No. 06-729

In the

Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection.

Petitioners,

- v.-

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the conveyance of water containing pollutants from one watershed, through a tunnel underneath a mountain range into higher quality waters of a trout fishery in a separate and distinct watershed, causing a violation of State-established water quality standards, constitutes an addition of a pollutant from a point source under Section 301 of the Clean Water Act, 33 U.S.C. §1311.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-23) is reported at 451 F.3d 77. The prior opinion of the court of appeals (Pet. App. A52-77) is reported at 273 F.3d 481. The opinion of the district court (Pet. App. A85-128) is reported at 244 F. Supp. 2d 41. The district court's partial summary judgment (Pet. App. A78-84) is unreported. The initial decision of the district court (Pet. App. A24-40) and that court's decision on plaintiffs' motion for reconsideration (Pet. App. A41-51) are unreported. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. A139-142) is unreported. The district court's order and amended judgment on remand (Pet. App. A129-138) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. A petition for rehearing and rehearing en banc was denied on August 25, 2006. The petition for a writ of certiorari was filed on November 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

STATEMENT

Petitioner New York City Department of Environmental Protection operates the Shandaken Tunnel ("Tunnel") as part of the New York City Catskill Water Supply System. (Pet. App. at A5). The Tunnel begins at the Schoharie Reservoir in Delaware County, passes through Greene County, and discharges into the Esopus Creek in Ulster County. When the Tunnel is in operation, water from the Schoharie Reservoir is diverted through the Tunnel for eighteen miles under a mountain range, and is discharged

into the Esopus Creek, which in turn empties into the Ashokan Reservoir. (*Id.* at A5-6).

The Schoharie Reservoir and the Esopus Creek are two different and distinct water bodies, hydrologically connected only insofar as both are tributaries of the Hudson River. (Pet. App. at A58). But for the Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek. (Pet. App. at A6; Pet. at 6). Water leaving the Schoharie would naturally flow north to the Schoharie Creek, join the Mohawk River, and flow into the Hudson River. (Pet. App. at A57-58 ("Under natural conditions, water from the Schoharie Reservoir would never reach Esopus Creek.")).

The water of the Schoharie Reservoir contains high levels of suspended solids and turbidity.[1] (*See* Pet. App. at A93). The suspended solids and turbidity present in the Schoharie Reservoir are caused at least in part by erosion in the Schoharie watershed, including surface runoff and land disturbance from human activities. (*Id.* at A93-94; *see also* Pet. App. at A6 ("water in the Schoharie Reservoir contains suspended solids from both natural and man-made causes")).[2] Consequently, water of the Schoharie Reservoir is highly turbid in comparison with other water bodies in the

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[1] Contrary to Petitioners' assertion in this petition that turbidity is not a pollutant, (*see* Pet. at 20), the court below noted that "[t]he parties do not contest that turbidity qualifies as a pollutant under the [Clean Water Act] CWA." (Pet. App. at A6 n.1). *See also* CWA § 304(a)(4), 33 U.S.C. § 1314(a)(4) (specifically defining "conventional pollutants" to include "suspended solids").

[2] Petitioners mischaracterize the pollutants in the Schoharie Reservoir as "naturally occurring." (Pet. at 10, 20). In fact, Petitioners stipulated that the pollutants in the Schoharie Reservoir are not purely natural, but are caused at least in part by human activities. *See* Exhibit A, attached at 28 ¶ 17, 32 ¶ 17.

New York City Drinking Water System. In contrast to the Schoharie Reservoir's water, the water of the Esopus Creek is naturally clear, less turbid, and lower in total suspended solids. (Pet. App. at A28). The Esopus Creek's naturally clear water makes it an important habitat for trout. The New York State Department of Environmental Conservation ("NY DEC") has designated the Esopus Creek, between the outlet of the Shandaken Tunnel and the inlet of the Ashokan Reservoir, a Class A(T) stream, which signifies high quality water that is suitable for a trout fishery. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 701.6 (1991).

Discharges of turbidity and suspended solids from the Shandaken Tunnel have diminished the quality of water in the Esopus Creek and have all but destroyed the recreational trout fishery; fishermen no longer fish downstream from the Shandaken Tunnel Outlet. *Compare* Exhibit B, attached (exemplifying the problem Respondents seek to address) *with* Exhibit C, attached (upstream view at same time and location). Not only is the increased turbidity in the Esopus Creek aesthetically offensive, but it has also created dangerous conditions for fly fishermen to wade into the water because they cannot see the creek bed or the slippery coating left on rocks by the discharge. (*See* Pet. App. at A90-91). In addition, increased turbidity makes dry fly fishing more difficult because of the trout's inability to perceive dry fly lures in the murky waters. *See id* at A90. These cumulative harms have devastated the economic opportunities for fly fishermen guides and the aesthetic beauty of the Esopus. *See id.* at A90-91

Respondents filed this citizen suit in the United States District Court for the Northern District of New York, alleging that Petitioners' discharge of suspended solids and turbidity from the Shandaken Tunnel into the Esopus Creek without a permit violated section 301(a) of the Clean Water

Act ("CWA"), 33 U.S.C. § 1311(a). *See* CWA 505(a)(1), 33 U.S.C. § 1365(a)(1) (citizen suit provision). The district court granted Petitioners' motion to dismiss for failure to state a claim. (Pet. App. A24-40). Respondents moved for reconsideration on the grounds that the court accorded inappropriate deference to the Environmental Protection Agency's ("EPA") informal position regarding the words "addition of a pollutant."[3] The court denied Respondents' motion on the theory that the Shandaken Tunnel does not "add" pollutants into the Esopus Creek. (Pet. App. A41-51).

Respondents appealed and the Second Circuit Court of Appeals, in an opinion by Chief Judge John Walker, unanimously reversed in part, vacated in part,[4] and remanded the case. (Pet. App. A52-77). The court ruled that releases of turbidity from the Shandaken Tunnel qualified as an "addition" under the plain meaning of the CWA. (*See* Pet. App. at A67). Because water from the Schoharie Reservoir containing turbidity was "artificially diverted from its natural course" and discharged into the Esopus Creek, "a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed," the court concluded that such discharge was indeed an addition, because the turbidity came from the "outside world," meaning "any place outside the particular water body to which pollutants are introduced." (*Id.* at A71-73). The court also rejected Petitioners' theory that the Schoharie Reservoir and the Esopus Creek are unitary or "singular" waters simply because they are both navigable waters: "Such an interpretation is inconsistent with the ordinary meaning of the word 'addition.'" (*Id.* at A75;

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[3] The CWA does not define the word "addition."

[4] The court vacated the judgment only insofar as it related to Respondents' claims that Petitioners were discharging heat, because Respondents failed to specifically include heat in their notice of intent to sue pursuant to CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A).

see also Pet. at 19 n.15). To hold otherwise, the court noted, would violate the CWA's "broad and uncompromising policy of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.'" (Pet. App. at A76; *see also* Pet. App. at A144, CWA § 101(a), 33 U.S.C. § 1251(a)).

On remand, the district court granted Respondents' motion for partial summary judgment on liability, finding violations of section 301(a) of the CWA for the unpermitted discharges of turbidity and suspended solids from the Shandaken Tunnel into the Esopus Creek. (Pet. App. A78-A84). The court also ordered Petitioner New York City Department of Environmental Protection ("NYC DEP") to obtain a permit pursuant to section 402 of the CWA, 33 U.S.C. § 1342(a) with respect to such releases into Esopus Creek.[5] After a bench trial on civil penalties, the court assessed $5,749,000 in penalties against Petitioners. (Pet. App. A85-128).

Petitioners appealed and the Second Circuit Court of Appeals unanimously affirmed.[6] (Pet. App. A1-23). Petitioners asked the Second Circuit to reconsider its 2001 holding in light of two intervening developments: *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and a 2005 memorandum from the EPA's general counsel, (Pet. App. A205), which posited that water transfers are not subject to the CWA permit requirement. (Pet. App. at A11). First, the court found that the *Miccosukee* decision reinforced its earlier rejection of the

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[5] Petitioner NYC DEP applied for a SPDES permit on December 30, 2002.

[6] The Court did remand the case, however, only for recalculation of the civil penalties. The civil penalties were thus reduced to $5,225,000. (*See* Pet. App. A129-138).

"unitary-water theory of navigable waters" relied upon by Petitioners. (*Id.* at A12). Second, the court was not persuaded by and declined to defer to EPA's informal position reflected in the EPA's 2005 memorandum. (*Id.* at A12-13).

Petitioners also argued that a permit for the Tunnel would interfere with New York's statutory rights to allocate water and would thereby violate sections 101(g) and 510 of the CWA, 33 U.S.C. §§ 1251(g), 1370 (protecting a state's authority to allocate water quantities within its jurisdiction). Citing this Court, the Second Circuit explained that these provisions preserve state authority to allocate water quantity, not water *quality*: "'[s]ections 101(g) and 510(2) . . . do not limit the scope of water pollution controls.'" (*Id.* at A14 (quoting *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994)). The Second Circuit held that Petitioners' "holistic" arguments about water allocation overlook the plain language of the CWA:

> [W]e pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. The CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters. [Petitioners] and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.

(*Id.* at A15). Petitioners then filed a petition for panel rehearing and rehearing en banc, which the Second Circuit denied. (Pet. App. A139-142).

On June 7, 2006, the EPA issued a Notice of Proposed Rulemaking (Pet. App. A170-204) that would create a specific exception from National Pollutant Discharge Elimination System ("NPDES")[7] permitting requirements for water transfers occurring between waters of the United States. (*See id.* at A190). The proposed rule abandons the "unitary waters theory" in both terms and effect. (*See id.* (defining a water transfer as occurring between "two 'waters of the United States'")). It also reasserts the EPA's position in its 2005 memorandum. (Pet. App. A205-237).

On September 1, 2006, the NY DEC issued a final SPDES permit for the NYC DEP's operation of the Shandaken Tunnel. The final permit contains flexible limitations (based on the season) governing the release of turbidity and suspended solids into the Esopus Creek, and also includes a number of exemptions from compliance with effluent limitations for turbidity and temperature.[8]

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[7] A state may also issue permits if its permitting program is approved by the EPA. State-issued permits under the CWA are called State Pollutant Discharge Elimination System ("SPDES") permits. In New York, the NY DEC issues SPDES permits. *See* CWA § 402(b), 33 U.S.C. § 1342(b), 40 C.F.R. § 123.1(d) (2006).

[8] The same respondents that filed this case are currently challenging this final permit in New York State Supreme Court, because the NY DEC's issuance of the permit constituted errors of law and a violation of lawful procedure: the permit allows the NYC DEP to operate the Shandaken Tunnel in violation of State-established water quality standards without undergoing the regulatory variance procedure that provides the only proper exceptions to meeting water quality standards. This contravenes state and federal law. Respondents also object that, in issuing the permit, the NY DEC has deprived the public of its statutory and regulatory rights to comment on the appropriate technology-based standard required by the permit. These respondents are not seeking to shut down the Shandaken Tunnel, but rather seek to compel the NY DEC to issue a legally

ARGUMENT

I

THERE IS NO SPLIT IN THE CIRCUITS, AS EVERY CIRCUIT TO CONSIDER THE ISSUE HAS AGREED THAT INTER-BASIN TRANSFERS OF POLLUTED WATER ARE SUBJECT TO CLEAN WATER ACT § 301.

A. Every court has reached the same conclusion that inter-basin transfers of polluted water require a CWA permit.

In addition to the court below, each federal court that has considered the issue has required a CWA permit for transfers of polluted water between two distinct water bodies. (Pet. App. at A19). Recently, the District Court for the Southern District of Florida held that a permit was required for the transfer of water from a polluted canal into a meaningfully distinct body of water, Lake Okeechobee. *See Friends of the Everglades, Inc. v. S. Fla. Water Mgmt Dist.*, No. 02-80309, 2006 WL 3635465, at *1, *48-*51 (S.D. Fla. Dec. 11, 2006). In another case on point, the First Circuit required a ski area to obtain a permit for pumping polluted river water through pipes directly into a pristine pond. *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1297-98 (1st Cir. 1996).[9]

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sufficient permit that controls the release of turbidity and suspended solids into the Esopus Creek without illegal exemptions.

[9] Petitioners attempt to distinguish *Dubois* by claiming that, unlike the case at bar, the water was "commercially exploited" for snowmaking use before it was discharged into the pond. (Pet. App. at 15 n.12). This argument ignores both the facts and holding in *Dubois*. The First Circuit noted that the polluted river water was pumped directly into the pond in May and December of each year to maintain water levels and to provide

The Ninth Circuit also required a permit for the discharge of polluted groundwater through a point source to a surface stream. *See N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003). The Commonwealth Court of Pennsylvania even concluded that inter-basin water transfers were subject to CWA permitting requirements. *See Del-Aware Unlimited, Inc. v. Dep't of Envtl. Res.*, 508 A.2d 348 (Pa. Commw. Ct.), *appeal denied*, 523 A.2d 1132 (Pa. 1986). In each case above, the court found that the transfer of pollutants from one body of water that are discharged into a separate, distinct body of water constituted an "addition" under CWA § 301, 33 U.S.C. § 1311.[10]

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drinking water for a nearby town. *See* 102 F.3d at 1277-79. Water from both the river and pond was also piped to snowmaking equipment on Loon Mountain, which was then discharged into the pond. *Id.* at 1278. The court held that regardless of whether water is "commercially exploited," a NPDES permit is required if, during the transfer of water, it loses its status as a "water of the United States," which was the circumstance in this case. *See id.* at 1297. In essence, the court did not find the presence of "commercial exploitation" significant. *See id.*

[10] Petitioners cite *Committee to Save Mokelumne River v. East Bay Municipal Utility District,* 13 F.3d 305 (9th Cir. 1993) and *United States v. Law*, 979 F.2d 977 (4th Cir. 1992) for the proposition that some courts have held that the diversion of water containing preexisting pollutants from one water body to another wholly distinct water body does not constitute an "addition." (Pet. at 18). However, neither of these cases address the issue in the context of an inter-basin water transfer. Rather, both courts upheld CWA liability for facilities that collected contaminated runoff and discharged this runoff to surface waters and rejected claims that a facility that merely transfers preexisting pollutants is not subject to CWA regulation. This Court also unanimously held that the CWA regulates point sources that do not themselves generate pollutants. *S. Fla. Water Mgmt Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). As such, *Mokelumne River* and *Law* do not produce incongruous results to the instant case.

B. The decision below is entirely consistent with this Court's remand in *Miccosukee.*

In *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), the Eleventh Circuit ruled consistently with the First, Second, and Ninth Circuits, holding that the transfer of pollutants (phosphorus) from a flood control canal to an undeveloped wetland required a NPDES permit. The court of appeals concluded that "addition" of a pollutant means addition from the outside world, where "outside world" includes "'any place outside the particular water body to which pollutants are introduced.'" *Id.* at 1368, n.5 (quoting Pet. App. at A71).

This Court granted certiorari and vacated and remanded the decision on narrow grounds. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Court affirmed the reasoning below on the question presented; specifically, a point source need not generate pollutants, but need only convey the pollutants to be subject to CWA regulation. *Id.* at 105. The Court went on to vacate the decision below on the grounds that the district court's summary judgment determination that the canal and the wetland were different water bodies was premature on the record before it, and remanded for a determination whether the two water bodies were hydrologically connected or distinct. *See id.* at 99.

Thus, this Court's *Miccosukee* decision intimated that if the canal and wetland are meaningfully distinct, a NPDES permit would be required for the inter-basin water transfer because pollutants are "added" from the outside world. *See id.* at 112. To illustrate the situation when a statutory "addition" would not occur, this Court quoted the Second Circuit in the instant case with approval: "As the Second

Circuit put it in *Trout Unlimited*, '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.'" *Id.* at 109-10 (quoting Pet. App. at A72). By remanding the *Miccosukee* case for a trial to determine whether the waters involved in that case were "two pots of soup, not one,'" *id.* at 110, this Court clearly adopted the Second Circuit's distinction between inter-basin transfers (for which a permit is required) and intra-basin transfers (for which no permit would be required) as being legally significant under the Clean Water Act. The Second Circuit's conclusion that an "addition" from the "outside world" occurs when polluted water from the Schoharie Reservoir is discharged into the separate and distinct Esopus Creek is, therefore, consistent with this Court's understanding behind the remand in *Miccosukee*.

II

THE COURT'S INTERVENTION IS BOTH UNTIMELY AND UNWARRANTED IN LIGHT OF THE EPA'S PENDING RULEMAKING.

Petitioners ask the Court to either grant the petition while relevant rulemaking is pending or hold the case until the EPA adopts a final rule. (*See* Pet. at 30). If the Court grants certiorari, any decision it makes could be subject to modification by the EPA rulemaking proceeding and judicial review of any final rule. *See* CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1); Administrative Procedure Act ("APA") 5 U.S.C. § 702. The time is simply not ripe for the Court to have the last word on inter-basin water transfers. Instead of generating a complex legal and procedural mess, the Court should allow the pending rulemaking to run its normal course, and defer resolution of this issue to a proceeding challenging the final rule.

A. Granting certiorari would not finally resolve the issue given the pendency of EPA's rulemaking.

If this Court affirms the Second Circuit, the EPA's forthcoming rulemaking could potentially overrule this Court's decision. This would violate the principle of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), that "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Assuming the final rule will reassert the proposed rule, further litigation will be required to determine (1) whether this Court's interpretation of inter-basin water transfers was the only possible interpretation or just the "best one"; (2) whether the final rule is entitled to *Chevron* deference; and (3) whether the rule is a permissible interpretation of the CWA or arbitrary and capricious. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Under *Brand X*, this Court squarely held that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 125 S. Ct. at 2700. In the instant case, the Second Circuit unanimously affirmed – twice – that Petitioners' discharge of suspended solids from the Shandaken Tunnel into the Esopus Creek constituted an "addition" within the plain meaning of the CWA; no other permissible interpretation of the statute was conceivable. (*See* Pet. App. at A15, A71, A76). As the court of appeals explained, "When the water and the suspended sediment therein passes from the Tunnel into the Creek, an 'addition' of a 'pollutant' from a 'point source' has been made to a

'navigable water,' and the terms of the [CWA] are satisfied." (Pet. App. at A73; *see also id.* at A71, A76 (holding that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition . . . . [N]one of the statute's broad purposes sways us from what we find to be the plain meaning of its text")). By finding the terms of the statute unambiguous as applied to Petitioners' inter-basin transfer of polluted water, the Second Circuit's affirmation of the plain meaning of the CWA trumps any contrary interpretation by the EPA.

Under *Brand X*, the EPA cannot correct a misinterpretation of law when a federal court declared the law to be unambiguous. *See* 125 S. Ct. at 2700; *cf. Hayburn's Case*, 2 U.S. (2 Dall.) 409. To avoid this awkward result, for a decision by the Supreme Court in this case to have finality, the Court's opinion must garner majority votes for a "plain meaning" or "specific intent" interpretation that the CWA regulates inter-basin water transfers. Final resolution of the water transfer issue is best deferred until the EPA adopts a final rule, and that rule has been reviewed by the lower courts before being presented to the Supreme Court for a final judicial determination of the proper interpretation of the CWA term "addition."

B. It is inappropriate for the Court to consider the final rule on this record.

If the Court grants certiorari and the final rule is promulgated during briefing, then the Court could consider the final rule to settle the issue. But nothing would be more inappropriate than for the Court to conduct judicial review of the final rule when the rulemaking record is not before the Court. Without the benefit of the administrative record, full briefing, and lower court review, the Court cannot possibly address the validity of the final rule. Not until after the final

rule goes through all the various procedural challenges would the question of any final rule's validity be ripe for review.

It should be noted that Petitioners assume that the proposed rule makes the final rule a *fait accompli*. Their assertion that the rule "*will* confirm that water transfers are not subject to the NPDES permitting program. . . . [The rule] *will* thus answer precisely the question that was before the Second Circuit . . . ." (Pet. at 27) (emphasis added) is highly speculative because nothing indicates that the final rule will confirm the legal premise underlying the proposed rule. During the public comment period, numerous and extensive comments on the proposed rule were submitted. Many comments challenged the legality of the proposed rule and also raised issues the EPA never identified.[11] Presumably, the EPA is now considering all of these comments. Petitioners assume that this notice and comment period will have no impact on the final rule, when in fact such comments could very well change the final rule's result. Such speculation is a perfect example why this petition is not ripe for the Court's review.

C. There is no reason to hold for the final rule.

Petitioners' alternate request to hold the petition for the final rule is unwarranted. They do not cite a single case where the Supreme Court held a petition, or granted and vacated, based on a pending rulemaking. The existence of EPA's pending rulemaking warrants denial of the petition,

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[11] For example, Respondents raised the concern that the proposed rule would violate Executive Order 13112, issued to prevent the introduction of invasive species. *See* 64 Fed. Reg. 6,183 (Feb. 9, 1999). Water transfers not subject to a NPDES permit will induce the addition or transfer of invasive species across water bodies.

not the addition of further delay after five years of litigation. There is no certainty if or when a final rule will ever be issued, and the average time for a rulemaking process, not including litigation, is three years. *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit,* 9 N.Y.U. Envtl. L.J. 60, 76-77 (2000). During that time, a hold would allow the NYC DEP to continue polluting the Esopus Creek in expectation of a rule that, even if promulgated after notice and comment, would likely fail judicial review.

Moreover, holding the petition will not affect the judgment in this case. If the EPA later "changes" the law in a final rule to exclude inter-basin water transfers from CWA permitting requirements, this would not undo the fact that the NYC DEP was in violation of the law, as declared by the Second Circuit, every day for which it was assessed a civil penalty. (*See* Pet. App. at A134 (civil penalty calculation)).[12] The EPA's rulemaking cannot affect the penalty judgment where the Second Circuit twice declared that the NYC DEP's discharges violated the plain meaning of the CWA.[13] *See Brand X*, 125 S. Ct. at 2700. In addition, the NYC DEP has now complied with the injunctive relief by obtaining a SPDES permit.

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[12] The district court only assessed civil penalties for the days of violations occurring after the Second Circuit's October 2001 decision that specifically held NYC DEP to be in violation of the CWA.

[13] The final rule will also have no retroactive effect. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); *see also* APA 5 U.S.C. § 554(1). Petitioners will not be excused from compliance during the time period penalties were assessed.

III

THE DECISION BELOW IS CORRECT.

A. The Second Circuit's unanimous holding applies the plain language of the Clean Water Act.

The principal, unwavering objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (Pet. App. at A144, CWA § 101(a), 33 U.S.C. § 1251(a)). To accomplish this goal, the CWA prohibits "the discharge of any pollutant by any person" without or in violation of a permit. (*Id.* at A147, CWA § 301(a), 33 U.S.C. § 1311(a)). This translates to the prohibition of "*any* addition of *any* pollutant to navigable waters of the United States from *any* point source." (*Id.* at A166, CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added)).

Petitioners' discharge of turbidity and suspended solids from the Shandaken Tunnel into the Esopus Creek falls squarely within the CWA's definition of "discharge of a pollutant." (*See id.*) The court below twice declared that Petitioners' conveyance of water containing turbidity and suspended solids from one watershed, through a tunnel underneath a mountain range into higher quality waters of a trout fishery in a separate and distinct watershed, constituted an addition of a pollutant from a point source into a navigable water under CWA § 301, 33 U.S.C. § 1311. (*See* Pet. App. at A15; A67). The unresolved factual question in *Miccosukee* was whether the canal and the wetland area are meaningfully distinct water bodies. *See* 541 U.S. at 112. Conversely, this Court already has the answer in the instant case: the Schoharie Reservoir and the Esopus Creek are not hydrologically connected because they are located in two

separate and distinct watersheds.[14] This is not a case where the soup ladle pours soup back into the same pot; rather, the soup ladle is pouring soup into a different pot located on a different stove.

Desperate for any grounds of reversal, Petitioners raise new questions about whether the CWA § 301 elements of "pollutant," "navigable water," and "point source," are satisfied, even though these elements were not at issue in the court below. (*See* Pet. at 17, 19-20). In fact Petitioners either stipulated or did not dispute the CWA elements they now seek to raise for the first time in a petition for certiorari. First, it is undisputed that suspended solids and turbidity discharged by Petitioners are pollutants regulated under the CWA. (*See* Pet. App. at A81-82). As explained *supra* in footnote 1, CWA § 304(a)(4), 33 U.S.C. § 1314(a)(4) defines "conventional pollutants" to include "suspended solids." When rock, sand, and cellar dirt (which are pollutants defined by CWA § 502(6)) are suspended in water, they become suspended solids and make the water turbid. *See, e.g., Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 939 n.1 (9th Cir. 2004) ("Turbidity refers to 'suspended sediment,' or the amount of dirt in the water."). Moreover, Petitioners do not dispute that turbidity qualifies as a pollutant under the CWA." (Pet. App. at A6 n.1). Second, the NYC DEP specifically admitted that the Esopus Creek is a navigable water.[15] (*See* Exhibit A, attached at 29 ¶ 27, 33 ¶

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[14] Throughout their brief, Petitioners disingenuously failed to make clear to the Court the lack of any hydrological connection between the Schoharie and the Esopus. As the Second Circuit stated, "Absent the man-made diversion through the Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek." (Pet. App. at A6).

[15] Because there is no question that the Esopus Creek is a navigable water of the United States, Petitioners' suggestion that the absence of the word "any" before "navigable waters" means something less than "any navigable waters" fails. (*See* Pet. at 17).

27; *see also* Pet. App. at A81). Third, and perhaps the most misleading, is Petitioners' omission of the word "tunnel" when quoting the CWA definition of "point source" to suggest that the discharge of turbidity and suspended solids is really "non-point source" pollution. (Pet. at 19-20). The Shandaken Tunnel is clearly a point source because the actual definition of "point source" includes the word "tunnel":

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, *tunnel*, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

(Pet. App. at A166, CWA § 502(14), 33 U.S.C. § 1362(14) (emphasis added); *see also* A81 ("Nor can there be any dispute that the Shandaken Tunnel is a point source.")).

B. This is not a "unitary waters" case.

Petitioners reassert the so-called "unitary waters" theory, which posits that "waters of the United States' form a collective body . . . ." (Pet. at 19 n.15).[16] They argue that the transfer of pollutants from one body of navigable water to another does not "add" anything to the latter, *id.* at 16-19, even though the water bodies are eighteen miles apart in two

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[16] Under the "unitary waters" theory, the statutory term "waters of the United States" would be given a "unitary" interpretation such that all navigable waters of the United States are considered one unitary water body, whereby pollutants already in such waters could not logically be added to waters of the United States. (*See* Pet. App. at A75).

separate watersheds. But the EPA has now abandoned this theory[17] and both panels in the Second Circuit unanimously rejected this approach: "[T]his theory would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the CWA's NPDES permit requirement." (Pet. App. at A9; *see also* Pet. App. at A75). The court below correctly rejected this theory because it would be absurd to deny that Petitioners are adding pollutants "from the outside world" into the Esopus Creek.

The Esopus Creek represents the paradigmatic case in which polluted water is discharged into a trout stream and violates state water quality standards. Pursuant to New York law, a discharge violates water quality standards of the Esopus Creek if it creates a "substantial visible contrast to natural conditions" in the water. N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (1991); *compare* Exhibit B, attached (substantial visible contrast) *with* Exhibit C, attached (upstream view at same time and location). Because such standards directly affect the parameters of NYC DEP's SPDES permit, a "unitary waters" approach to regulation would not reduce the turbidity and suspended solids that have beset this individual water body. *See Miccosukee*, 541 U.S. at 107.

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[17] The EPA has abandoned the "unitary waters" theory in both terms and effect. In its proposed rule and 2005 memorandum, the EPA refers to water transfers as occurring "between two 'waters of the United States.'" (Pet. App. at A190; *see also* A206). This definition forecloses any possible interpretation that the waters of the United States be viewed as a unitary water body.

C. Petitioners' reliance on *Gorsuch* and *Consumers Power* is misplaced.

Petitioners attempt to confuse the issues in this case by arguing that *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), are controlling. (*See* Pet. at 17-18, 21). Both circuits held that water drawn from and then released back into the same water body is not an "addition" to navigable waters under the CWA. *See* 693 F.2d at 183; 862 F.2d at 587. Contrary to Petitioners' assertion, *Gorsuch* and *Consumers Power* are inapposite to the instant case because, as noted by the Second Circuit, they involved "recirculation of water, without anything added 'from the outside world.'" (Pet. App. at A71).

In *Gorsuch*, the D.C. Circuit held that water passing through a dam into a stream did not constitute a discharge from a point source under the CWA. *See* 693 F.2d at 183. The court in *Consumers Power* addressed the same issue with respect to a hydroelectric turbine that entrained fish as it pumped water uphill and then returned the water plus the mutilated fish to the same water body. This process was also found not to constitute an addition, because the fish were already present in water; only their physical form changed. *See* 862 F.2d at 587.

While acknowledging the *Gorsuch* gloss on the statutory term of "addition" to require an addition "from the outside world," 693 F.2d at 174, the Second Circuit drew the inescapable conclusion that polluted water transferred miles under a mountain range "strains past the breaking point the assumption of 'sameness' made by the *Gorsuch* and *Consumers Power* courts." (Pet. App. at A72). The court explained:

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

(*Id.* at A72-A73).

Moreover, the *Gorsuch* decision was based almost exclusively on deference to informal EPA interpretations of the term "addition." *See Gorsuch*, 693 F.2d at 183. Those types of informal agency interpretations are no longer entitled to *Chevron* deference under this Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000). *Gorsuch* and *Consumers Power* not only presented critically different facts, they are also of questionable precedential value under current law.

IV

THE REQUIREMENT OF A CWA PERMIT DOES NOT UNDULY BURDEN NEW YORK CITY'S ABILITY TO TRANSFER WATER.

A. The Supreme Court held that CWA § 101(g) presumes legitimate regulation of water quality.

Petitioners complain that a SPDES permit would not only significantly impair their ability to allocate water to New York City, but it would also violate CWA § 101(g), 33

U.S.C. § 1251(g). (*See* Pet. at 25-26). This is simply untrue.[18] The CWA requires state water allocation systems to accommodate legitimate water quality regulations. Section 101(g), which preserves the states' authority to allocate water *quantity* and water rights, does not preclude the regulation of water *quality* through the NPDES permit program. Congress' directive strikes a balance by respecting existing water allocation systems while simultaneously preventing and reducing pollution of the nation's waters: "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." (Pet. App. at A146).

Indeed, this Court upheld the primacy of the CWA's water quality regulations over the reservation of water allocation authority in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 720 (1994) ("Sections 101(g) and 510(2) . . . 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."). The court below also declared that "the power of the states to allocate quantities of water within their borders is not inconsistent with federal regulation of water quality." (Pet. App. at A13-14).

B. New York City conceded that a SPDES permit allows for flexibility.

In hearings related to its SPDES permit application, the NYC DEP endorsed the flexibility of the CWA permit scheme as well as the flexibility built into its own permit. (*See* Pet. App. at A16 n.6). For example, the permit limitations on the discharge of turbidity and suspended solids

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[18] The court below found Petitioners' claim to be "alarmist and unwarranted." (Pet. App. at A18).

change with the season and the permit also contains numerous exemptions from meeting water quality standards.[19] The NYC DEP could also seek a temporary exemption from compliance with water quality standards if the NY DEC grants a variance.[20]

Requiring a SPDES permit for the conveyance of polluted water does not unduly burden the NYC DEP's ability to allocate water or infringe on its water rights. New York City still holds a right to water; the permit requirement simply means that if the NYC DEP wishes to move polluted water to another water body and discharge it through a point source, it must obtain a permit relating to the quality of the water being moved. Petitioners' transfer of polluted water through the Shandaken Tunnel precludes the achievement of New York State water quality standards needed to protect the trout fishery and recreational uses of the Esopus Creek. The only hope of achieving this standard is for the NY DEC to develop a permit with appropriate turbidity limits and technology-based requirements for the Shandaken Tunnel discharge.

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[19] Various respondents here are challenging the permit's level of flexibility due to the numerous built-in exemptions. *See supra* note 8.

[20] The NY DEC will grant a "variance" if the requestor demonstrates, *inter alia*, that achieving an effluent limitation is not feasible because "naturally occurring pollutant concentrations prevent attainment of the standard or guidance value." N.Y. Comp. Codes R. & Regs. tit. 6, § 702.17(b)(1) (1998); *see also* CWA § 301(m)-(n), 33 U.S.C. § 1311(m)-(n) (the federal variance provisions). Respondents argue in their permit challenge that NYC DEP never properly applied for, nor has the NY DEC ever granted, a variance for the operation of the Shandaken Tunnel.

V

THE EPA'S PROPOSED RULE IS NOT ENTITLED TO DEFERENCE.

Petitioners make much of the fact that the Second Circuit ignored and failed to defer to the EPA's six-day-old proposed rule on water transfers.[21] (*See* Pet. at 4). Under settled law, however, the proposed rule is entitled to little, if any, deference. Courts do not accord authoritative deference to a pending rule. *See, e.g., Goodlin v. Medtronic, Inc.,* 167 F.3d 1367, 1375 n.15 (11th Cir. 1999) (refusing to give the FDA's proposed rule any authoritative weight or deference); *Public Citizen, Inc. v. Shalala,* 932 F. Supp. 13, 18 n.6 (D.D.C. 1996) (citing *Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (noting that a "tentative conclusion articulated in a nonfinal, proposed rule does not command deference from the Court nor is it binding on the agency"). Under *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference – to the extent the agency's position is persuasive. Full deference under *Chevron* is only given to regulations that were promulgated after a full notice and comment period, or after similar formalities. *See, e.g., Perez v. Ashcroft*, 236 F. Supp. 2d 899, 903 (N.D. Ill. 2002). Because the EPA's proposed regulation has yet to be promulgated to represent the agency's final interpretation of the CWA, the Court should not apply *Chevron* deference to this pending rule.

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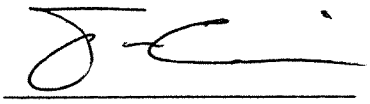
[21] Had the notice of proposed rulemaking been issued much earlier, it would not change the Second Circuit's decision because the proposed rule simply reasserts the 2005 EPA memorandum, which the court below devoted a number of paragraphs to in its opinion. (*See* Pet. App. at A10-11, A12 n.5). In addressing the agency interpretation, the court reviewed it, considered it, and rejected it as being unpersuasive. (*Id.* at A12 n.5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,



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