No. 08-13652, 08-13653, 08-13657, 08-14921, & 08-16283 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, SIERRA CLUB, ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON, and PROVINCE OF MANITOBA, CANADA,
Petitioners,

-v.-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and its ADMINISTRATOR,
Respondents,
(For Continuation of Caption See Reverse Side of Cover)

_____

On Petition for Review from the U. S. Environmental Protection Agency

BRIEF *AMICI CURIAE* OF THE CITY OF NEW YORK, NATIONAL LEAGUE OF CITIES, NEW YORK CONFERENCE OF MAYORS, AMERICAN WATER WORKS ASSOCIATION, ASSOCIATION OF METROPOLITAN WATER AGENCIES, AND NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF RESPONDENTS

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Dated November 3, 2011

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RULE 26 CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

The City of New York is municipal corporation organized under the laws of the State of New York. National League of Cities, New York Conference of Mayors, American Water Works Association, Association of Metropolitan Water Agencies, and National Association of Clean Water Agencies are not-for-profit organizations representing, and with memberships comprised of, local governments, public utilities, water suppliers, and local water management agencies. Pursuant to Eleventh Circuit Rules 26.1 and 26.1-3, *amici* certify that, in addition to the persons and entities who have an interest in the outcome of this case identified by Petitioners and Respondent, the following list of persons and entities also have an interest in the outcome of this case:

Anastasio, Julia

Beltramo, J. Wade

Coleman, Carolyn

Jones, Keith

Kleinman, Alan

McCamphill, Amy

National Association of Clean Water Agencies

Friends of the Everglades, et al. v. EPA, et al., Appeal Nos. 08-13652 and consolidated cases

New York Conference of Mayors

Schmid, Kathleen

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INTERESTS OF *AMICI CURIAE*

Amici curiae submit this brief in support of Respondent United States Environmental Protection Agency ("EPA").[1] *Amici* are or represent local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring that the water in our country is clean and safe for a variety of uses including consumption and recreational use. *Amici* also have an interest in ensuring that their activities are regulated with suitable laws. For these reasons, *amici* support EPA's challenged Water Transfers Rule, 40 C.F.R. § 122.3(i), which clarifies that transfers of untreated water are not subject to Clean Water Act ("CWA" or "Act") National Pollutant Discharge Elimination System ("NPDES") permits, as the correct interpretation of the Act.

Transfers and diversions of untreated water are essential to the design and operation of public water supply systems, municipal and regional flood control and water management efforts, and structures designed to assist in inland navigation. For example, the operation of canals, locks, and dams involves movement of water from one body – whether natural or constructed – to others. All surface water supply systems involving more than a single source rely fundamentally on local governments' ability to move water from one source to

[1] Respondent EPA, Intervenors United States Sugar and South Florida Water Management District, and State Petitioners have consented to the filing of this brief. *Amici* have requested consent but have not received the consent of Petitioners Friends of the Everglades and Miccosukee Indians.

another to meet local water supply needs. Water management systems throughout the country transfer water to areas that need water or away from areas in danger of flooding.

Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by federal, state, and local governments and public utilities for public water supply, flood control, navigation, and other governmental and public purposes including ordinary management of water, currently operates pursuant to a federal NPDES permit under the CWA. Most such water management structures predate the enactment of the CWA in 1972 and have been in continuous operation since that time. EPA has never required that such transfers and diversions operate pursuant to NPDES permits. Similarly, none of the more than forty states with delegated authority to administer the CWA permit program has historically required NPDES permits for these water transfers and diversions.[2] The consequences of applying the NPDES program to transfers and diversions of water could be devastating to water suppliers, local governmental water managers, and the citizens they serve every day across the nation.

Amicus the City of New York ("City"), a political subdivision of the State of New York, owns and operates a water supply system that provides

[2] The NPDES program is administered by some states, including New York, as State Pollution Discharge Elimination System ("SPDES") programs.

drinking water to over eight million City residents and an additional million people in upstate communities. For decades, the City's water supply system has depended upon transfers of natural, untreated water through a series of reservoirs. The transfers send the water from each reservoir downstream to the next. The instant challenge to EPA's Water Transfers Rule jeopardizes the City's ability to supply sufficient water through this system to fulfill demand.

The National League of Cities ("NLC") is the oldest and largest national organization representing municipal governments throughout the United States. In partnership with the 49 state municipal leagues, NLC serves as a national resource and advocate on behalf of the 19,000 cities, towns, and villages across the country it represents. The specific interest of the NLC in this case lies in the fact that municipal governments have historic authority and responsibilities to protect public safety and the health of their citizens in the management of their resources. NLC is particularly concerned that the conflict over the Water Transfers Rule leaves cities and other water management agencies in such a position of uncertainty that it is impossible to move forward with planning for vital water management programs.

The New York Conference of Mayors ("NYCOM") is a not-for-profit voluntary membership association whose members include 60 of the State's 62 cities and 526 of the State's 555 villages, thereby representing an overwhelming

majority of such municipalities. NYCOM's mission is to improve the administration of municipal affairs in New York State through training for municipal officials, and to provide its members with legislative advocacy at both the state and federal levels on issues of concern to local government. This case is of significant concern to all of NYCOM members as they each have a direct role in ensuring clean and safe water, and an interest in ensuring that suitable laws and regulations apply to their activities.

The American Water Works Association ("AWWA") is the largest and oldest association of water professionals in the world. With over 60,000 members, it represents the full spectrum of the water community, including utilities, individual members, consulting firms, manufacturers, academics, and environmental advocates. Its utility members represent both public and private utilities, from the nation's largest to the very smallest. Collectively, AWWA's utility members serve drinking water to about 80 percent of the American population.

The Association of Metropolitan Water Agencies ("AMWA") is an organization representing 189 of the nation's largest publicly-owned municipal drinking water suppliers. AMWA's members include agencies and divisions of city governments and special purpose commissions, districts, agencies, and authorities created under state law to supply drinking water to the public.

AMWA's members provide drinking water to over 125 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another. AMWA is concerned that the Petitioners' challenge, if successful, would have a particularly devastating effect in western states, whose water supply networks often rely on engineered transfers among various natural water bodies.

The National Association of Clean Water Agencies ("NACWA") represents the nation's publicly owned treatment works ("POTWs") and municipal stormwater utilities. NACWA's nearly 300 member agencies provide the majority of the U.S. population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. NACWA members operate their POTWs and municipal stormwater utilities under the CWA's NPDES permitting program. NACWA members are concerned, however, that a successful challenge to EPA's Water Transfers Rule will unnecessarily subject certain aspects of their operations to NPDES permitting for the first time.

SUMMARY OF THE ARGUMENT

New York City's recent litigation regarding a water transfer illustrates that such transfers should not be regulated under the NPDES permitting program. The City enjoys exceptionally high quality drinking water that is delivered, untreated and unfiltered, from upstate reservoirs through a series of aqueducts and tunnels, many of which are "water transfers" as defined under the Rule, to downstate reservoirs. Over the past ten years, the City has expended tremendous resources in litigation defending one particular transfer that brings water downstate toward the City from the Schoharie Reservoir, through the Shandaken Tunnel, and into the Esopus Creek; ultimately, the Second Circuit held that the City must obtain a NPDES permit for this transfer. Because of naturally occurring turbidity in the Schoharie Reservoir, however, obtaining such a permit remains a challenge for the City. The permit that the City obtained after a prolonged administrative process was invalidated by the State Court and remains in effect only until the State makes a determination on the City's application for variances from State water quality standards. Even if the variances are ultimately granted, further administrative process and future litigation challenging the permit are likely.

The current uncertainty and likelihood of future litigation has hampered the City's ability to plan for its water supply needs. If the issue remains unresolved, the City will be subject to additional years of litigation regarding the

transfers made via the Shandaken Tunnel and, potentially, at numerous other locations throughout the City's water supply system. Other local governments, public utilities, water suppliers, and local water management agencies will also be threatened by expensive litigation and burdensome and unnecessary regulation.

Numerous existing provisions in both federal and state law are designed to ensure that water transfers and diversions are managed in ways that avoid pollution. In most cases, these other provisions can regulate transfers and diversions more appropriately and effectively than the ill-suited NPDES program. Proper use of these existing measures will address the fundamental concerns of Petitioners in this case and avoid the significant problems created by courts' attempts to apply the NPDES program to water transfers in a new way, far outside the program's intended scope. For this reason, among others, the Water Transfers Rule survives review under the Administrative Procedure Act, since it is reasonable in light of the record that was before EPA.

EPA's Water Transfers Rule also should be upheld under *Chevron,* as it is consistent with the text and legislative intent of the CWA. The Rule correctly clarifies that interbasin water transfers of untreated water are not subject to the NPDES permitting program. Based on the numerous water management structures that predate the enactment of the CWA in 1972, it would have been clear to Congress at that time that the nation depends on such transfer facilities. There is

no indication in the language or history of the CWA that Congress intended to interfere with these basic functions.

The instant challenges to this rule provide this court with an opportunity to resolve this important issue for the City as well as other municipalities and water management agencies throughout the nation.[3]

FACTUAL BACKGROUND

The facts of the *Catskill Mountains* case, with which the City as a litigant is unfortunately intimately familiar, provide an example of the types of diversions and transfers frequently undertaken by municipal and regional water management agencies for water supply, flood control, and other local water management purposes.

A. *The Shandaken Tunnel Water Transfer*

New York City owns and operates a water supply system in upstate New York. The Shandaken Tunnel transfers water from the Schoharie Reservoir, one of the two reservoirs that comprise New York City's Catskill water supply system, to the other, the Ashokan Reservoir. Specifically, the Tunnel moves water from the Schoharie Reservoir to the Esopus Creek, the main tributary to the Ashokan. New York City's average demand for water is about one billion gallons

[3] Although the parties to these proceedings have offered extensive arguments regarding the jurisdiction of this court to hear the Petitioners' challenge, *amici* focus solely on the merits of the challenge, which is the issue of most concern to *amici*.

per day, of which the Catskill system generally provides about 40%. Approximately 40% of the Catskill supply, or 16% of New York City's drinking water, originates in the Schoharie Reservoir. The Ashokan Reservoir went into service in 1915. The Shandaken Tunnel and the Schoharie Reservoir were both on line by 1926. A year-round average of approximately 40% of the Esopus flow below the Shandaken Tunnel portal originates from the Schoharie Reservoir. From June through September, the Tunnel contributes over 70% of the flow in the lower Esopus, on average, and can peak at nearly 100%.

The New York State Department of Environmental Conservation ("DEC") assigns use classifications to specific waters pursuant to Section 17-0301 of the New York Environmental Conservation Law. DEC has given a higher water quality rating to the portion of the Esopus Creek that is combined with diversions from the Shandaken Tunnel than to the upstream Esopus. Downstream of the Shandaken Tunnel portal, the Esopus Creek has been designated a Class A(TS) stream, the best uses of which are as a water supply for "drinking, culinary or food processing purposes, primary and secondary contact recreation, and fishing."[4] N.Y. COMP. CODES R. & REGS. ("NYCRR") tit. 6, § 701.6; *see also id.* § 862.6, Item 555. Upstream of the Shandaken Tunnel portal, prior to mixture with water

[4] The "TS" designation is not a class, but shows that a stream segment is recognized as trout spawning waters. 6 NYCRR § 862.3(h).

from the Shandaken Tunnel, the waters of the Esopus Creek have been designated a class C(TS) stream, the best use of which is fishing. 6 NYCRR §§ 701.8, 862.6, Item 556. Thus, in the Esopus Creek, the addition of diversions from the Shandaken Tunnel correlates with a higher water quality classification.

The watershed of the Schoharie Reservoir is characterized by extensive deposits of silts and clays, which are often exposed by erosion, particularly during storms. New York City does not treat water collected in the Schoharie Reservoir before diverting it through the Shandaken Tunnel. As a result, water from the Schoharie Reservoir that is diverted through the Tunnel regularly contains elevated levels of suspended solids, and thus turbidity. Extensive research and analysis indicate that even with reasonable structural and programmatic measures in place, the diversions from the Shandaken Tunnel regularly will continue to be visibly more turbid than the receiving water, the Esopus Creek. Despite this, as noted above, downstream of the Shandaken portal the Esopus Creek's water quality classification is higher, evidencing the high water quality of the transferred water – water which is used, unfiltered, as drinking water for City residents – notwithstanding any temporary turbidity.

Moreover, the diverted water is currently regulated under federal and New York State law. The City is required by these law to divert water through the Shandaken Tunnel without regard to these naturally occurring elevated turbidity

levels. In particular, the City is required under State law to transfer water in specified amounts and at specified times to protect the ecosystem and advance the recreational use of the Esopus Creek. 6 NYCRR § 670.3(i). In addition, the City is required to analyze and address turbidity in the Tunnel diversions through Filtration Avoidance Determination requirements issued pursuant to the Surface Water Treatment Rule and the federal Safe Drinking Water Act, administered by the New York State Department of Health ("NYSDOH"). 40 C.F.R. § 141.71; 42 U.S.C. § 300-f *et seq.* The purity of the water is also regulated by the New York State Sanitary Code, also administered by NYSDOH. 10 NYCRR § 170.4.

B. Catskills Mountains *Litigation*

In 2000, groups primarily representing recreational users of Esopus Creek brought suit against the City challenging its water transfers in the Shandaken Tunnel. The Northern District of New York dismissed the citizen suit, holding that transfers of untreated water do not constitute the discharge of pollutants under the CWA. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. Oct. 6, 2000) (order granting defendant's motion to dismiss for failure to state a claim). The plaintiffs appealed, and the Second Circuit reversed and remanded. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

In 2002, the Northern District granted plaintiffs' motion for partial summary judgment on the sole question of the City's liability under the CWA. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. June 4, 2002). The City was ultimately found liable for statutory penalties of $5,749,000. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), *aff'd* in part, *remanded* in part, 451 F.3d 77 (2d Cir. 2006). The Northern District also made respondent DEC a third-party defendant pursuant to the All Writs Act, and directed DEC to make a determination concerning the City's application for a SPDES permit for the Shandaken Tunnel within 18 months.[5] *Catskill Mountains*, 244 F. Supp. 2d at 55.

Approximately one week after EPA proposed the Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)), the Second Circuit issued a decision affirming in part and remanding for resolution of a minor error in the calculation of penalties. *Catskill Mountains*, 451 F.3d at 89. In affirming the Northern District's imposition of CWA penalties and requiring the City to obtain a permit for the Shandaken Tunnel, the Second Circuit found that EPA's position that water transfers do not require NPDES permits was not entitled

[5] The NPDES program is administered by DEC in New York State as the SPDES program.

to *Chevron* deference because this position had not been formally promulgated through the rulemaking process.

After its appeals were denied, *see Catskill Mountains Chapter of Trout Unlimited, Ltd. v. City*, No. 03-7203-cv (2d Cir. Aug. 25, 2006); *City v. Catskill Mountains Chapter of Trout Unlimited, Ltd.*, 549 U.S. 1252 (2007), the City applied for a permit. CWA permits must include effluent limits to "achieve water quality standards . . . including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). The State water quality standard for discharges of turbid waters in New York is "no increase that will cause a substantial visible contrast to natural conditions." 6 NYCRR § 703.2.

On September 1, 2006, DEC issued the permit for the Shandaken Tunnel's portal, SPDES Number NY-026-8151. The permit established a maximum allowable difference between the turbidity levels in the diversions from the Shandaken Tunnel and the Esopus Creek upstream of the Tunnel outlet, an absolute upper limit for turbidity, a temperature limit for May through September, a year-round minimum flow, and a maximum flow from June through October. DEC included in the permit a number of exemptions to the temperature, turbidity, and flow requirements. These exemptions were included to address circumstances where transfers are vital to the public water supply or are required by the State to

promote a healthy aquatic environment in, and recreational use of, the Esopus Creek.

The same group of plaintiffs that originally brought the CWA citizen suit against the City challenged the exemptions in the Shandaken SPDES Permit. *Catskills Mountains Chapter of Trout Unlimited v. Sheehan*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923, at *5 (N.Y. Sup. Ct. Aug. 5, 2008). The court struck down the exemptions and ordered the City to instead apply for variances from the permit's effluent and temperature limitations. *Id.* at *19. The City has applied for variances, but no determination has been made to date. The Shandaken SPDES Permit remains in force, with the exemptions in place, pending DEC's issuance of an amended final permit. *Id.*

C. *New York City's Current Predicament*

Without the exemptions provided in the current SPDES permit, if the variances are not granted, the City could be prohibited from making diversions of water that are necessary for public health and safety as well as for the protection of the downstream ecosystem. Based on extensive research and analysis, the City expects that such diversions will continue, on a regular basis, to be visibly more turbid than the receiving water, the Esopus Creek, no matter what reasonable structural and programmatic measures are implemented.

Even if the variances are granted and survive plaintiffs' challenges, those variances may be shorter in duration than the actual permit, and will require that "reasonable progress be made toward achieving the effluent limitation." 6 NYCRR § 702.17(e)(2). Consequently, even if the City is able make diversions in compliance with the SPDES permit initially, should DEC determine that the City has not made progress towards achieving the "no . . . visible contrast" standard, the City could later find itself without authorization to make these necessary diversions.

As illustrated by the New York City example, NPDES permits, which require strict compliance with effluent limits, are not compatible with transfers of natural, untreated water such as the flows through the Shandaken Tunnel. New York City is currently faced with a dilemma that could threaten other municipalities: it can either subject itself to continual enforcement actions under the CWA, potentially involving extensive civil and even criminal penalties,[6] or cease – or at any rate modify, often at great public expense – fundamental public water supply and water management activities, which municipalities engage in for the public good.

[6] In connection with the *Catskill Mountains* litigation, the City has paid over $5.2 million in penalties for having operated the Shandaken Tunnel without a CWA permit in the past. *Catskill Mountains*, 244 F. Supp. 2d at 54 (assessing over $5.7 million in penalties), *modified by Catskill Mountains*, No. 1:00-CV-511 (N.D.N.Y. Oct. 23, 2006) (order amending penalty to $5,225,000.00 based on a calculation error).

Moreover, in many cases, diversions or transfers of natural, untreated water are now vital to sustaining a healthy aquatic environment in the receiving water body. For instance, the generally cold water diverted through the Shandaken Tunnel from the Schoharie Reservoir is essential to maintaining the exceptional trout fishery in the Esopus Creek, especially during the summer when temperatures in the Creek rise and "natural" flow (without the Tunnel's contribution) is diminished.[7] If the challenges to EPA's Water Transfers Rule succeed, operators of water supply or flood control infrastructure may be forced to alter or even eliminate diversions or transfers of water in order to avoid liability under the CWA. The result in many cases will be a net detriment to ecosystems that have come to depend on such diverted flows.

For the reasons set forth herein, the City urges this Court to uphold the Water Transfers Rule.

ARGUMENT

I. EPA's Water Transfers Rule is a Reasonable Interpretation of the Statute.

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a court reviewing an agency's interpretation of a statute must follow two steps. First, the court must ask whether the statute is ambiguous. If the

[7] Indeed, as noted above, New York State requires the City to divert specified volumes of water from the Shandaken Tunnel pursuant to its authority to protect natural resources and recreational use of water. 6 NYCRR § 670.3(i).

statute is not ambiguous, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-3. The second *Chevron* step requires a court to "give effect to an agency's reasonable interpretation of an ambiguous statute." *Sierra Club v. Johnson*, 541 F.3d 1257, 1265 n.3 (11th Cir. 2008).

While this Court has previously analyzed the Rule under *Chevron*'s second step, *see infra* I.A, *amici* contend that the Rule could also be upheld under *Chevron*'s first step, as the Rule is a direct expression of the CWA, read closely. *See, e.g.*, Brief of Intervenor United States Sugar Corporation, 11, 18-26; Response Brief of the South Florida Water Management District *et al*., 2, 7-13. In any event, however, the Water Transfers Rule is a reasonable construction of the CWA and thus must be upheld.

A. *This Court Correctly Applied* Chevron *in* Friends of the Everglades.

In *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), the Eleventh Circuit held that EPA's Water Transfers Rule is a reasonable construction of the CWA. *Id.* at 1227-28. As discussed below, this decision was and remains the correct analysis of the Water Transfers Rule under *Chevron*'s second step. Moreover, this Court is bound by the *Friends of the Everglades* decision. *Friends of the Everglades v. S. Florida*

Water Mgmt. Dist., 605 F.3d 962 (11th Cir. 2010) (denying request for rehearing *en banc*); 131 S. Ct. 643 (2010) (denying petition for writ of certiorari).

B. *The Water Transfers Rule Is Consistent with the Controlling Language of the CWA.*

A precise textual reading of the CWA shows that the Water Transfers Rule is expressive of the statute. As the Supreme Court recently held, close attention must be paid to the language of the CWA, "where technical definitions are worked out with great effort in the legislative process." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006) ("'[I]t is extremely important to an understanding of [§ 402] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended'" (quoting H.R. REP. NO. 911, 92nd Cong., 2d Sess., at 125 (1972))).

As noted in the CWA's legislative history, "[o]f particular significance [are] the words 'discharge of pollutants.'" H.R. REP. NO. 911, 92nd Cong., 2d Sess., at 125 (1972). The CWA provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. Moreover, "a discharge of a pollutant" is "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12) (emphasis added). In the CWA's definition, the modifier "any" is notably missing only from the term "navigable waters." The term "navigable waters," in turn, is defined as "*the* waters of the United States." 33 U.S.C. § 1362(7) (emphasis

added). The use of the collective term "waters," like the use of the definite article and the absence of the adjective "any," suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer from one body of water to another.

Read together, these definitions require a permit when there is any addition of any pollutant to the waters of the United States from any point source. A pollutant cannot be "added," however, once it is already in "the waters of the United States." For example, both Shandaken Tunnel and the Esopus Creek are "waters of the United States." *Cf. Friends of the Everglades, Inc. v. S. Florida Water Mgmt. Dist.*, No. 02-80309-CIV, 2006 U.S. Dist. LEXIS 89450, at *25 & *44 (S.D. Fla. Dec. 11, 2006). Therefore, a transfer of water from one to the other does not constitute an "addition," but rather, the joining of one thing to more of the same: the joining of "waters of the United States" to more "waters of the United States."

The Supreme Court made clear in *S.D. Warren Company v. Maine Board of Environmental Protection* that the "waters of the United States" remain national waters, even when they are moved or manipulated. 547 U.S. at 378 n. 5. In rejecting the notion that when water is impounded, it "loses its status as waters of the United States . . . and becomes an addition to waters of the United States when redeposited into the river," the Supreme Court explained that one cannot

"denationalize national waters by exerting private control over them." *Id.* (internal quotations omitted).

This interpretation – known, perhaps unfortunately,[8] as the "unitary waters" approach – reflects how the CWA has been administered throughout its history. The focus of the NPDES program has long been to ensure that sewage and industrial waste are treated adequately prior to being discharged or added to the nation's waters; the program is not compatible with diversions of natural, untreated water such as the flows through the Shandaken Tunnel. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) ("Throughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which indirectly cause pollutants to enter navigable upstream water and then convey these polluted waters downstream."); *see also S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004).

In sum, no statutory language suggests that the introduction of water from one water body to another particular water body necessarily constitutes an "addition" under the CWA. On the contrary, the Act refers to an addition "to

[8] *Amici* do not argue that the waters of the United States are themselves a single, interconnected entity; rather, the "waters of the United States" form a collective body that constitutes the relevant receiving water for purposes of this definition.

navigable *waters*," or to "the *waters* of the United States."[9] 33 U.S.C. § 1362(7), (12) (emphasis added). Similarly, the definition of the term "discharge of a pollutant" requires that the pollutants be added "from a point source." As explained below, to the extent Congress addressed diversions of water at all, it treated diversions as "nonpoint sources" rather than as "point sources." A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). While "nonpoint source" is not defined in the CWA, EPA has explained that the term "is defined by exclusion and includes all water quality problems not subject to § 402," *Gorsuch*, 693 F.2d at 166 (citing EPA's brief), which therefore includes water transfers.

C. *Other Provisions of the CWA Show that Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water.*

EPA's Water Transfers Rule is further supported by a consideration of the CWA statute as a whole. While Congress clearly contemplated that pollutants might be moved within the nation's waters as a result of facilities diverting flow,

[9] The language elsewhere in the statute makes clear that when Congress felt it appropriate to address particular water bodies, or portions of specific water bodies, it did so explicitly, and did not use the defined term "navigable waters." *See, e.g.*, provisions concerning the identification of specific water bodies or segments not meeting water quality standards, 33 U.S.C. §1313(d)(1)(A) ("Each State shall identify *those waters within its boundaries* . . . .") and (B) ("Each State shall identify *those waters or parts thereof within its boundaries* . . . .") (emphasis added).

such as the Shandaken Tunnel, the CWA is structured to address transfers of pollutants resulting from such diversions in a different manner from "additions" subject to the NPDES permitting requirements. Instead, in one of several statutory provisions addressing nonpoint sources of pollution, Congress directed EPA to study and make recommendations concerning "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F). In recommending consultation with appropriate federal and state agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, 33 U.S.C. § 1314(f), Congress clearly contemplated that facilities that change the flow of water would be evaluated differently from point sources of pollutants. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988) (stating that § 1314(f) supports "the view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution" (*citing Gorsuch*, 693 F.2d at 177)).

This reading is consistent with the legislative history of this provision. The House Committee report on Section 304(f) states:

> The Committee . . . expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of

> pollution from such nonpoint sources as . . . natural and manmade changes in the normal flow of surface and groundwater.

H.R. REP. NO. 911, 92nd Cong., 2d Sess., at 109 (1972).

Moreover, the CWA makes it clear that Congress did not intend to interfere with state water allocation. Section 101(g), entitled "Authority of States Over Water," states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

33 U.S.C. § 1251(g). Similarly, Section 510 of the Act, entitled "State Authority," further affirms Congress' intention that the CWA NPDES permitting provision not affect allocation of water within a state:

> Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.

33 U.S.C. § 1370. Indeed, the Supreme Court confirmed in *Miccosukee* that if the ability to transfer water is impaired through the application of the NPDES program, Section 101(g) of the Act would be violated:

> Many of these diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution

> prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.

Miccosukee, 541 U.S. at 108 (quoting 33 U.S.C. § 1251(g)).

Thus, both the language of Section 402 of the CWA, and the broader structure of the entire CWA, illustrate that EPA's Water Transfers Rule is a reasonable construction of the statute.

II. EPA's Determination Was Not Arbitrary or Capricious.

Under the Administrative Procedure Act, agency actions are subject to review under the arbitrary and capricious standard.[10] 5 U.S.C. § 706(2)(A). The scope of review under this standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As the Supreme Court has explained:

> The agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

Id. (internal citations omitted). As discussed below, EPA's Water Transfers Rule was clearly based on a consideration of the relevant factors and data.

[10] As noted above, *see supra* note 3, *amici* are not taking a position in this brief on jurisdiction under the Administrative Procedure Act.

A. *The Water Transfers Rule Reflects EPA's Practical Understanding of the CWA Program.*

If the Petitioners' challenges succeed, the scope of the CWA's NPDES permit program will far exceed the capacities of EPA and states with delegated authority to administer the program. Diversion structures across the nation currently operating without NPDES permits would be added to the backlogged and overburdened NPDES program. *See, e.g.*, *Gorsuch*, 693 F.2d at 182.

Moreover, because NPDES permits must include effluent limits to "achieve water quality standards . . . including State narrative criteria for water quality," 40 C.F.R. § 122.44(d)(1), the NPDES program lacks the flexibility to deal appropriately with transfers of untreated water. Where the transferred water contains pollutants that are not introduced by the entity operating the transfer – as in *Catskill Mountains*, where the water contains naturally occurring turbidity – this requirement can place an impossible burden on the transferor.[11] The *Catskill Mountains* case is illustrative: as noted above, there may be no feasible mechanism for ensuring that Schoharie water diverted from the Shandaken Tunnel meets the New York State water quality standard of no substantial visible increase

[11] Moreover, this burden is unfair. The CWA was intended to regulate entities that *introduce* pollutants, not entities that merely move water that already contains pollutants. *See, e.g.*, *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377-78 (4th Cir. 1976) (CWA does not make industrial dischargers responsible for removing constituents occurring naturally in intake water or introduced by upstream discharges).

in turbidity. Petitioners' challenges place 16% of the City's water supply in jeopardy.

B. *More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water*

Contrary to the assertions of some of the Petitioners, *see* Brief of Friends of the Everglades *et al.* 6-10, 44-47 (No. 08-16283-CC), many other provisions of federal and state law provide sufficient, and in fact more appropriate, regulatory frameworks to address any water quality impacts of transfers of untreated water. This section provides an overview of several other such provisions.

1. Federal Programs

a. Total Maximum Daily Loads and State Water Quality Management Plans

In most cases, a receiving waterbody that fails to meet applicable water quality standards for a particular pollutant will be placed on the state's impaired waters list under the CWA and therefore subject to the development of total maximum daily loads ("TMDL"). 33 U.S.C. § 1313(d). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating pollutant limitations to the various contributors. TMDLs are implemented for point sources via NPDES permits, and for nonpoint sources through state best management practices.

In addition to the TMDL program, states must establish Water Quality Management ("WQM") Plans to address water bodies for which water quality standards cannot be attained or maintained without the control of nonpoint sources. 33 U.S.C. § 1329(a)(1)(A). A WQM Plan "identifies those categories and subcategories of nonpoint sources, or, where appropriate, particular nonpoint sources which add significant pollution . . . in amounts which contribute" to the failure to meet water quality standards. 33 U.S.C. § 1329(a)(1)(B). A WQM Plan includes a process for identifying best management practices to reduce pollution from the significant individual nonpoint sources or categories of sources, and describes the programs that have been implemented to control pollution from those sources. 33 U.S.C. § 1329(a)(1)(C) and (D). A WQM Plan includes both regulatory and non-regulatory means to control nonpoint source pollution. 40 C.F.R. § 130.6(c)(4)(i), (ii). Moreover, the TMDLs that are established under 33 U.S.C. Section 1313 are incorporated into a state's WQM Plan. 40 C.F.R. § 130.7(a).

Regulators, environmental advocates, and the scientific community continually stress that it is far better to address pollutants at their source, rather than trying to remove them, or compensate for their impacts, after they have been added to the nation's waters. Thus, if pollutants are to be addressed at all, the appropriate place is where they enter the water waters of the United States, not

where they are subsequently transferred from one water body or watershed to another. The CWA's nonpoint source programs, including the TMDL program and state WQM plans, provide an important tool for addressing pollution that arises from farming, logging, development, or disturbances to streambanks and streambeds.

b. Municipal Separate Storm Sewer System Permits

The NPDES program itself includes provisions that are better tailored to addressing pollutants originating in urban runoff than individual NPDES permits for the transfers of water containing such pollutants.[12] Under the stormwater provisions of the CWA, EPA has established permit programs to protect water quality by reducing the pollutants in stormwater runoff from municipalities and other populated areas. *See* 33 U.S.C. § 1342; 40 C.F.R. § 122.32. In addition, municipalities required to obtain permits for their municipal separate storm sewer systems ("MS4s") are required to implement best management practices to reduce stormwater pollutants to the "maximum extent practicable."[13] 33 U.S.C.

[12] Many stormwater discharges are regulated as "point sources" under the NPDES program because stormwater draining from land uses most likely to cause pollution is typically controlled by storm sewers or other stormwater management systems with controlled discharge points. EPA, *National Pollution Discharge Elimination System (NPDES), Stormwater Basic Information*, http://cfpub.epa.gov/npdes/stormwater/swbasicinfo.cfm (last updated December 2, 2008).

[13] Some states have gone farther than the CWA requires. For instance, New York requires MS4s to "take all necessary actions to ensure future *discharges* do not directly or indirectly cause or contribute to the violation of a *water quality standard*." N.Y. Dept. of Envtl. Conserv. SPDES

§ 1342(p)(3)(B)(iii). Thus, to the extent that the pollutants of concern in a water transfer or diversion come from urban stormwater runoff, the MS4 permit program as well as nonpoint source best management practices can appropriately address the pollutants at their sources.

c. The Safe Drinking Water Act and Surface Water Treatment Rule

Municipal water supply systems are closely regulated under the federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300(f) *et seq*., and its implementing regulations, the Surface Water Treatment Rule ("SWTR"), 40 C.F.R. § 141.70 *et seq*. The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems, and set forth the criteria that must be met for a public water system to avoid filtration. *See* 40 C.F.R §§ 141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity to 5 Nephelometric Turbidity Units ("NTU") immediately prior to the first point of disinfection. 40 C.F.R. § 141.71(a)(2) and (c)(2)(i).

The facts of the *Catskill Mountains* case again provide an example of how water transfers are already appropriately reviewed, managed, and regulated. The City's Catskill system supplies unfiltered water to the City of New York, and thus operates under a Filtration Avoidance Determination ("FAD") issued by the

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Gen. Permit for Stormwater Discharges from Mun. Separate Storm Sewer Sys., Permit No. GP-0-10-002, at 10 (*available at* www.dec.ny.gov/docs/water_pdf/ms4gp2011.pdf).

EPA under 40 C.F.R. § 141.71. The City's most recent FAD, which was issued in July 2007, contains several provisions that require the City to address and control pollution entering and within the City's Catskill and Delaware water supply systems from both point and nonpoint sources. The 2007 FAD specifically requires the City to implement a plan (developed pursuant to the previous FAD) to improve turbidity and temperature control in waters diverted through the Shandaken Tunnel. The FAD requirements also include a stream management program to restore streambanks and streambeds, an agricultural program to reduce pollution from farms near the watershed, and a forestry program to address erosion resulting from logging.[14]

Thus, the pollutants at issue in *Catskill Mountains* are being addressed under the SDWA and SWTR, both at the location where they enter the water system and after water is diverted through the Shandaken Tunnel. The FAD program administered under the SDWA and SWTR not only imposes more effective environmental controls than the NPDES permitting program, it also resolves the underlying issues without losing sight of the fact that the main purpose of the Catskill system is to provide a safe and adequate supply of drinking water to the public.

[14] While the specific source control measures in place under New York City's FAD would not be required of filtered public water systems under the SDWA, many of the filtered systems throughout the country employ similar measures under state or local law.

2. State Laws and Regulations

In addition to the federal requirements, there are a number of state laws and regulations that address and control pollutants in the context of municipal water management and water transfers. Regulatory programs in New York are illustrative of the types of programs that exist throughout the nation. These provisions operate independently from the NPDES point source permit program.

Consistent with its delegated authority to administer the CWA, New York State has adopted and enforces water quality standards. *See* N.Y. ENVTL. CONSERV. L. §§ 15-0313(2); 17-0301; 6 NYCRR § 700 *et seq*. The State classifies bodies of water in accordance with their best use, and adopts and enforces water quality standards for specific water bodies, including the Esopus Creek, based on those classifications. *See id.* Releases that violate the State water quality standards are subject to enforcement by the DEC Commissioner. N.Y. ENVTL. CONSERV. L. § 17-0501. Diversions from the Shandaken Tunnel are subject to these provisions, independent of the NPDES or New York's SPDES program.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. N.Y. ENVTL. CONSERV. L. § 15-0501. A permit is also required to excavate or place fill in navigable waters. N.Y. ENVTL. CONSERV. L. § 15-0505. These laws, if enforced properly, are specifically tailored to address many of the activities that create turbidity in

source waters of the Schoharie Reservoir, and thus in diversions from the Shandaken Tunnel.

Finally, New York State regulates releases from reservoirs in order to protect natural resources and recreational uses in the receiving waters. N.Y. ENVTL. CONSERV. L. §§ 15-0801 and 15-0805.[15]

Therefore, Petitioners' argument that water transfers will be wholly unregulated without NPDES permits, *see* Brief of Friends of the Everglades *et al.* 6-10, 44-47, fails.

[15] Indeed, as noted above, New York City is required, under regulations promulgated by New York State pursuant to these statutes, to make diversions from its Shandaken Tunnel, to enhance recreational use of the Esopus Creek. *See* 6 NYCRR § 670.3(i).

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court to uphold EPA's Water Transfers Rule, to avoid serious negative consequences for the many public agencies and authorities nationwide involved in water management for water supply, flood control, and related public purposes.

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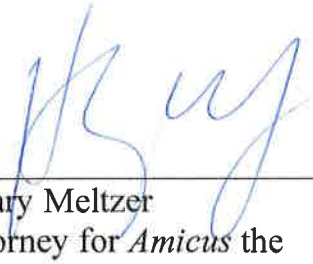
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that the foregoing Amicus Brief is printed in proportionately spaced typeface of 14 points. The brief is double-spaced except for quotations and footnotes. The side, top and bottom margins are one inch. According to the word processing system's tally, the word count for the brief is 6,778 (excluding the Certificate of Interested Persons and Corporate Disclosure, Table of Contents, Table of Authorities, Certificate of Compliance, Appendix A, and Declaration of Service).

By: 

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DECLARATION OF SERVICE

I, Hilary Meltzer, declare pursuant to 28 U.S.C. § 1746, under penalty of perjury, that I caused copies of the foregoing *Amicus* Brief in Support of Respondents to be served upon counsel this 3rd day of November, 2011, by Electronic Mail and United States Mail addressed to:

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