EPA which fails to pass muster under *Chevron* step one; and (2) it fails to pass muster under *Chevron* step two because it is procedurally defective, arbitrary and capricious in substance, and manifestly contrary to the CWA.

Respectfully submitted,

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Dated: December 23, 2014
White Plains, New York

CERTIFICATE OF COMPLIANCE

I, Daniel E. Estrin, one of the Attorneys of Record for the Plaintiffs-Appellees herein, hereby certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B) as this brief contains 13,868 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ *Daniel E. Estrin*

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