14-1823(L)

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

United States Court of Appeals for the Second Circuit

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC.,

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-Cross Appellees,

(*caption continues on inside front cover*)

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, AND WASHINGTON, AND THE PROVINCE OF MANITOBA

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Dated: December 23, 2014

(Caption continued from front cover)

THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELEWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., WATERKEEPER ALLIANCE, INC., TROUT UNLIMITED, INC., NATIONAL WILDLIFE FEDERATION, ENVIRONMENT AMERICA, ENVIRONMENT NEW HAMPSHIRE, ENVIRONMENT RHODE ISLAND, ENVIRONMENT FLORIDA, STATE OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON,

Plaintiffs-Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

Consolidated Plaintiff-Appellee,

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

Intevenor Plaintiffs-Appellees,

V.

STATES OF COLORADO, STATE OF NEW MEXICO, STATE OF ALASKA, ARIZONA DEPARTMENT OF WATER RESOURCES, STATE OF IDAHO, STATE OF NEBRASKA, STATE OF NORTH DAKOTA, STATE OF NEVADA, STATE OF TEXAS, STATE OF UTAH, STATE OF WYOMING, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL UTAH WATER CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER, by and through its Board of Water Commissioners, CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION, CITY OF BOULDER [COLORADO], CITY OF AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT, IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, KANE COUNTY [UTAH] WATER CONSERVANCY DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION, SALT LAKE & SANDY [UTAH] METROPOLITAN WATER DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER AUTHORITY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS, acting by and through its enterprise Colorado Springs Utilities, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS, CITY OF NEW YORK,

Intervenor Defendants-Appellants-Cross Appellees,

NORTHERN COLORADO WATER CONSERVANCY DISTRICT,

Intervenor Defendant,

V.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Intervenor Defendant-Appellant-Cross Appellant.

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PRELIMINARY STATEMENT

The issue in this appeal is whether the Clean Water Act's permit program—the primary means by which the Act controls water pollution—applies to artificial transfers of polluted water from one water body into another, distinct water body (hereinafter "water transfers" or "inter-basin transfers"). This Court has held three times that the Act prohibits such transfers absent a permit that controls the quantities, rates, and concentrations of pollutants that may be discharged into the receiving water body. In explicit disagreement with this Court's statutory interpretation, the Environmental Protection Agency promulgated the "Water Transfers Rule," which exempts inter-basin transfers from the permitting program.

The States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, and the Government of Manitoba, Canada challenged the Rule as contrary to the Clean Water Act and arbitrary and capricious under the Administrative Procedure Act. The U.S. District Court for the Southern District of New York

(Karas, J.) granted summary judgment to the plaintiff States,[1] and vacated in part and remanded the Rule. This Court should affirm.

EPA has no statutory authority to exempt transfers of polluted water from the Clean Water Act's permit requirement. An exemption would authorize the pumping of salt water into fresh water or toxic water into pristine water—results contrary to the Act's plain language and structure as well as Congress's objective of protecting individual water bodies and their users from the harmful effects of pollutants.

Even if the Act were unclear, which it is not, the Court should affirm the district court's determination that the Rule is an unreasonable and arbitrary interpretation of the Act. To justify its interpretation, EPA claimed authority to "balance" purportedly competing congressional policies regarding water protection and water allocation. But EPA failed to engage in that balancing, instead ignoring Congress's clean-water goals and the critical role of permitting in achieving those environmental aims. EPA's purportedly "legal" interpretation of the Act is also unreasonable because it depends on

[1] References to the plaintiff States include Manitoba.

factual assumptions that EPA did not support or explain—indeed, EPA has acknowledged that it did not engage in any scientific or factual analysis of the effects of the Rule. The resulting Rule is far outside the bounds of any discretion conferred on EPA by Congress and inconsistent with EPA's statutory mandate. Accordingly, the Rule must be invalidated.

ISSUE PRESENTED

The Clean Water Act prohibits "any addition of any pollutant to navigable waters from any point source" without a permit. 33 U.S.C. §§ 1311(a), 1362(11). Inter-basin water transfers can indisputably transport pollutants from one body of water to another by means of a point source, increasing the quantities of pollutants in the receiving water body. The issue is whether EPA's Water Transfers Rule, which excludes inter-basin transfers from the permit requirement, is contrary to the Clean Water Act or is unreasonable and arbitrary and capricious.

STATEMENT OF THE CASE

A. The Harms Caused by Inter-basin Water Transfers

The term "inter-basin transfer" refers to an artificial conveyance of water between two distinct water bodies that would otherwise not be connected—such as the eighteen-mile Shandaken Tunnel, an underground pipe that provides water to New York City by connecting two "utterly unrelated" reservoirs. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 492 (2d Cir. 2001) (*Catskill I*); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 81 (2d Cir. 2006) (*Catskill II*). Artificial transfers of contaminated water from one water body to another harm water quality, degrade the environment, endanger public health, and cause billions of dollars in economic damage. (J.A. 400-434, 502-515, 527-530.) Water bodies differ in significant ways: some are highly polluted, others pristine; some contain salt water, others fresh water; some are used for industrial purposes, others for recreational purposes; and so on. Moving water between such distinct water basins introduces contaminants, chemicals, and other dangerous substances into the receiving water body—for example, conveying salt water into a fresh-water lake or

transferring heavily polluted water into a pristine stream. (J.A. 400-415, 525-526.) *See Catskill II*, 451 F.3d at 81.

Moving polluted water into clean water can harm public health and welfare if the transfers are not carefully regulated. Inter-basin transfers containing pollutants such as industrial waste, toxic blue-green algae, or fecal coliform can contaminate waters used for drinking or recreation, creating the risk of illness and even death. (J.A. 384-386, 509-511.) And conveying pollutants from one water body to another often wreaks havoc on surrounding property values and businesses that rely on a clean water supply, including fishing and tourism. (J.A. 298, 325-330.)

Conveying polluted water into clean water bodies can destroy aquatic ecosystems by introducing invasive species and disease into new water bodies. (J.A. 402-415, 507-509.) Because invasive species—such as toxic algae, zebra mussels, and Asian carp—lack predators in the receiving water body, their populations expand unchecked, threatening native and often endangered species and ruining local industries. (J.A. 527-530, 686-689 (estimating losses from invasive species at $137 billion annually).) *See Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1013 (9th Cir. 2008) (invasive

species are "one of the most serious, yet least appreciated, environmental threats of the 21st century" (quotation marks omitted)).

Such harms to the natural and human environment from inter-basin transfers are not hypothetical—they have already come to pass. For example, this Court has twice reviewed New York City's transfer of turbid, muddy water via the Shandaken Tunnel into the prized trout-fishing stream of Esopus Creek, which clouds the creek's clear waters, impairs its use for fishing, and contributes to the need for chemical treatment before the water can be used for drinking. (J.A. 503-505, 676-679.) *See Catskill II*, 451 F.3d at 79-80. In Florida, the pumping of highly polluted water into Lake Okeechobee and surrounding water bodies has triggered algae outbreaks, introduced cancer-causing chemical compounds, and triggered a health department warning against human contact with the waters. (J.A. 421-430, 510-511, 696.) And in California, transfers of polluted water over four hundred miles from the Sacramento-San Joaquin Delta into Lake Skinner likely contaminated the lake with "an unrelenting new strain of algae" that forced residents to stop using the lake as a public water supply. (J.A. 416-421; *see* J.A. 400 (describing

inter-basin transfers containing "pathogens, nutrients, sediment, algae, pharmaceuticals, and personal care products").)

Private industry and municipal utilities can also degrade water quality by moving polluted water into a clean water body. For example, the First Circuit required a NPDES permit for a private ski resort's conveyance of river water contaminated with bacteria into a pristine mountain pond. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1277 (1st Cir. 1996). Without proper regulation, other industrial and commercial polluters would largely be free to move already polluted water into unpolluted water bodies.

EPA has itself acknowledged and warned of dangers from water transfers. In 2002, for example, EPA cautioned that the transfer of polluted water containing sulfates, metals, and dissolved solids from Devil's Lake in North Dakota into the Sheyenne and Red Rivers, which flow into Manitoba, Canada, could "adversely affect water quality" in receiving waters, impair their use for drinking and irrigation, and spread parasites and pathogens. (J.A. 573-599.) North Dakota initially regulated its Devil's Lake transfers by issuing a NPDES permit. (J.A. 600-616.) But because of the Rule, neither transfer outlet is currently

subject to NPDES permitting, to the detriment of downstream interests. Decl. of Charles Silver ¶ 8, *Catskill Mountains Trout Unlimited, Inc. v. EPA*, No. 08-cv-5606 (ECF No. 150).

B. The Central Role of Permitting in Protecting the Quality of Individual Water Bodies

The Clean Water Act was enacted in 1972 to address severe environmental harms caused by the discharge of pollutants into individual water bodies. To "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," Congress set the national goal of eliminating "the discharge of pollutants into the navigable waters" of the United States and maintaining water quality for the protection of fish, wildlife, and recreational use. 33 U.S.C. § 1251(a). The Act protects individual water bodies by (1) requiring States to establish individualized water-quality standards for each distinct water body within its borders, *see id.* § 1313(c)(2)(A), and (2) regulating every point-source discharge of pollutants into each such water body through a permit.

1. Water quality standards. To establish water-quality standards, a State must designate a use for every waterway and establish criteria

for "the amounts of pollutants that may be present in [those] water bodies without impairing" their uses. *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012). Water-quality standards are thus "balanced and tailored to accommodate the various needs of each" water body, *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1343 (N.D. Cal. 2000), differing based on the nature of its fish and wildlife, its use for drinking or recreation, and so on.

2. NPDES permitting. Needed improvements in water quality are obtained and preserved through the National Pollutant Discharge Elimination System (NPDES) permitting program, "the primary means" by which the Act achieves its water-protection goals. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992). States typically operate the NPDES program within their borders after receiving EPA approval, *see* 33 U.S.C. §§ 1313, 1342(b), although in a few States EPA itself operates the permitting scheme (SPA 53).

The Clean Water Act comprehensively prohibits the "discharge of any pollutant" into navigable waters except as authorized by a NPDES permit. *See* §§ 1311(a), 1342. Covered discharges are defined broadly to mean "any addition of any pollutant to navigable waters from any point

source." § 1362(12). The permit requirement is thus not limited to any one polluter, pollutant, or water body. Instead, the NPDES program covers all "point source[s]"—*i.e.*, "discernible, confined and discrete conveyance[s]," including "any pipe, ditch, channel, [or] tunnel."[2] § 1362(14). The permit requirement covers a broad range of pollutants, including but not limited to chemicals, biological materials, rock, and sand. § 1362(6). And the requirement applies to all "navigable waters," the term Congress used throughout the Act to define the scope of federal water-protection programs such as NPDES permitting. *See* Senate Committee on Public Works, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 178 (Senate Debate), 250-51 (House Debate), 1410 (Senate Debate) (1973) (Act "increases [f]ederal jurisdiction by applying to all navigable waters rather than just interstate and boundary waters").

The Act thus mandates that "[*e*]*very* point source discharge [be] prohibited unless covered by" a NPDES permit. *Milwaukee v. Illinois*, 451

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[2] By contrast, "nonpoint" source pollutants are pollutants that enter individual water bodies outside of discrete point sources, such as surface water runoff not transported through a pipe. *See Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219-21 (2d Cir. 2009).

U.S. 304, 318 (1981). Congress has specified a few narrow exemptions from the NPDES program, s*ee* §§ 1342(l), (p), (r), 1362(6)(A)-(B), but has never exempted inter-basin water transfers from permitting. And given the Act's clear mandate that all point-source discharges are prohibited absent a permit, courts have consistently found that EPA has no authority to exclude additional discharges from permitting. *See Nw. Envtl.*, 537 F.3d at 1021; *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

The NPDES program is "critical to the successful implementation of the Act" because permits define pollutant dischargers' obligations and facilitate enforcement of these responsibilities. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d Cir. 2005). A NPDES permit sets forth two types of effluent limitations on a discharger. *Id.* at 491. First, a permit contains technology-based limitations that restrict the quantities of pollutants that the permit-holder is allowed to discharge into a particular water body. *See* §§ 1311(b)(1)(A)-(B), (b)(2), 1342(a)-(b). Second, where technology-based effluent limitations fail to achieve the water-quality standards of the receiving water body, the permit imposes any "more stringent limitation" required to achieve the applicable standards. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1312(a); 40 C.F.R. § 122.44(d)(1)-(2).

NPDES permitting "need not be an onerous process." *Nw. Envtl.*, 537 F.3d at 1010. Permitting authorities have "considerable flexibility in establishing permit terms and conditions" in light of "available technologies, costs in relation to effluent reduction benefits, . . . [and] available best management practices." *Catskill II*, 451 F.3d at 85 (quotation marks omitted); *see* 40 C.F.R. § 125.3. Moreover, point source operators can seek variances from effluent limitations. *See* 40 C.F.R. § 125.3(b). And general permits can be issued to "an entire class of hypothetical dischargers in a given geographical region," allowing covered discharges to commence automatically without an individualized application process. *Nw. Envtl.*, 537 F.3d at 1011 (quotation marks omitted); *see* 40 C.F.R. § 122.28.

3. The NPDES program's protections for downstream States. Congress recognized that States face powerful incentives to compete for industry by establishing lower water-protection standards than those established in other States, thereby externalizing to downstream States the harms resulting from such lower standards. *See Costle*, 568 F.2d at 1378. As a result, downstream States would suffer the environmental consequences and economic burdens from lax upstream pollution

controls without reaping any benefits. *See Legislative History*, *supra*, 517 (House Debate) (explaining danger that industry would move to States with "lowest standards").

To avoid this result, Congress required implementation of the NPDES program in every State and required that permits include minimum effluent limitations to establish a nationwide floor for pollution control. 33 U.S.C. § 1370(1). In addition, Congress included procedures in the NPDES program for resolving "conflicts over pollution discharges between upstream and downstream states." *Upper Blackstone*, 690 F.3d at 15. Before a NPDES permit can issue, any State with jurisdiction over water bodies that could be affected by the discharges must receive notice and an opportunity to comment at a public hearing and through written recommendations. *Milwaukee*, 451 U.S. at 325-26. The permitting State cannot reject an affected State's recommendations without written explanation. *See* § 1342 (b)(3), (b)(5). And if "a stalemate between an issuing and objecting State" develops, EPA has the power to veto the permit. *Milwaukee*, 451 U.S. at 325-26; § 1342 (d)(2)(A), (d)(4).

These procedures, which must be part of any State's permitting program, are critical because the Act displaces federal common law. *Arkansas*, 503 U.S. at 100. As a result, without the NPDES program's statutory remedies, States receiving pollutants from another State would have little recourse except to file a common-law nuisance lawsuit under the law of the polluting State. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490-91 (1987).

C. EPA's Promulgation of the Rule

EPA promulgated the Water Transfers Rule in the face of uniform federal circuit court precedent holding that the Clean Water Act requires a NPDES permit for the transfer of polluted water into a clean water body. This Court has held three times that a permit is needed to transfer contaminated water between two distinct water bodies via a point source, and has twice specifically rejected EPA's interpretation of the Act as exempting water transfers from permitting. *See Catskill I*, 273 F.3d at 491-92; *Catskill II*, 451 F.3d at 84-85; *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *see also Dubois*, 102 F.3d at 1299.

In *Catskill I* and *II,* the Court was presented with New York City's discharge of muddy water out of the Shandaken Tunnel into Esopus Creek. In both cases, after analyzing the text, structure, and purposes of the Act, the Court held that the statute's "ordinary meaning" and "plain language" dictate that when polluted water is conveyed into an unpolluted waterway, "an 'addition' of a 'pollutant' from a 'point source' has been made to a 'navigable water'" and a permit is required. 273 F.3d at 492; 451 F.3d at 81, 84-85. The Court twice considered and rejected the same contrary interpretations that defendants present here, emphasizing that these arguments contradicted the Act's "plain language" and led "to the absurd result" of allowing an unpermitted "transfer of water from a heavily polluted, even toxic, water body to one that was pristine." *Catskills II*, 451 F.3d at 81, 84; *see Catskill I*, 273 F.3d at 493. And this Court was not alone in reaching these conclusions: the First Circuit has also held that the Act prohibits the conveyance of dirty water from one water body to another absent a permit. *Dubois*, 102 F.3d at 1299.

EPA adopted the Water Transfers Rule in 2008 in an attempt to overturn these decisions and similar court rulings. (*See* SPA 125-126.)

The Rule amends a regulation entitled "Exclusions," 40 C.F.R. § 122.3, by adding "water transfer" to a list of "discharges" exempted from NPDES permitting. (SPA 122.) The Rule provides that a pollutant discharge from a "water transfer" does "not require NPDES permits," and defines a "water transfer" as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." (SPA 122.) The "exclusion does not apply to pollutants introduced by the water transfer activity itself." (SPA 122.)

To justify the Rule, EPA analyzed the "legal question" of whether moving dirty water into clean water "constitutes an 'addition'" of pollutants under the Act. (SPA 126.) (This analysis derives from, and is essentially identical to, a legal memorandum issued in 2005 by EPA's then-General Counsel Ann R. Klee ("Klee Memorandum") (SPA 123, 126), which this Court found unpersuasive in *Catskill II*, *see* 451 F.3d at 83-84 & n.5.) After claiming that the term "addition" is ambiguous (SPA 126-127), EPA embarked on a "holistic" reading of the Clean Water Act, claiming that other statutory provisions suggest congressional intent to exclude water transfers from the NPDES program and to leave their

regulation solely to the States. In particular, EPA focused on a general policy to recognize state authority over water allocations—*i.e.*, decisions over the *quantity* of water available to specific users. (SPA 127-128.) EPA acknowledged that this allocation provision does not limit the Act's water-pollution controls, which control the *quality* of water rather than its quantity (SPA 128 n.5), but nonetheless inferred from this and other provisions a "general direction" that Congress was concerned about "unnecessarily" interfering with water allocations and thus intended not to apply NPDES permitting to inter-basin transfers (SPA 126-130).

EPA justified the Rule entirely on this "legal analysis" and did not conduct "a scientific analysis of water transfers" (J.A. 1245) or evaluate "State-specific information on the effects of the proposed rule" (J.A. 1294). EPA thus never considered the severe environmental, health, and economic harms caused by some inter-basin transfers that move polluted water into cleaner waterways, see, *infra*, at 74-76, despite receiving thousands of public comments warning of such dangers. And EPA likewise never considered the sovereign interests of downstream States, which can be severely harmed by lax pollution controls in upstream States.

D. This Proceeding and the Decision Below

After EPA promulgated the Rule, the plaintiff States and environmental groups filed lawsuits in the U.S. District Court for the Southern District of New York against EPA and its Administrator, challenging the Rule. (J.A. 112, 145-146.) Because EPA had asserted that the Rule could be reviewed only by a Court of Appeals (see SPA 123), plaintiffs filed protective petitions for review in this Circuit. Different plaintiffs filed similar petitions in other circuits, and the United States Judicial Panel on Multidistrict Litigation consolidated the petitions before the Eleventh Circuit. (SPA 30.) The district court here stayed its proceedings until the Eleventh Circuit dismissed the consolidated petitions for lack of subject-matter jurisdiction, holding that the challenges were properly brought in district court. (SPA 31-32.) *See Friends of the Everglades v. EPA,* 699 F.3d 1280 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 422 (2013). Various plaintiffs and defendants intervened in the district court proceedings here, and the parties filed motions and cross-motions for summary judgment. (SPA 32-33.)

The district court (Karas, J.) granted summary judgment to plaintiffs, vacated the Rule to the extent it was inconsistent with the

Act, and remanded to EPA. (SPA 120-121.) The district court evaluated the Rule under the two-step framework of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and under the APA. (SPA 34-35.) In the first *Chevron* step, the court employs statutory-interpretation tools to determine whether Congress has "unambiguously expressed" its meaning. *Riverkeeper Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004). If Congress's intent is clear, that "meaning controls." *Id.* Only if the statute is "'silent or ambiguous with respect to the specific issue'" does the court move to *Chevron*'s second step and determine "'whether the agency's answer is based on a permissible construction of the statute,' which is to say, one that is 'reasonable,' not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843-44).

At *Chevron* step one, the district court noted that this Court has twice held that the Act's "plain meaning" requires NPDES permits for inter-basin transfers. (SPA 40-41, 44 (quoting *Catskill I*, 273 F.3d at 491).) The district court also noted this Court's concern that unpermitted inter-basin transfers would produce harmful environmental consequences inconsistent with the Act's water-protection purpose. (SPA 49.) But the district court nonetheless

concluded that the Act's text is ambiguous because it might refer to all waters of the United States as a unitary whole, such that polluted water from one body cannot be added to another. (SPA 45-60.)

At *Chevron*'s second step and applying the APA's arbitrary-and-capricious factors, the district court rejected the Rule as an unreasonable and arbitrary construction for several reasons, including but not limited to EPA having: (1) abdicated any authority it might have had to "balance" congressional policies by arbitrarily ignoring the Act's fundamental clean-water purposes (SPA 85-91); (2) failed to support or explain its conclusion that NPDES permits would "unnecessarily" burden state water allocations (SPA 98-99); and (3) refused to consider reasonable policy alternatives (SPA 91-97).

SUMMARY OF ARGUMENT

EPA's interpretation of the Act as allowing an exclusion from permitting for polluted inter-basin transfers fails under each step of the *Chevron* analysis and the APA. The Rule cannot survive *Chevron* step one because this Court has already held in *Catskill I* and *II* that the Clean Water Act unambiguously expresses Congress's intent to prohibit

point-source operators from adding polluted water from one water body into a distinct water body without a permit. Removing dirty inter-basin transfers from NPDES permitting would be incompatible with the Act's clean-water goals and basic structure, which protects the individualized water quality of each navigable waterway and provides downstream States with unique administrative remedies to protect their waters against pollutants originating from transfers in upstream States.

Neither EPA's Rule nor defendants' arguments can inject ambiguity into the Act's plain meaning. Defendants assert that the Act might refer to all of the waters of the United States as a unitary water body, such that polluted water from one water body cannot be "added" to another. But this Court has already rejected this "unitary waters" theory for good reason—it makes no sense in the context of the real world or the Clean Water Act. And this Court has likewise rejected defendants' attempts to read other sections of the Act as creating an implicit permit exception for inter-basin transfers. Defendants point to provisions preserving States' authority to allocate water quantities, but these provisions in no way limit the NPDES program's water-quality controls. Nor can other state or federal pollution-control programs change the fact that inter-basin transfers

are point-source discharges that must by congressional design be regulated through NPDES permits.

Moreover, even if there is some ambiguity, the Rule fails at *Chevron*'s second step and under the APA, as the district court properly held. The Rule is far outside the bounds of reasonableness and is arbitrary and capricious because EPA: (1) advanced a construction that is manifestly contrary to the Clean Water Act's purposes by failing to engage in any "balancing" of Congress's purportedly conflicting policy goals; (2) implicitly relied on unsupported factual conclusions while claiming to rely on a purely legal analysis; and (3) did not consider obvious policy alternatives authorized by the Act and approved by the courts. Accordingly, the Court should affirm the grant of summary judgment to plaintiffs.

ARGUMENT

POINT I

THE CLEAN WATER ACT UNAMBIGUOUSLY REQUIRES PERMITS FOR WATER TRANSFERS

The Clean Water Act requires permits for all discharges of pollutants into navigable waters from any point source. As this Court has twice held, the Act contains no exception for discharges resulting from transfers of contaminated water from one body of water to another. Nor would such an exception make sense, as it would allow the unregulated movement of polluted water into clean water—an outcome incompatible with the Act's structure and fundamental purpose of protecting the quality of individual water bodies. Because EPA's Rule thus conflicts with the Clean Water Act, the Rule is invalid. "[T]hat is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

A. This Court Has Already Held That the Plain Language of the Clean Water Act Requires NPDES Permits for Water Transfers.

EPA's interpretation of the Clean Water Act is unambiguously foreclosed by this Court's rulings in *Catskill I* and *II*. In the *Catskill* decisions, this Court applied traditional statutory-construction tools and twice held that the Act's "plain language" and "ordinary meaning" dictate that the movement of polluted water into "another, distinct body of water is plainly an addition" of pollutants that requires a NPDES permit. 273 F.3d at 491-493; 451 F.3d at 84-85. Given the Act's unambiguous meaning, this Court found no need to resort to legislative history, but nonetheless noted that no history supported an interpretation of the Act that would exempt water transfers from NPDES permitting. *Catskill I*, 273 F.3d at 493.

Moreover, this Court "expressly rejected" the same arguments that defendants raise here. *Id.* at 492. First, this Court rejected the "unitary water" (or "singular entity") theory, "which posits that all of the navigable waters of the United States constitute a single water body," *Catskill II*, 451 F.3d at 81. *Compare* Br. for Defs.-Appellants EPA & Gina McCarthy ("EPA Br.") 27, 50-56. The Court held that this

theory was "inconsistent with the ordinary meaning" of the discharge prohibition, *Catskill I*, 273 F.3d at 493, and would lead to the "absurd result" where "heavily polluted, even toxic" water could be moved into pristine water without NPDES oversight, *Catskill II*, 451 F.3d at 81. Second, the Court rejected EPA's "holistic" argument, which posited that (a) the Act's recognition of state authority over water allocations required a NPDES exemption for water transfers, and that (b) Congress intended to address point-source pollution from water transfers through nonpoint-source regulations. *Catskill II*, 451 F.3d at 83-84. *Compare* EPA Br. 29-30. As with the "unitary waters" theory, this Court held that "these 'holistic' arguments . . . simply overlook [the Act's] plain language." *Catskill II*, 451 F.3d at 84; *see Catskill I*, 273 F.3d at 494.

Because this Court's prior rulings thus followed from the plain, "unambiguous terms" of the Act, the Rule's contrary interpretation must fail. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Emps. Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989); *see New York v. F.C.C.*, 267 F.3d

91, 104 n.6 (2d Cir. 2001) (noting that "statutory 'plain meaning' exists to prevent" *Chevron* deference).

Defendants nonetheless assert that *Catskill I* and *II* can be ignored here because those decisions did not apply "*Chevron*-level deference." EPA Br. 33. But that analysis flips the *Chevron* framework on its head. Courts do not defer to agency interpretations at *Chevron* step one because the sole inquiry at that stage is whether the meaning of the statute is clear. *Shays v. F.E.C.*, 337 F. Supp. 2d 28, 52 (D.C. Cir. 2004). *Catskill I* and *II* resolved the application of NPDES to water transfers under, essentially, a step one analysis that interpreted the plain text of the Clean Water Act's discharge prohibition. 273 F.3d at 491-94; 451 F.3d at 82-87. EPA cannot circumvent these binding precedents by reasserting, under a "lens of *Chevron* deference" (SPA 126 n.4), the same "warmed-up arguments" that this Court has twice rejected, *Catskill II*, 451 F.3d at 82.

This Court's brief mention of *Skidmore* deference in the *Catskill* decisions does not, as EPA contends, suggest that it found the Act unclear. EPA Br. 33. The Court referenced *Skidmore* in *Catskill I* and *II* as background law to explain that the framework of *Skidmore*, rather

than *Chevron*, would apply to EPA's informal interpretation of the Act if there were ambiguity in the Act. *Catskill I*, 273 F.3d at 490-91; *Catskill II*, 451 F.3d at 82. But in its legal analysis, the Court never identified any statutory ambiguity (because there was none) that would warrant deference. *Catskill I*, 273 F.3d at 490-91; *Catskill II*, 451 F.3d at 82. To the contrary, this Court *rejected* EPA's statutory interpretation—an interpretation that EPA essentially reasserts here—as unpersuasive and contrary to the statutory text. *Catskill II*, 451 F.3d at 82 & 83 n.5; *Catskill I*, 273 F.3d at 491-92. This Court's conclusion that EPA's prior interpretation conflicted with the Act's plain language cannot plausibly be read as a finding that the statute is ambiguous.

Finally, EPA takes this Court's words even further out of context by selectively quoting *Catskill II*'s statement that New York City had "a reasonable, albeit incorrect, interpretation of a statute." EPA Br. 33 (quoting 451 F.3d at 89). The Court made this statement not in interpreting the Act but in a separate portion of the opinion upholding a civil penalty based on the district court's credibility assessment of the City's subjective belief that no permit was needed when no permitting authority had required one. *Catskill II*, 451 F.3d at 89. Nothing in this

comment about *the City's* beliefs suggests that *the Court* ever found the Act unclear while twice finding its meaning plain.

Put simply, no amount of administrative rulemaking can manufacture ambiguity where this Court has already ruled that none exists. *See, e.g.*, *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 396-399 (5th Cir. 2014) (rejecting agency interpretation even if *Chevron* applied because court had already rejected interpretation as against statute's "plain text"); *Sierra Club v. EPA*, 479 F.3d 875, 880-83 (D.C. Cir. 2007) (per curium) (rejecting EPA rule as contrary to prior judicial interpretation of statute's "plain language"). Accordingly, the Court should reject the Rule as foreclosed by *Catskill I* and *II*.

B. The Text, Purpose, and Structure of the Act Support the Requirement of a Permit for Transfers Between Water Bodies.

Even if this Court were to consider again the statutory question already resolved in *Catskill I* and *II*, it should reach the same conclusion and reject EPA's attempt to exempt water transfers from NPDES permitting.

1. The Act's plain language requires a permit because water transfers discharge pollutants into navigable waters.

The Clean Water Act's plain language prohibits the conveyance of dirty water into a clean body of water via a point source absent a NPDES permit. The Act requires a permit for any "discharge of a pollutant," which means "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A); *see* §§ 1311(a), 1342(a)-(b). There is no dispute that the water transfers covered by EPA's Rule are effected through point sources—*i.e.*, tunnels, pipes, or other artificial conveyances that transmit water from one body to another. And there is likewise no dispute that such water transfers add pollutants to downstream bodies that are navigable waters. *See L.A. County Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 713 (2013) (defining "add" as "to join . . . so as to bring about an increase" (quotation marks omitted)). Thus, a movement of water from one body to another plainly "qualifies as an 'addition'" covered by the permit requirement if the transfer increases the quantity of pollutants in the receiving water body. *Catskill I*, 273 F.3d at 489; *see Catskill II*, 451 F.3d at 83; *Dubois*, 102 F.3d at 1299.

The Act's "all-encompassing" regulation of "*[e]very* point source discharge" through the NPDES program further supports the requirement that water transfers go through the permitting process. *Milwaukee*, 451 U.S. at 318. Congress wrote the permit requirement broadly to cover every type of point source. Where Congress intended to exempt certain point-source discharges from NPDES permitting, it did so explicitly—providing, for example, that EPA "shall not require a permit" for agricultural return flows, certain stormwater runoff, and other narrowly defined categories. § 1342(*l*). But the Act contains no such exemption for water transfers, and the absence of an exemption precludes EPA's attempt to infer that inter-basin transfers are outside the NPDES program. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied."). EPA simply "does not have authority to exempt categories of point sources from the [NPDES] permit requirements." *Costle*, 568 F.2d at 1377; *see Nw. Envtl.*, 537 F.3d at 1021. But that is precisely what the Rule does.

In two recent decisions, the Supreme Court has also recognized that water transfers fall within the plain meaning of the Act's discharge

prohibition. In both *South Florida Water Management District v. Miccosukee Tribe of Indians* and *L.A. County*, the Court made clear that the relevant question for determining whether an "addition" of pollutants to navigable waters has occurred is whether the donating and receiving water bodies are "meaningfully distinct." *L.A. County*, 133 S. Ct. at 712-13; *Miccosukee*, 541 U.S. 95, 109-12 (2004). If they are distinct, then the transfer adds pollutants to the receiving body, thus triggering NPDES permitting; if they are not, then the "transfer" merely moves water within a single body and thus does not add pollutants to that body at all.[3] *See L.A. County*, 133 S. Ct. at 712-13; *Miccosukee*, 541 U.S. at 109-12. But the Supreme Court's "meaningfully distinct" test would be a dead letter if, as EPA's Rule states, NPDES

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[3] Defendants' reliance on cases holding that moving water within the *same* water body does not "add" pollutants is thus misplaced. *See* NYC Br. 49 (citing *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) and *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)). As this Court has held, moving polluted water into an "utterly unrelated" water body does "add" pollutants to the receiving water body. *Catskill I*, 273 F.3d at 492 (explaining that arguments to the contrary "strain[ed] past the breaking point the assumption of 'sameness'" in *Gorsuch* and *Consumers Power*). Indeed, the Rule does not even apply to movements of water within a single water body. (SPA 125 n.3.)

permitting does not apply to water transfers at all, even when the donating and receiving bodies are distinct.

To be sure, neither *Miccosukee* nor *L.A. County* squarely addressed the Water Transfers Rule. But the Rule had been promulgated by the time *L.A. County* was decided, and even though numerous briefs brought the Rule to the Court's attention, *see, e.g.*, Br. for Pet. L.A. County Flood Control District, *L.A. County*, 133 S. Ct. 710, at *33 & n.6, the Court focused on the plain meaning of the word "addition" and confirmed its prior holding "that [the] water transfer [in *Miccosukee*] would count as a discharge of pollutants" requiring a permit if the water bodies at issue were "meaningfully distinct." 133 S. Ct. at 713 (quotation marks omitted). The logic of that ruling cannot be reconciled with EPA's argument here (EPA Br. 50-53) that moving dirty water between two entirely distinct water bodies is not an "addition" even if the transfer increases the quantity of pollutants in the receiving waterway. Because such an interpretation violates the Act's plain meaning, it should be rejected. *Catskill I*, 273 F.3d at 494.

2. Requiring permits for water transfers is consistent with the Act's protection of individual water bodies.

The meaning of a statute's words cannot be evaluated in the abstract; instead, they must be ascertained in light of the statutory purposes and the "broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, the foundational purpose of the Clean Water Act drives home that the statute requires NPDES permitting for inter-basin transfers that add pollutants to clean waterways. The Act's "broad and uncompromising" objective is to restore and maintain the integrity of individual water bodies for use by people and wildlife. *Catskill I*, 273 F.3d at 494. The absolute prohibition against pollutant discharges absent a NPDES permit is critical to achieving this water-protection goal. *Arkansas*, 503 U.S. at 101-02; *see Dubois*, 102 F.3d at 1294. (NPDES permitting is Act's "most important component").

In multiple, overlapping ways, the Act evinces Congress's intent to ensure that individual water bodies are protected from receiving pollution. The water-quality standards that States must promulgate under the Act are defined for every individual water body, and tailored to each waterway's designated uses. *Miccosukee*, 541 U.S. at 107. These

standards are site-specific: designated uses and water-quality criteria vary based on the particular water body's geographical location, climate, biology, and the needs of its surrounding populations. *See* § 1313(a), (c); *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704-05 (1994). Where technology-based effluent limitations fail to maintain these individualized standards, the permitting authority must impose additional effluent limitations on pollutant discharges to achieve the affected water body's water-quality objectives. §§ 1311(b)(1)(C), 1312(a).

Many other provisions of the Act also rely on individualized water-quality standards to protect each navigable water body or portions thereof. For example, States must identify impaired water bodies for which standard NPDES permits are not achieving applicable water-quality standards and implement plans to restore the quality of these waters. § 1313(d)(1)(A), (e). "Anti-degradation" and "anti-backsliding" policies ensure that each waterway's existing designated uses and water quality will be maintained. *See* §§ 1313(d)(4)(B), 1342(o)(3); *PUD No. 1*, 511 U.S. at 705. And a certification program requires applicants for certain federal licenses or permits to obtain a state certification that any

discharge of pollutants will comply with the receiving water body's water-quality standards. 33 U.S.C. § 1341; *PUD No. 1,* 511 U.S. at 707-08.

Congress's focus on individual water bodies makes sense. Water pollution causes harm not in an abstract, collective sense, but rather in specific locations—for example, when people drink water polluted by fecal coliform, or when freshwater fish attempt to survive in a river inundated by salt-water pollution. To the victims of such localized pollution, it makes little difference whether harmful pollutants were artificially channeled from another water body or from (for example) a chemical plant. Either way, pollutants enter the local water body through a point source, degrading the quality of the waterway and impairing its intended uses.

Indeed, the Rule would turn on its head Congress's regulation of point sources—the means by which pollution enters into receiving water bodies. Point sources are regulated under the NPDES program typically because they transport pollutants from other places, not because they are "the original source of the pollutant." *Miccosukee*, 541 U.S. at 105; *see Catskill I*, 273 F.3d at 493. But the Rule takes the opposite approach, ignoring inter-basin transfers when the pollutants originate

elsewhere, while requiring a permit in the "unlikely" situation where the point source "created the pollutants that it releases." *Catskill I*, 273 F.3d at 493. (SPA 131 (permit required if "water transfer facility itself . . . introduce[s] pollutants into" transferred water).) This focus on whether the transferor is the originator of the pollutants (*see* Districts Br. 6) has no place in the NPDES program, which aims "to protect receiving waters" for use by people and wildlife, "not to police the alteration of" transferred water. *N. Plains. Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003).

Ultimately, allowing unpermitted transfers of polluted water between watersheds without regard to the water-quality standards of receiving water bodies cannot be squared with Congress's goal of protecting individual water bodies. Under the Rule, the NPDES program would pose no barrier to a point-source operator conveying "heavily polluted, even toxic" water into a pristine lake, *Catskill II*, 451 F.3d at 81; moving water contaminated with invasive species into a noninfected water body, *Nw. Envtl.*, 537 F.3d at 1012-13; or dumping water "laced with sulfur . . . into receiving water used for drinking," *N. Plains*, 325 F.3d at 1163. Congress could not have intended such absurd results at odds

with the Act's premise of preserving each water body's distinct quality and uses. *See Catskill II*, 451 F.3d at 81; *Dubois*, 102 F.3d at 1297.

Placing inter-basin transfers outside of the NPDES program also undermines the permitting program's procedures for resolving competing interests over interstate water transfers. Without NPDES permitting, downstream States would have no right to be heard or to seek relief from EPA, even if upstream transfers in one State devastate the quality of water bodies downstream. As Colorado admitted during oral argument below, under defendants' theory, if an inter-basin transfer pollutes drinking water in another State, downstream water-users just "have to drink dirty water" or attempt a common-law nuisance lawsuit in the courts of the polluting State. (SPA 95-96.) Congress could not have intended for its carefully crafted administrative remedies to be so easily circumvented precisely at the point when they are needed most—when two States cannot resolve an interstate water-pollution dispute.

Moreover, NPDES permits help ensure that upstream States and water users do not unfairly foist the economic burdens of controlling water pollution onto downstream States and permit holders. If point-

source operators in upstream States are not required to obtain permits for their dirty inter-basin transfers, upstream States and water users would be able to avoid pollution-abatement costs while downstream States may be required to subject existing permit holders to stricter effluent limitations to prevent water-quality violations—in essence, forcing downstream States and permit holders to bear higher costs due to the unpermitted water transfer. *See* § 1311(b)(1)(C). But Congress enacted the NPDES program to avoid such unfair results and to prevent States from competing "for industry and development by providing more liberal limitations than their neighboring" States. *Costle*, 568 F.2d at 1378.

C. Defendants Have Failed to Identify Any Ambiguity Warranting Agency Deference.

1. There is no plausible basis to interpret "navigable waters" to refer only to the waters of the United States as a collective whole.

The Act prohibits a point source from adding "any pollutant to navigable waters" absent a NPDES permit. § 1362(12)(A). Defendants argue that "the statutory term 'waters' is ambiguous" because the term could refer only to the waters of the United States as a collective whole, and not to each individual water body. EPA Br. 26-28, 50-56; Br. for S.

Fl. Water Mgmt. Dist. ("SFWMD Br.") 9, 18-25. Under this exclusively collective interpretation, a NPDES permit is required only when pollutants are first added anywhere in the United States, but not when they are subsequently transferred *within* the United States. This Court should again reject this so-called "unitary waters" argument as having "no basis in law or fact." *Dubois*, 102 F.3d at 1296; *see Catskill I*, 273 F.3d at 493; *Catskill II*, 451 F.3d at 81, 83.

As an initial matter, defendants may not defend the Rule based on their interpretation of the term "navigable waters" because EPA declined to base the Rule on any purported ambiguity in that term. EPA specified that the Rule addressed only the "legal question" of whether a inter-basin transfer "constitutes an '*addition*'" under the Act (SPA 126 (emphasis added)) and disclaimed any attempt to interpret the scope of the term "navigable waters" (SPA 125 n.2). Likewise, the Klee Memorandum, the basis of the Rule's legal analysis (SPA 74-76 & n.21-23), deliberately avoided adopting the "unitary waters" theory—most likely because that theory had "struck out in every court of appeals where it ha[d] come up to the plate." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (*Friends I*)

(citing cases). (*See* J.A. 443 (Klee stating that EPA is "not basing [its] interpretation . . . on the unitary waters theory"). Because the "unitary waters" theory is thus a "post hoc rationalization[]" that does not address the legal question on which EPA based the Rule, it cannot serve as a basis for upholding the Rule. *See Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 61 (2d Cir. 2003).

But even if the Court considers the "unitary waters" argument, it should again reject it. This theory is contrary to the ordinary meaning of "navigable waters," which refers to waters in the plural and not to one, unitary water. In regular usage, people do not refer to many different "waters" as "a single water body." *Catskill II*, 451 F.3d at 81. To be sure, "waters" can refer to multiple water bodies, such as "the waters of the Gulf coast," but this does not remotely suggest that the referenced waters are a unitary entity instead of "several different bodies of water." EPA Br. 26-27 (quoting *Friends I*, 570 F.3d at 1223-24). SFWMD's assertion (SFWMD Br. 21-23) that "the waters of the United States" must have a collective meaning because of the definitive article "the" and the plural "waters" also does not comport with the ordinary meaning of those words. Use of the definite article does not

connote collectivity; rather, it means that "navigable waters" refers to particular waters, namely, those "of the United States," rather than to unspecified waters. *See* Norman Singer, *Sutherland Statutes and Statutory Construction* § 66:3 (7th ed.) ("definite article suggests specificity); *see, e.g., United States v. Rybicki*, 354 F.3d 124, 137-38 (2d Cir. 2003) (en banc). As the Supreme Court has explained, by using the "definite article ('the') and the plural number ('waters')," Congress did "not refer to water in general" but rather to real-world water bodies "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes." *Rapanos v. United States*, 547 U.S. 715, 732 (2006) (plurality op.) (quotation marks omitted).

In any event, "ambiguity is a creature not of definitional possibilities but statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). And in the context of the Clean Water Act's protective purposes, a reading of the permit requirement that ignores undisputed harms to individual water bodies "cannot sensibly be credited." *N. Plains*, 325 F.3d at 1163. There is no logical reason for Congress to refer to all waters in the United States as a collective whole when, as discussed above, it aimed to preserve the integrity of each of the nation's

navigable waters. Defendants' theory would allow unpermitted transfers of cold water into a warm water fishery and toxic water into a pristine river on the theory that all such waters are "sufficiently the 'same.'" *Catskill I*, 273 F.3d at 491. A theory so divorced from reality that it produces "irrational" results cannot inject ambiguity into the Act's plain meaning. *Dubois*, 102 F.3d at 1297; *see Catskill II*, 451 F.3d at 81.

Indeed, defendants do not suggest *any* discernible legislative purpose behind the "unitary waters" theory other than to reach the litigation outcome they seek in this case. Nor have defendants identified a single other place in the Clean Water Act that uses the phrase "navigable waters" to refer *only* to the waters of the United States as a unitary whole, thereby precluding consideration of harms to individual water bodies. To the contrary, multiple provisions of the Clean Water Act unambiguously use the term "navigable waters" to refer individually to water bodies. As explained, the water-quality standards mandated by the Act are tailored to each water body. And Congress enacted many protections designed to achieve and maintain these individualized water-quality standards and to protect the designated uses of all waters. See *supra* at 35-36. The Clean Water Act's basic structure is thus flatly

incompatible with the "unitary waters" theory. *See Miccosukee*, 541 U.S. at 107 (explaining that water-quality provisions "suggest a view contrary to the unitary waters approach").

Moreover, the Clean Water Act, like other statutes, must be interpreted to harmonize and give effect to each of its provisions. *See, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 237 (2d Cir. 2011). The Act contains many provisions directing States to act with respect to "navigable waters" within their borders.[4] That direction cannot refer to all waters in the United States as a whole because the whole of the nation's waters cannot be located within any one State. Rather, "navigable waters" in these provisions can only mean individual water bodies located within each State. Congress's consistent reference to "navigable waters" as individual water bodies thus demonstrates that it intended the "same meaning" in the discharge prohibition. *See Prus v. Holder*, 660 F.3d 144, 147 (2d Cir. 2011) ("identical words" in statute normally "have the same meaning"). Indeed, because Congress defined "navigable waters" for the entire statute, this term should have only one meaning throughout the

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[4] *See, e.g.*, 33 U.S.C. §§ 1313(c)(2)(A), (c)(4), (e)(3); 1314(*l*)(1)(A)-(B); 1315(b)(1)(A)-(B); 1329(a)(1)(A), (b)(1), (d)(2)(D), (h)(9), (h)(11)(B).

Act. *See* Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 226 (Thompson/West 2012) (where statute uses word "means" to define term, "the clear import is that this is its *only* meaning"); *United States v. ExxonMobil Pipeline Co.*, 2014 WL 2925079, at *5 (June 9, 2014) (applying statute-wide definition of "navigable waters").

The "unitary waters" theory not only lacks legislative purpose; it also conflicts with the intended jurisdictional purpose of the term "navigable waters." The Supreme Court has long understood "navigable waters" as a term that defines the Act's scope, such that particular water bodies are either navigable waters protected by the Act or nonnavigable waters outside the statute's reach. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 172 (2001); *Rapanos*, 547 U.S. at 731-32 (plurality op.). Indeed, EPA (along with the U.S. Army Corps of Engineers) recently proposed a rule clarifying which individual water bodies fall within the definition of "navigable waters" and are therefore "jurisdictional" waters subject to the Act's permit requirements. *Definition of "Waters of the United States" Under the Clean Water Act*, 79 Fed. Reg. 22,188-01

(2014). But the "unitary waters" theory ignores Congress's use of "navigable waters" to include water bodies within the Act's protections and instead uses the term to exempt discharges into water bodies that indisputably qualify as "navigable waters." Such a backwards interpretation of "navigable waters" cannot be reconciled with its intended purpose. As EPA once explained, "to define" water bodies as "navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary." EPA, Office of the General Counsel, *In re Riverside Irrigation Dist.*, 1975 WL 23864, at *4 (June 27, 1975).

Defendants' attempts to justify the "unitary waters" theory are unavailing. Relying on the Eleventh Circuit's decision in *Friends I*, defendants contend that the absence of the word "any" before "navigable waters" in the definition of a "discharge" "implies that Congress was not talking about *any* navigable water, but about *all* navigable waters as a whole." 570 F.3d at 1223-25; EPA Br. 27; SFWMD Br. 22-23. But the Clean Water Act provides no support for this inference. Neither the Eleventh Circuit nor defendants have identified a single instance (outside of the language at issue here) in which Congress used the

unmodified phrase "navigable waters" to mean a "collective whole." *Friends I,* 570 F.3d at 1224-25. Their argument thus boils down to the assertion that in the NPDES permit requirement alone, Congress intended through the nonappearance of the word "any" to adopt subtly the "unitary waters" theory and thus "alter the fundamental details" of the Act. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). But, as the Supreme Court has repeatedly held, Congress does not "hide elephants in mouseholes." *Id.* And an interpretation of the Act's permit requirement that exempts an entire class of point-source discharges based on the omission of a single word would do exactly that.

Moreover, defendants' theory does not comport with the ordinary meaning of the word "any" in this context. The word "any" is used in various points of the Act to emphasize that there are no exceptions—it is used, therefore, when the possibility of exceptions was contemplated and rejected. For example, the permit requirement uses "any addition" to underscore that there is no exception for particular quantities of pollutant, and uses "any pollutant" and "any point source" to emphasize that there is no exception for pollutants or point sources not specifically enumerated in the statute. *See* § 1362(6), (14). And Congress likewise

used the phrase "any navigable waters" in other provisions of the Act to reject theoretical exceptions. *See* § 1314(f) (using "any navigable waters" to emphasize that there is no exception to information-sharing provision for flow changes from "dams, levees, channels, causeways, or flow diversion facilities"). But the word "any" is not used in the Act to distinguish between references to collective nouns and collections of individual nouns. As the Eleventh Circuit itself noted, while the Act sometimes uses "'any navigable waters' . . . to protect individual water bodies," it "also use[s] the unmodified 'navigable waters' to mean *the same thing*." 570 F.3d at 1224-25 (emphasis added). Thus, the presence or absence of the word "any" makes no difference: both with and without that modifier, Congress used the phrase "navigable waters" to refer to individual waterways.[5]

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[5] Provisions of the Act using other modifiers with "navigable waters" to refer to "particular water bodies or subparts of" waters (EPA Br. 27-28) do not change the analysis. These modifiers are used to refer to a particular subset of navigable waters. Congress had no reason to use such modifiers in defining "discharge of pollutants" because the permit requirement covers all navigable waters, not a subset or portion of navigable waters.

The analogies presented by defendants and the Eleventh Circuit are also unpersuasive because they are divorced from the context and purposes of the Act. *See Friends I*, 570 F.3d at 1228 (stating that its analogies "strip [the] legal question" from the "policy interests attached to it" and operate "in the abstract"). *See* Br. for City of N.Y. ("NYC Br.") 42-43. For example, the Eleventh Circuit's bucket analogy, which posits that moving a marble from one bucket to another might not add any marbles to "buckets" (plural), draws any persuasive force it has from the assumption that moving a marble between buckets makes no real-world difference. *Id.* But that assumption is demonstrably untrue in the context of water transfers and the Clean Water Act—each water body "bucket" is very different, and moving water from one body to another can have drastic polluting consequences that Congress sought to prohibit. A more apt analogy that incorporates the Clean Water Act's concern with protecting individual water bodies would be a local health department's prohibition of "any addition of any insect to the dishes of a restaurant." *Cf. Catskill II*, 451 F.3d at 81 (analogizing water transfers to "scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot"). Under a "unitary dishes" theory, this

prohibition would prevent cockroaches from entering the kitchen—but would not apply to the transfer of a cockroach from a soup to a parfait. Neither common sense nor the plain language would support such a perverse reading.[6]

EPA also claims that water transfers are not an "addition" of pollutants to "waters of the United States" because the transferred water retains its "status" as "waters of the United States" throughout the journey from the donating water body to the receiving water body. (SPA 127, 131 n.10.) But as the district court properly concluded (SPA 110-119), this "status" argument conflicts with all of the understandings of "navigable waters" expressed by the Supreme Court in *Rapanos*. (SPA 116-119.) And it ignores that inter-basin transfers often employ "highly artificial, manufactured, enclosed conveyance systems," including

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[6] SFWMD relies on another untenable analogy. SFWMD invents the phrase "addition of wine to the United States" and asserts that wine is an "addition" only when entering from "outside of the United States" and not when moved from one State to another. SFWMD Br. 31. But the relevant statutory language here is not "addition of waters to the United States" but "addition of *any pollutant* to navigable waters." § 1362(12) (emphasis added). Thus, an appropriate analogy would be a statute prohibiting the "addition of *any poison* to wines of the United States." It is absurd to interpret this prohibition as applying only to poisons added from France, but not from California.

"mains, pipes, hydrants, machinery, [and] buildings . . . [that] likely do not qualify as 'waters of the United States." *Rapanos*, 547 U.S. at 736 n.7 (plurality op.); *see Dubois*, 102 F.3d at 1297.

And in any event, point-source regulation does not depend on the status of the donating water body or the transferred water; whatever that status, a conveyance of dirty water adds pollutants to receiving waters and triggers the environmental, economic, and public-health consequences that the Clean Water Act was meant to redress. See, *supra*, at 30-40. Indeed, the Rule itself acknowledges that the status of the donating water body and transferred water is not dispositive: when inter-basin transfers undergo an "intervening commercial, municipal, or industrial use," the transferor must obtain a permit for *all* discharged pollutants, even if "some of the pollutants in the discharge . . . may have been present in the source water" before the intervening use. (SPA 130 & n.8.) Similarly, a preexisting EPA regulation provides a "credit" against effluent limitations to a discharger for pollutants already in donor water (SPA 130), but it does so only if the transferred "water is drawn from the *same body of water* into which the discharge is made" or if "no environmental degradation" will result to the receiving water body

—implying that no credit is available for inter-basin transfers that degrade the quality of receiving waters. 40 C.F.R. § 122.45(g)(4) (emphasis added). EPA's own rules thus demonstrate that the "status" of the donor water body or the transferred water as "waters of the United States" (or not) does not control the question of NPDES permitting. Rather, it is the "status" of the receiving water bodies as "waters of the United States" that triggers the permit requirement.

2. EPA improperly reads other sections of the Act to create a blanket exemption for water transfers.

With no ambiguity in the discharge prohibition, defendants resort to claiming that other provisions of the Clean Water Act create an implicit exemption to permitting for all water transfers. But this Court has twice considered and rejected the very same "holistic" arguments, and should do so again here. *See Catskill I*, 273 F.3d at 493-494; *Catskill II*, 451 F.3d at 83-84.

a. The States' authority to allocate water quantity does not displace the Act's regulation of water quality.

Defendants first rely on two provisions of the Act that recognize the States' authority over proprietary rights to water within their boundaries: (1) 33 U.S.C. § 1251(g), which provides that the Act does not impair rights to quantities of water established by the States; and (2) 33 U.S.C. § 1370(2), which provides that the Act does not affect the States' jurisdiction over waters. EPA claimed in the Rule that these provisions demonstrated ambiguity in whether a water transfer "constitutes an 'addition'" of pollutants under the Act (SPA 126), but the allocation provisions have nothing to do with the term "addition" or to the NPDES permit requirement. Indeed, as the district court explained, EPA has essentially conceded that the meaning of "addition" is clear. (SPA 42-43.)

In any event, as the Supreme Court has directly held, these provisions only "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."[7] *PUD No. 1*, 511 U.S. at 720. Because the States' power "to allocate *quantities* of water . . . is not inconsistent with federal regulation of water *quality*," there is no inconsistency in Congress's purposes and no statutory ambiguity. *Catskill II*, 451 F.3d at 84 (emphasis in original); *see Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513-14 (10th Cir. 1985) (allocation provisions inapplicable because permits did not deny State's "right to water").

Indeed, contrary to defendants' arguments, these provisions in fact support the requirement that water transfers undergo NPDES permitting. Section 1370 reinforces, rather than restricts, the Act's water-quality measures by requiring States to abide by minimum federal pollution-control standards (including the NPDES permit

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[7] The Western States' attempt to distinguish *PUD No. 1* as involving the Act's state certification program rather than NPDES permits is meritless. Br. for Western States ("Western Br.") 27-28. Like defendants here, the petitioners in *PUD No. 1* argued that the allocation provisions restricted application of a pollution control program authorized by the Act that enforces "*federally* controlled water quality standards." 511 U.S. at 720 (emphasis added (quotation marks omitted)). The Supreme Court rejected this argument, *id.*, and nothing suggests that this holding does not extend to NPDES permitting. Indeed, the Western States argue that the certification program is run by States, but so are nearly all NPDES programs, as intended by Congress. § 1251(a).

program) while authorizing States to implement even stricter pollution regulations. § 1370(1). And the legislative history of § 1251(g) cited by defendants (Western Br. 24-25; Br. for Water Districts ("Districts Br.") 29-30) makes clear that this provision's recognition of the States' allocation authority was not intended to interfere with the Act's water-quality controls, even if those measures might "incidentally affect individual water rights." 95 Cong. Rec. 39,212 (1977). EPA affirmed this understanding in a formal memo issued shortly after § 1251(g)'s enactment, explaining that the provision should not be read to undermine water-protection measures—even those that "might affect water usage"—and noting that Congress had left "untouched" the NPDES program's requirement that "without exception . . . point source discharges be controlled to meet water quality standards." EPA, *State Authority to Allocate Water Quantities—Section 101(g) of the Clean Water Act*, at 1, 3 (Nov. 7, 1978).

Because NPDES permits thus do not allocate water quantities, the Western States and Water Districts are wrong in asserting that requiring NPDES permits for water transfers intrudes on "traditional state authority" over water allocations. *See* Western Br. 12-17 (invoking

Tenth Amendment and clear-statement and constitutional-avoidance rules). States remain free to allocate water quantities as they see fit; the sole purpose of NPDES permits is to regulate any harms to water quality from transfers. The cases on which defendants' rely (Western Br. 16-17) are inapposite. In *SWANCC* and *Rapanos*, the EPA regulations at issue raised serious constitutional questions about federal intrusion on state authority because they sought to extend the scope of "navigable waters" to "the outer limits of Congress's commerce power," *Rapanos*, 547 U.S. at 738 (plurality op.), *i.e.*, to areas never traditionally understood to be navigable waters. *See id.* ("immense stretches of intrastate land"); *SWANCC*, 531 U.S. at 174 ("abandoned sand and gravel pit"). Here, by contrast, applying the NPDES permitting program to inter-basin water transfers would not extend the Act beyond traditionally navigable waters squarely within the heartland of Congress's authority. *See Rapanos*, 547 U.S. at 723-24 (plurality op.); *see SWANCC*, 531 U.S. at 171-72.

Nor is there any merit to defendants' contention that permitting inter-basin transfers would contravene States' rights because transfers involve state entities moving water containing "natural" pollutants

(Districts Br. 5-10, 19-23) rather than "municipal and industrial pollution" (EPA Br. 41; SFWMD Br. 4). As this Court has recognized, the Clean Water Act is not exclusively focused on industrial or commercial polluters. *See Catskill I*, 273 F.3d at 494. To the contrary, Congress broadly prohibited unpermitted discharges from *any* point source regardless of the operator's identity, *see* §§ 1311(a), 1362(12), (14), and extended NPDES permitting to a vast array of pollutants that includes nonindustrial pollutants, *id.* § 1362(6). In any event, defendants' attempt to justify certain pollution as "natural" improperly disguises the artificial and often highly engineered conveyances that transport pollutants such as heat, mud, and suspended solids "over long distances, across both State and basin boundaries," in the inter-basin water transfers covered by EPA's Rule (SPA 124).

Because NPDES permits do not dictate water rights or improperly intrude on state authority, defendants' objection ultimately rests on the assumption that "federal regulation of interbasin water transfers" will be so onerous that it might "lead to the termination of those transfers." *Catskill II*, 451 F.3d at 86; *see* Western Br. 31-34; Districts Br. 11-24. But this Court has already concluded that such claims are "alarmist

and unwarranted."[8] *Catskill II*, 451 F.3d at 86. As the Court explained, multiple flexibilities in the NPDES permitting scheme—including variances, general permits, and consideration of costs in setting effluent limitations—"allow federal authority over [water] quality regulation and state authority over quantity allocation to coexist without materially impairing either." *Id.* at 86; *see Nw. Envtl.*, 537 F.3d at 1010-11. See, *infra*, at 79-82. And, to the extent that the Act's water-protection measures nonetheless affect the States' water-allocation decisions, that is by congressional design: as this Court recognized, "in honoring the text, [the Court] adhere[s] to the balance that Congress has struck and remains free to change." *Catskill II*, 451 F.3d at 85.

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[8] Many Western States appeared as *amicus curiae* in *Catskill II* and raised the same contentions regarding "state water rights." *See* 451 F.3d at 84; Br. Amici Curiae, *Catskill II*, 451 F.3d 77, 2004 WL 3565226, at *16-29. The Western States' assumptions regarding the alleged effects of permitting on water allocations remain just as speculative as they were before the Rule. See, *infra*, at 74-79.

b. The potential availability of other pollution controls does not justify ignoring the NPDES permitting scheme.

Defendants' "holistic" approach also relies on the assertion that "Congress would have considered the[] effects of water transfers to be best treated" through other regulatory mechanisms. EPA Br. 17. In particular, defendants assert that Congress intended water transfers to be regulated by programs for *nonpoint* sources. *Id.* 31. But this argument suffers from multiple flaws.

First, nothing in the Clean Water Act supports defendants' assertion of congressional intent. Defendants primarily cite to 33 U.S.C. § 1314(f) (*id.* 30-31; Western Br. 35-37), but this is merely an information-sharing provision that requires EPA to publish information on two topics: (1) "nonpoint" pollution generally, § 1314(f)(1); and (2) methods to control pollution from activities that could result in nonpoint- or point-source pollution, including mining activities, construction activity, and "changes in the movement, flow, or circulation of any navigable waters," § 1314(f)(2). This information is required to aid agencies in developing waste treatment management plans, which

address pollution from both "point and nonpoint sources" for areas with substantial water-quality control problems. §§ 1281(c), 1288(a), 1314(f).

The information-sharing and waste treatment-plan provisions do not address, let alone limit, the obligation of all point-source dischargers to obtain NPDES permits. As the Supreme Court has explained, § 1314(f) does not "exempt *nonpoint* pollution sources from the NPDES program" when "they *also* fall within the 'point source' definition" *Miccosukee*, 541 U.S. at 106 (first emphasis added). It is even less plausible to read the information-sharing provision as exempting from NPDES permitting the undisputed point sources that effect water transfers.[9] Indeed, EPA acknowledges that the "mere mention of an activity in [§ 1314(f)] does not mean it is exclusively nonpoint source in nature." (SPA 128.)

Second, defendants' position (EPA Br. 30; Western Br. 35-37) that *point* source pollutant discharges via inter-basin transfers "more

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[9] EPA's reliance on a House Report regarding the information-sharing provision is likewise misplaced. (SPA 128.) The report's listing of "manmade changes in the normal flow of surface and ground waters" as one activity that can produce nonpoint-source pollution, Legislative History, *supra*, at 796, does not remotely suggest that inter-basin transfers conveying and discharging pollutants through point sources are exempt from permitting. EPA is simply conflating water-flow changes that do not involve point sources with those that do.

naturally fit" under "*nonpoint* source programs" makes little sense. Nonpoint-source pollution—*i.e.*, "pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source"—poses unique regulatory problems. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). "Non-point sources cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *see Cordiano*, 575 F.3d at 219-21 (explaining that nonpoint source pollutants cannot be traced to identifiable point sources). But point sources pose no similar obstacles. Since it is undisputed that the water transfers covered by the Rule are point sources, there is no basis to relegate their regulation to nonpoint-source programs. Indeed, if Congress had intended to regulate point-source discharges via inter-basin transfers solely through state nonpoint-source programs, it surely would have said so.

Finally, aside from nonpoint-source programs, defendants also rely (EPA Br. 31; Western Br. 34-40) on water-quality regulation

outside of the federal NPDES program. For example, defendants point to the States' authority to enact their own pollution-control programs to regulate water transfers within their own borders. But the lack of a federal ceiling on water-pollution controls does not suggest that States may circumvent the federal floor. In particular, where Congress has mandated that all point-source discharges nationwide receive permits, States are not free to decide otherwise. Congress's directive that all States implement the NPDES program, *see* § 1251(b), hardly suggests that States may lower federal standards through their own programs.

Moreover, defendants' suggestion that state programs are sufficient ignores the fact that no State can impose its own permit requirements on another State. *See Ouellette*, 479 U.S. at 490-91. Relying only on state permit programs would thus improperly eliminate downstream States' rights to ensure that waters flowing across their borders will not receive pollutants from upstream point sources unregulated by NPDES permitting.[10]

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[10] Defendants also rely on provisions encouraging voluntary inter-State cooperation through compacts or agreements to address cross-border pollution. Western Br. 43-44 (citing 33 U.S.C. §§ 1253,
(*continued on the next page*)

Ultimately, the availability of other federal or state water-protection programs merely "demonstrate a congressional intent to address the serious national problem" of water pollution through "multiple, nonexclusive fronts." *Nw. Envtl.*, 537 F.3d at 1025. Contrary to defendants' arguments, these alternative sources of regulation do not create an implicit exemption to the Act's central NPDES program. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (other regulations "in no way license[] EPA to shirk its environmental responsibilities" under Clean Air Act).

"In the end, . . . [defendants'] holistic arguments about the allocation of state and federal rights, said to be rooted in the structure of the [Act], simply overlook its plain language." *Catskill II*, 451 F.3d at 84. Given the critical role of NPDES permitting in eliminating pollutants and protecting water quality and downstream States, Congress would not have exempted inter-basin transfers that discharge pollutants via point sources from the NPDES program without saying so expressly, as it did for other categories of discharges.

1288(a)(4). But these provisions are nonenforceable, and cannot replace Congress's mandate that every state-run NPDES program regulate all point-source discharges and provide procedural protections to downstream States.

POINT II

THE RULE IS BOTH AN UNREASONABLE AND AN ARBITRARY AND CAPRICIOUS INTERPRETATION OF THE ACT

Because Congress unambiguously intended to prohibit unregulated discharges of dirty water into clean water bodies, the Rule fails at *Chevron* step one. But even if the statutory text were ambiguous—and it is not—the Rule also fails at *Chevron* step two and under the APA because it is unreasonable, arbitrary and capricious, and manifestly contrary to the Clean Water Act.

Because the plaintiff States challenged both EPA's interpretation of the Clean Water Act and its promulgation of the Rule (J.A. 145-146), this Court reviews the Rule under the distinct but substantially overlapping standards of *Chevron* step two and the APA. *See Waterkeeper*, 399 F.3d at 497-98; *see Judulang v. Holder*, 132 S. Ct. 476, 483-84 n.7 (2011) (noting that analysis would have been "the same" under *Chevron* or APA because *Chevron* asks whether "agency interpretation is arbitrary or capricious in substance" (quotation marks omitted)); *Mineta*, 340 F.3d at 52-58 (reviewing and rejecting rule under *Chevron* and APA).

Under *Chevron*, no deference is accorded to an agency interpretation that is unreasonable, *i.e.*, a construction that is "'arbitrary, capricious, or manifestly contrary to the statute.'" *Riverkeeper*, 358 F.3d at 184 (quoting *Chevron*, 467 U.S. at 843). Moreover, an agency rule is arbitrary and capricious under the APA if the agency failed to consider "an important aspect of the problem," to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," or to consider "alternative way[s] of achieving the" statute's objectives. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983). Here, the Rule fails under either standard. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 728 (D.C. Cir. 1994) (*ICC*) (rejecting rule as unreasonable whether analyzed under *Chevron* step two or the APA).

A. Even If a Statute Has Multiple Permissible Readings, EPA May Not Arbitrarily Choose Between Those Readings.

As an initial matter, defendants misstate the law when they claim that EPA's selection of either of two possible ways to read the Act—as referring to "navigable waters" individually or collectively—is essentially

"per se reasonable." (SPA 106.) *See* EPA Br. 34-36. EPA's "unitary waters" theory is not a permissible reading of the Act, see, *supra*, at 40-54, but even if the Act were ambiguous, it would "scarcely follow[] that Congress has authorized [EPA] to choose any" possible meaning of the statute. *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006).

Courts defer to an agency's statutory interpretation based on the assumption that the agency has applied expertise and rational thought to resolve a policy gap. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). Thus, if there is any need for EPA to resolve ambiguity, EPA must use "expert policy judgment" to reach a reasoned policy choice. *Brand X*, 545 U.S. at 1003. Here, despite claiming deference for its "policymaking authority" (EPA Br. 40), EPA seeks automatic deference to its selection between perceived definitional possibilities. But EPA does not gain deference for essentially picking a statutory "interpretation out of a hat." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2010).

As the district court explained, "if the fact that [EPA] chose" among possible interpretations was "enough to trigger deference," *Chevron* step two would be a nullity. (SPA 106.) But courts "do not hear cases merely to

rubber stamp agency actions." *NRDC v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000). Because deference "does not mean acquiescence," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992), courts "retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang*, 132 S. Ct. at 484-85.

For the reasons given below, among others, the district court properly fulfilled this critical judicial role by carefully reviewing the Rule and determining that it is unreasonable and arbitrary.

B. EPA Engaged in an Arbitrary "Balancing" of Competing Interests.

EPA claims that tension between the Clean Water Act's fundamental objective of protecting water quality and general policy of preserving state authority over water allocations creates a statutory ambiguity that EPA reasonably resolved by "balancing" Congress's purportedly competing goals. (SPA 127.) *See* EPA Br. 41-42, 46-47. But this "balancing" was invalid from the start. Congress already "has struck and remains free to change" its desired balance between water-quality and water-quantity goals in the NPDES program. *Catskill I*, 451 F.3d at 84-85. See, *supra*, at 55-60. In light of Congress's choice, EPA is

not free to engage in a wholesale recalibration of this balance, even if there were some textual ambiguity in the Act. But this is what EPA did by imposing a blanket permit exclusion that would be "patently inconsistent" with Congress's core water-protection goals. *See Continental Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988).[11] See, *supra*, at 35-40. EPA's contention that it chose between two permissible interpretations is thus wrong—the range of permissible interpretations of the Clean Water Act does not include a Rule that "actually frustrate[s]" Congress's water-quality purposes by elevating another purpose that Congress already factored into the statutory balance. *See id.* at 1453; *see Whitman*, 531 U.S. at 487 (rejecting EPA's interpretation of textual ambiguity because it was "at odds" with statute's "manifest purpose"); *Chem. Mfr. Assoc. v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (rejecting EPA's interpretation at *Chevron* step two because it deviated from congressional intent).

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[11] *Continental* (EPA Br. 39) is thus inapposite. Unlike in *Continental*, where the regulation was "clearly" "compatible with Congressional purposes," 843 F.2d at 1453, the Rule is flatly incompatible with the Act's goals.

In any event, even if EPA had authority to balance water-quantity and water-quality goals, it utterly failed to do so. Balancing means that an agency has genuinely weighed both sides. But EPA's "one-dimensional analysis" in the Rule (SPA 86-87) credited upstream States' interests in allocating water without giving any serious weight to the Act's core objective of protecting our Nation's waters, or the critical role of NPDES permitting in achieving that objective. Nor did EPA's analysis account for the importance of permits in preserving each waterway's individualized water-quality standards and designated uses. The resulting Rule is "not so much a balance of conflicting policy goals as the acceptance of one without any real consideration of the other." *ICC*, 41 F.3d at 728.

EPA's singular focus on water allocations is particularly unreasonable given the Supreme Court's recognition that preservation of state water allocations does "not limit the scope of [the Act's] water pollution controls." *PUD No. 1*, 511 U.S. at 720. Because Congress made water quality of paramount importance, "[w]hatever it means" to balance the Act's goals, "it must mean" that water allocations "cannot be considered without reference" to water protection. *Mineta*, 340 F.3d at 58;

see Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 362 (D.C. Cir. 1984) (per curium) (explaining that Congress's intent to address health in waste-treatment statute "would necessarily make it unreasonable for EPA" to promulgate standards "without regard" to health).

EPA's assertion that it did not ignore Congress's water-protection objectives is meritless. *See* EPA Br. 40-42, 46-47. EPA notes that the Rule identifies Congress's environmental goals and the polluting nature of inter-basin transfers. *Id.* 41. But merely *mentioning* the Act's protective purposes does not change the fact that EPA ignored those purposes entirely by "abandon[ing] any attempt to reconcile its reading of" the Act with Congress's water-protection objectives. *See Chem. Mfr. Assoc.*, 217 F.3d at 866; *NRDC v. EPA*, 824 F.2d 1146, 1163-64 (D.C. Cir. 1987) (EPA unreasonably ignored Clean Air Act's health goals, despite mentioning health risks, when EPA made no findings regarding health).

EPA failed to conduct a reasonable balancing here in another respect: its reliance on States' rights is itself impermissibly one-sided and fails to consider "an important aspect of the problem." *State Farm*, 463 U.S. at 43. EPA focused only on the interests of inter-basin *transferors*. But as the district court concluded, EPA failed to recognize

the sovereign interests on both sides of the balance, ignoring the rights of downstream States that must bear the environmental and economic costs of pollutants discharged through transfers upstream. (SPA 94-96.) The Rule thus fails to address how downstream States can protect themselves from interstate pollutants without the critical federal remedies provided by Congress in the NPDES program.[12] (SPA 95-96.) And as the district court explained, the Rule's "balance" leaves downstream States with no remedy except to attempt a common-law nuisance suit in the polluting States' courts. (SPA 95-96.) Unfairly elevating the interests of upstream States "in a manner that wholly undermines" the interests of downstream States is not a reasonable balance. *See ICC*, 41 F.3d at 728 (rejecting agency's statutory interpretation at *Chevron* step two).

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[12] For the reasons explained, EPA's assertion that States retain "the ability to address potential in-stream and/or downstream effects of" inter-basin transfers (SPA 131-132) is a non sequitur. See, *supra*, at 63-64.

C. EPA Relied on a Nonexistent Cost/Benefit Analysis of the Burdens of NPDES Permitting.

In addition to claiming "balancing" authority that it failed to execute, EPA also asserted that exempting inter-basin transfers from permitting would avoid "unnecessarily" or "unduly" burdening States' water allocations. (SPA 97-99; *see, e.g.*, SPA 126, 128; J.A. 1243.) But determining whether the burdens of permitting justify its costs requires factual findings that EPA never made. Indeed, EPA explicitly stated that the Rule is based on EPA's legal interpretation rather than a scientific or factual analysis of the costs or benefits of NPDES permitting. (J.A. 1245, 1267.) That unreasonable cost/benefit analysis requires invalidation of the Rule. *See Mineta*, 340 F.3d at 58 (rejecting agency regulation that did "not explain why the costs saved were worth the benefits sacrificed").

EPA has conceded that the Rule is not based on any "scientific analysis of" inter-basin transfers (J.A. 1245) or any study of the effects of such unregulated transfers "on the costs of drinking water treatment, recreation, or commercial fishing" (J.A. 1267). Nor did EPA ever evaluate or find any facts regarding the burdens of compliance with NPDES permitting. Although defendants now speculate that permitting

will be so cost-prohibitive as to interfere with States' water allocations (*see* Districts Br. 12-24), EPA made no such finding—instead, it stressed that the Rule was based on a legal analysis "rather than an assessment of [the] costs or administrative burdens" of permitting (J.A. 1267). EPA thus never analyzed how regulating water *quality* would burden allocations of water *quantity*¸ *see Catskill II*, 451 F.3d at 84, let alone whether any such costs would actually interfere with point-source operators' water movements rather than causing operators to reduce the pollutants they discharge—the outcome Congress intended.[13] As a result, the Court is left only with EPA's "conclusory [and] unsupported suppositions," which do not qualify for any deference.[14] *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010); *see Hazardous Waste*, 886 F.2d

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[13] In its response to public comments, EPA asserted "beliefs" regarding the potential harms from inter-basin transfers and the potential burdens from permitting. (J.A. 1267-1268.) But EPA "gets no deference for its 'beliefs,'" *Chem. Mfrs.*, 217 F.3d at 865-66, which in this case are "unsupported . . . by any kind of analysis scientific, technical, legal, or otherwise" (SPA 90 n.26).

[14] Appellate counsels' post-hoc claims about permits' theoretical burdens cannot save the Rule when EPA never assessed the real-world costs in jumping to its unsupported conclusions. *See State Farm*, 463 U.S. at 49-50.

at 365-66 (rejecting as unreasonable interpretation based on "unexplained and unelaborated" conclusions).

Having failed to inquire into the actual benefits or burdens of NPDES permits, EPA could not rationally have concluded that permitting would "unduly" burden water allocations. *See Chem. Mfrs.*, 217 F.3d at 866-67 (rejecting rule at *Chevron* step two when EPA claimed rule would have health and environmental benefits but "made no findings to support this claim"). As the Supreme Court has explained, even if burdens exist, permitting costs may well be "*necessary* to protect water quality." *Miccosukee*, 541 U.S. at 108. Indeed, the principal reason that NPDES permitting would be costly is if water transfers are highly polluted—the precise situation when compliance costs might be justified by the benefits of cleaner water. But EPA has no way of knowing how to weigh these competing interests because it failed to consider any of the "relevant factors." *State Farm*, 463 U.S. at 42-43 (quotation marks omitted).

EPA's claim that it had authority to choose any possible "legal" interpretation of the Act without engaging in fact-finding is thus unavailing. *See* EPA Br. 36-39, 48. Rather than interpret the statute,

EPA essentially created a new NPDES program based on its own determination that NPDES permits are unnecessary for water transfers that discharge pollutants. Ambiguity in the Act does not allow EPA to rewrite the Act in this manner, but at a minimum such an exercise would require EPA to "examine the relevant data" and to articulate "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. EPA did not do either.

EPA's only other response is the assertion that because "application of concepts like 'unnecessary' or 'undue' is necessarily a line-drawing exercise," EPA has "discretion to draw" the "appropriate line." EPA Br. 50. But this assertion only reinforces the Rule's unreasonableness. Drawing a line that assumes certain facts while affirmatively refusing to consider any facts on either side of that line is the essence of arbitrary and capricious decision-making. *See Daley*, 209 F.3d at 754-56 (rejecting at *Chevron* step two agency demand for deference to scientific judgment when rule was not based on discernible scientific judgment). "[I]n the absence of reasoned analysis to cogently explain" and support the factual inferences that EPA drew, EPA's

"unsupported conclusion[s]" are "manifestly insufficient" to support the Rule. *See id.* (quotation marks omitted).

D. EPA Failed to Consider Obvious Policy Alternatives.

EPA further compounded the unreasonableness of the Rule by failing "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008); *see State Farm*, 463 U.S. at 48-51. Specifically, EPA did not consider whether the built-in flexibilities of the NPDES program, including general permits, consideration of costs, and variances, would have allowed permitting authorities to require permits for harmful inter-basin transfers without unduly interfering with States' water-allocation decisions. (*See* J.A. 1267 (declining to consider whether alternatives "would be less burdensome").)

EPA's refusal to evaluate these other options is particularly glaring given the courts' near-universal recognition that variances, general permits, and similar measures are designed to address the very problems that EPA identified here. *See Miccosukee*, 541 U.S. at 108

(noting that EPA might reduce burdens on water allocations "by issuing general permits to point sources associated with water distribution programs"); *Nw. Envtl.*, 537 F.3d at 1011; *Catskill II*, 451 F.3d at 86; *Costle*, 568 F.2d at 1380-81.[15] As the Tenth Circuit has explained, even where a "state's interest in allocating water and the federal interest in protecting" water quality are both implicated, Congress "intended an accommodation" to be reached through the permit process. *Riverside*

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[15] New York City now complains about its "experience" with permitting (NYC Br. 34-36, 55), but these complaints are irrelevant because EPA did not rely on the City's (or anybody else's) experience in issuing the Rule. In any event, the City's experience only proves that permitting need not be unduly burdensome. The City notes (*id.* at 28-29, 55) that after *Catskill II*, New York's courts ruled that the City had failed to use the appropriate state "regulatory mechanism" for obtaining deviations from turbidity limits because the City had obtained "exemptions" from effluent limitations instead of going through the procedural process for obtaining "variances" from effluent limitations. *Matter of Catskill Mountains Chapter of Trout Unlimited Inc. v. Sheehan*, 2008 N.Y. Misc. LEXIS 5923, at *11-*15 (Sup Ct. N.Y. County Aug. 5, 2008) ("*NY Catskill*"), *aff'd*, 71 A.D.3d 235 (3d Dep't 2010). The City has since followed the rules and applied for variances, and has retained pursuant to the state court's order its prior effluent-limitation exemptions while the variance application is pending. *See* NYC Br. 29. The City's experience thus shows that variances are available when appropriate to control permitting costs. Indeed, the state court emphasized that if the City's claim about the cost of controlling turbidity in its Shandaken Tunnel discharges is accurate, the City "may well be able to" obtain variances. *NY Catskill*, 2008 N.Y. Misc. LEXIS at *15-*16.

Irrigation, 758 F.2d at 513. Ignoring these precedents, EPA declared without any explanation, let alone a rational one, that even evaluating these cost-reducing options was not a "necessary or appropriate" part of its decision. (J.A. 1267.) But having claimed policy-making authority, EPA must reasonably explain why it took the extreme measure of excluding all dirty water transfers from permitting instead of adopting a less drastic approach. This blanket refusal to consider obvious alternatives renders the Rule unreasonable.

EPA's only justification for declining to look at any of these alternatives is the assertion that these other options are inconsistent with its legal conclusion that Congress did not intend to require NPDES permits for inter-basin transfers. EPA Br. 48-49. But as the district court explained, this argument is entirely circular. (SPA 94.) Having demanded authority to balance policies to resolve *ambiguity* in congressional intent, EPA cannot now disclaim any need to balance on the assumption that Congress clearly intended a NPDES exemption all along. Such reasoning invents "a legal constraint on th[e] balancing process that is simply not there." *ICC*, 41 F.3d at 728.

CONCLUSION

For the reasons explained, this Court should affirm the judgment of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Judith Vale, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 14,974 words, as authorized by this Court's December 19, 2014 Order, and it complies with the type-volume limitations of Rule 32(a)(7)(B).

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