14-1823(L)

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

To Be Argued By:
ROBERT WILLIAM YALEN

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket Nos. 14-1823(L), 14-1909(con), 14-1991(con), 14-1997(con), 14-2003(con)

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.,

(*Caption continued on inside cover*)

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

BRIEF FOR DEFENDANTS-APPELLANTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND GINA McCARTHY

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Plaintiffs-Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

Consolidated Plaintiff-Appellee,

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

Intervenor Plaintiffs-Appellees,

—v.—

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

Defendants-Appellants-Cross Appellees,

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

UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS, CITY OF NEW YORK,

Intervenor Defendants-Appellants-Cross Appellees,

NORTHERN COLORADO WATER CONSERVANCY DISTRICT,

Intervenor Defendant,

—v.—

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Intervenor Defendant-Appellant-Cross Appellant.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 14-1823(L), 14-1909(con), 14-1991(con), 14-1997(con), 14-2003(con)[1]

BRIEF FOR DEFENDANTS-APPELLANTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND GINA McCARTHY

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[1] The government respectfully requests that the official caption in the clerk's docket be corrected as follows: (1) "Government of the Province of Manitoba, Canada" should be listed among the "Plaintiffs-Appellees" and not separately as a "Consolidated Plaintiff-Appellee"; (2) the parties listed as "Defendants-Appellants-Cross Appellees" should be listed simply as "Defendants-Appellants"; (3) the parties listed as "Intervenor Defendants-Appellants-Cross Appellees" should be listed simply as "Intervenor Defendants-Appellants"; (4) "South Florida Water Management District" should be listed among the "Intervenor Defendants-Appellants" and not separately as an "Intervenor Defendant-Appellant-Cross Appellant"; (5) "Catskill-Deleware Natural Water Alliance, Inc." should be appear as "Catskill-Delaware Natural Water Alliance, Inc."; and (6) "States of Colorado" should appear as "State of Colorado."

Preliminary Statement

Water transfers—in which water is conveyed from one body of water of the United States to another—are a critical part of the nation's infrastructure. Water transfers are essential for moving water to where the public needs it: among other things, they bring drinking water from Catskill Mountains sources to the City of New York, prevent flooding throughout South Florida, and supply water to the arid West.

Under the Clean Water Act, permits are generally required for "any addition of any pollutant to navigable waters from any point source," and "navigable waters" is defined to mean "the waters of the United States." This statutory text can be read either to prohibit the unpermitted addition of pollutants to any individual water body that is part of the waters of the United States, or to prohibit the unpermitted addition of pollutants to the waters of the United States considered collectively.

Faced with this ambiguity, the Environmental Protection Agency ("EPA") has never construed the statute to require a permit for water transfers except where the transfer itself introduces pollutants or the water is subjected to an intervening use. In 2008, EPA codified its interpretation in a regulation (the "Water Transfers Rule" or "Rule") adopted through notice-and-comment rulemaking. EPA concluded that the structure and purpose of the Clean Water Act demonstrated Congress's intent to address water transfers through means other than the permit program at issue here. In doing so, EPA reasonably exer-

cised its authority to resolve the statutory ambiguity —as the Eleventh Circuit has since held.

The district court erroneously reached the opposite conclusion. Although it found the statute to be susceptible to EPA's interpretation, it nonetheless concluded that EPA did not give a "reasoned explanation" for adopting that interpretation. In doing so, the district court failed to apply the requisite high level of deference to EPA's decisionmaking, instead undertaking a skeptical review of EPA's reasoning, disregarding EPA's explanations, and substituting its own judgments about the best reading of the statute for that of the agency. The district court then went on to speculate about other interpretations EPA might adopt and held them to be contrary to the statute—and on that basis partly vacated the Rule.

The Court should correct the district court's multiple errors, join the Eleventh Circuit in upholding the Rule, and reverse the district court's contrary judgment.

Jurisdictional Statement

Plaintiffs invoked the district court's subject matter jurisdiction under 28 U.S.C. § 1331, as the action arose under the laws of the United States.[2] The dis-

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[2] EPA initially contested jurisdiction, arguing the courts of appeals have exclusive jurisdiction over challenges to the Water Transfers Rule pursuant to 33 U.S.C. § 1369(b)(1)(E) and (F), and therefore the Administrative Procedure Act's waiver of sovereign immunity—which permits review only when "there is

trict court entered final judgment on March 31, 2014 (Joint Appendix ("JA") 47-48, 90), and EPA filed a timely notice of appeal on May 29, 2014 (JA 49, 91). Accordingly, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Issue Presented

The Clean Water Act requires a National Pollutant Discharge Elimination System ("NPDES") permit for "any addition of any pollutants to [the waters of the United States] from any point source." EPA has promulgated the Water Transfers Rule, reflecting its interpretation of the Act that conveying or connecting waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use does not constitute an "addition" to "the waters of the United States" and therefore does not require an NPDES permit. The question is whether, applying *Chevron* deference, this Court should uphold the Rule.

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no other adequate remedy in a court," 5 U.S.C. § 704—does not apply. However, in a related case involving the government and many of the plaintiffs here, the Eleventh Circuit rejected that position. *Friends of the Everglades v. EPA (Friends II)*, 699 F.3d 1280, 1288 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 421 (2013). EPA thereafter stipulated to the denial of its motion to dismiss for lack of jurisdiction, on the basis of collateral estoppel. (JA 192).

Statement of the Case

A. Procedural History

Two cases were consolidated in the district court: one brought by non-governmental organizations on June 20, 2008, the other brought by nine states and a Canadian province on October 2, 2008. (JA 13, 63). New York City, eleven states, numerous Western water districts and similar entities, and the South Florida Water Management District ("SFWMD") intervened as defendants, while certain parties interested in water transfers in South Florida intervened as plaintiffs. (JA 16, 26, 190).

On April 29, 2009, the district court (Kenneth M. Karas, J.) stayed the proceedings pending the outcome of two Eleventh Circuit cases involving the Water Transfers Rule, *Friends of the Everglades v. South Florida Water Management District (Friends I)*, 570 F.3d 1210, 1227-28 (11th Cir. 2009), and *Friends II*. (JA 18). After those decisions were issued and the district court lifted its stay, the three groups of plaintiffs each filed motions for summary judgment on March 26, 2013. (JA 30, 31, 32). The EPA defendants (EPA and its Administrator) and the four groups of defendants-intervenors each cross-moved for summary judgment on June 7, 2013. (JA 34, 35, 36).

On March 28, 2014, the district court issued a memorandum and order granting plaintiffs' motions for summary judgment and denying defendants' cross-motions. (JA 47; SPA 6). It entered judgment on March 31, 2014. (JA 47-48, 90).

On May 29, 2014, the EPA defendants filed a timely notice of appeal. (JA 49, 91). Each group of defendants-intervenors also appealed. (JA 48-53, 91-94).[3]

B. Legal Background

1. The Clean Water Act

In 1972, Congress enacted the Federal Water Pollution Control Amendments of 1972, better known as the Clean Water Act ("CWA" or the "Act"). 33 U.S.C. §§ 1251-1387. "Congress passed the Clean Water Act in response to widespread recognition—based on events like the 1969 burning of the Cuyahoga River in Cleveland—that our waters had become appallingly polluted." *Rapanos v. United States*, 547 U.S. 715, 809 (2006) (Stevens, J., dissenting). Congress's focus was to address "industrial and municipal sources of pollutants," which "were the worst and most obvious offenders of surface water quality." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (quotation marks omitted).

The Act's "objective" is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). At the same time, Congress expressly sought "to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhance-

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[3] SFWMD filed a notice of cross appeal, which it subsequently withdrew.

ment) of . . . water resources," *id.* § 1251(b), and not to "supersede[], abrogate[], or otherwise impair[]" "the authority of each State to allocate quantities of water within its jurisdiction," *id.* § 1251(g).

The Act provides that "the discharge of any pollutant by any person shall be unlawful," except as authorized by certain provisions. 33 U.S.C. § 1311(a). One of those provisions is section 402, which establishes the NPDES permitting program. 33 U.S.C. § 1342. The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12)(A), and "navigable waters," as relevant here, means "the waters of the United States," *id.* § 1362(7).[4] Thus, the Act generally requires an NPDES permit for an activity that causes "any addition of any pollutant to [the waters of the United States] from any point source."[5]

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

[5] If required, an NPDES permit will contain "effluent limitations" restricting the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" that may be discharged. 33

The NPDES program, however, does not address all water quality concerns. The Act creates other programs, including "nonpoint source" programs, that generally address pollution from diffuse sources unlike typical industrial or municipal pollution, such as run-off. *See, e.g.*, 33 U.S.C. §§ 1288, 1314, 1329. In nonpoint source programs, states are required to propose for EPA's approval, then to administer, water quality programs. *See id.* §§ 1288, 1329. EPA provides technical information to states for use in their nonpoint source programs, including information about control methods for "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F).

Beyond these nonpoint source programs, the Act also authorizes states to impose permitting programs that are broader and more rigorous than NPDES. *See* 33 U.S.C. § 1370(1). The Act preserves other federal

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U.S.C. §§ 1311(e), 1362(11); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (*Catskill II*), 451 F.3d 77, 85-86 (2d Cir. 2006). As part of the cooperative federal-state framework established by the Clean Water Act, states have the option, with EPA approval, of administering the NPDES program within the state, 33 U.S.C. § 1342(b)-(c), and in most states it is the state environmental agency, rather than EPA, that issues NPDES permits. (SPA 53).

water regulation not inconsistent with the Act, *id.* § 1371, such as the federal Safe Drinking Water Act, which imposes treatment standards for drinking water provided by public water systems, including those that obtain water through water transfers, 42 U.S.C. §§ 300f–300j-26. (JA 1244-45).

2. Water Transfers and EPA's Interpretation of the Act

The Water Transfers Rule defines a "water transfer" as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i).

Water transfers play a critical role in our nation's infrastructure. As EPA has explained:

> Water transfers occur routinely and in many different contexts across the United States. Typically, water transfers route water through tunnels, channels, and/or natural stream water features, and either pump or passively direct it for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. . . .
>
> Water transfers are administered by various federal, State, and local agencies and other entities. . . . Many large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redi-

> rection of water from outside basins. For example, both the cities of New York and Los Angeles depend on water transfers from distant watersheds to meet their municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers, and these transfers are an integral component of U.S. infrastructure.

73 Fed. Reg. 33,697, 33,698-99 (June 13, 2008).

The allocation of water among its many uses is generally set by state law, pursuant to longstanding federal policy. *See California v. United States*, 438 U.S. 645, 653 (1978) (noting Congress's "purposeful and continued deference to state water law"). Water transfers are often the means by which states and water resource agencies "balance competing needs" for limited water supplies. 73 Fed. Reg. at 33,703. Congress has recognized the importance of these water allocations by including in the CWA an express "statement of policy" not to impair, supersede, or abrogate "the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(g).

a. Court Rulings Prior to the Water Transfers Rule

EPA's view has long been that a water transfer does not constitute an "addition of any pollutants to navigable waters from any point source" and therefore does not need an NPDES permit. As EPA explained when promulgating the Rule, even where pol-

lutants are present in the conveyed water, as will typically be the case given the broad definition of the word "pollutant," *see* 33 U.S.C. § 1362(6); 73 Fed. Reg. at 33,699, water transfers do not effect an "addition" to the waters of the United States "because the pollutant at issue is already part of 'the waters of the United States' to begin with," 73 Fed. Reg. at 33,701 (quotation marks omitted); (JA 1262). Thus, since the enactment of the Clean Water Act, water transfers have been regulated under NPDES only in response to judicial decisions or where the transferring activity itself introduces pollutants. 73 Fed. Reg. at 33,699-700.

In two earlier cases, EPA successfully advanced a similar view concerning the movement of water through dams. EPA argued that an "addition [of a pollutant] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world," and that whether there has been an "addition" is determined based on "when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). The D.C. Circuit upheld EPA's interpretation. *Id.* at 161. Although *Gorsuch* pre-dated *Chevron*, the court essentially applied the two-step *Chevron* analysis: first, it found the statute to be ambiguous, and second, it upheld EPA's interpretation as "reasonable, not inconsistent with congressional intent, and entitled to great deference." *Id.* at 166, 183. The Sixth Circuit later followed the *Gor-*

such ruling under *Chevron*. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988).

However, in later cases not involving dams, other courts of appeals, including this Court, declined to apply *Chevron* deference and held that a permit was required for a water transfer between distinct water bodies. First, in *Dubois v. USDA*, the First Circuit declined to accord *Chevron* deference to the U.S. Forest Service's determination that water transfers do not require a permit, because the Forest Service is not the federal agency charged with interpreting the Clean Water Act. 102 F.3d 1273, 1285 n.15 (1st Cir. 1996). The court then held that a water transfer conveying pollutants between "distinct" water bodies, where the "transfer of water or its contents" between the water bodies "would not occur naturally," requires an NPDES permit. *Id.* at 1297, 1299.

In 2001, this Court adopted a similar interpretation in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (*Catskill I*), 273 F.3d 481 (2d Cir. 2001). The Court held that *Chevron* did not apply to EPA's interpretation of the statute, because it was "based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years," which "do not deserve broad [*Chevron*] deference." 273 F.3d at 490 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000)). The Court stated, however, that "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied

by the *Gorsuch* and *Consumers Power* courts might be appropriate." *Id.* at 490-91.

Applying *Skidmore* deference, the Court rejected EPA's views. *Id.* at 491. The Court concluded that the water transfer at issue—through a tunnel connecting a reservoir to a creek—"qualifies as an 'addition' under the plain meaning of that word." *Id.* at 489. The Court agreed with *Gorsuch* and *Consumers Power* that "for there to be an 'addition,' a 'point source must *introduce* the pollutant into navigable water from the outside world,'" but only when "'outside world' is construed as any place outside the particular water body to which pollutants are introduced." *Id.* at 491 (quoting *Gorsuch,* 693 F.2d at 165). It thus rejected "the *Gorsuch* and *Consumers Power* courts' understanding of 'addition,' at least insofar as it implies acceptance of what *Dubois* called a 'singular entity' theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States." *Id.* at 493.

In 2004, the Supreme Court considered, but did not resolve, the applicability of the NPDES program to water transfers in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-09 (2004). In the decision under review, the Eleventh Circuit had followed *Catskill I* and held that a permit was required for a water transfer. *See id.* at 98, *vacating* 280 F.3d 1364 (11th Cir. 2002). The Supreme Court held that, at a minimum, no permit is required where water is transferred between water bodies that are not "meaningfully distinct," and remanded for further findings on that question. *Id.* at

109, 112. But the Court expressly left unresolved the question whether a permit would be required if the water bodies were "meaningfully distinct." *Id.* at 108-09. The Court noted that the government as *amicus curiae* had advocated what the Court called the "'unitary waters' approach," under which the statutory phrase "any addition of any pollutant to navigable waters from any point source" should be read to refer to "navigable waters" collectively. *Id.* at 106-07. The Court identified arguments for and against that approach but expressly declined to resolve the matter, leaving it open for litigation on remand. *Id.* at 105-09. The Court declined to accord deference to EPA's interpretation because of the absence of any "administrative documents in which EPA has espoused" its position. *Id.* at 107.

b. The Water Transfers Rule

Taking up the Supreme Court's invitation in *Miccosukee*, EPA began an administrative process to formalize its views. In August 2005, EPA's Office of General Counsel and Office of Water issued a memorandum interpreting the statute to exclude water transfers from the NPDES program. (JA 271).[6] In June 2006, EPA published a proposed rule to exclude

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[6] After the issuance of this interpretive memorandum, this Court declined to reconsider its holding in *Catskill I*. *Catskill II*, 451 F.3d at 81. The Court again noted that no formal rule eligible for *Chevron* deference was before it. *Id.* at 83 n.5.

water transfers from the NPDES permit program. 71 Fed. Reg. 32,887 (June 7, 2006).

On June 13, 2008, EPA published the final Water Transfers Rule. 73 Fed. Reg. at 33,697. The Rule added a new subsection (i) to 40 C.F.R. § 122.3:

> Section 122.3 Exclusions
>
> The following discharges do not require NPDES permits:
>
> . . .
>
> (i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

The preamble to the Rule explains EPA's rationale in depth, as does a lengthy "response to comments" document. 73 Fed. Reg. at 33,697-708 (preamble); (JA 1238-94) (response to comments). First, EPA sets out the ambiguity in the statute. It notes that some courts have held that an "addition" of pollutants to navigable waters occurs whenever pollutants are transferred to a particular water body. 73 Fed. Reg. at 33,700-01 (citing *Catskill I, Catskill II*, *Dubois*, and the Eleventh Circuit decision vacated in *Miccosukee*). But it also explains the government's contrary interpretation of the statute, advancing what some courts,

including the Supreme Court, have called a "unitary waters" reading of the statutory language:

> "[T]he pollutants in transferred water are already *in* 'the waters of the United States' before, during, and after the water transfer. Thus, there is no 'addition'; nothing is being added '*to*' 'the waters of the United States' by virtue of the water transfer, because the pollutant at issue is already part of 'the waters of the United States' to begin with. Stated differently, when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as 'waters of the United States,' and thus nothing is added to those waters from the outside world."

73 Fed. Reg. at 33,701 (quoting government's brief in *Friends I*).

EPA adopted this latter interpretation of the statute. *See* 73 Fed. Reg. at 33,701. In choosing that view, EPA emphasized the importance of water transfers to the national infrastructure, and Congress's intent reflected in 33 U.S.C. § 1251(b) and (g) and § 1370 to avoid burdening state authority over water allocations and water resources. 73 Fed. Reg. at 33,701-02. Although EPA acknowledged that water transfers typically carry pollutants, *id.* at 33,699, and that there may be "pollution associated with water management activities," *id.* at 33,702, EPA explained that

Congress would have considered these effects of water transfers to be best treated through nonpoint source programs, *see, e.g.*, *id.* at 33,702-03. EPA also emphasized that the Clean Water Act expressly authorizes states to develop permit programs that sweep more broadly than NPDES, *see id.* at 33,699, as well as that water conveyed in water transfers may also be regulated by other federal statutes such as the Safe Drinking Water Act (JA 1244-45).

As EPA summarized,

> The Agency has concluded that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend to subject water transfers to the NPDES program. Interpreting the term "addition" in that context, EPA concludes that water transfers, as defined by today's rule, do not constitute an "addition" to navigable waters to be regulated under the NPDES program. Instead, Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities.

73 Fed. Reg. at 33,701.

c. The Eleventh Circuit's Decision in *Friends I*

After the Rule was adopted, the Eleventh Circuit applied *Chevron* and held that the Rule was a reasonable construction of the Act. *Friends I*, 570 F.3d at

1228 (holding "we must give effect to [the Rule]" in rejecting contention that permit was required for particular discharge). The court explained that the Rule reflected the "unitary waters" theory "that it is not an 'addition . . . to navigable waters' to move existing pollutants from one navigable water to another" and that "[a]n addition occurs . . . only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." 570 F.3d at 1217. Although the court noted that, prior to the promulgation of the Rule, "[t]he unitary waters theory ha[d] a low batting average"—citing *Catskill I, Catskill II*, *Dubois*, and the Eleventh Circuit's own vacated *Miccosukee* decision—it observed that those cases had neither held the statute to be unambiguous nor viewed the matter through the *Chevron* lens. *Id.* at 1217-18. As the court of appeals explained, "[d]eciding how best to construe statutory language is not the same thing as deciding whether a particular construction is within the ballpark of reasonableness" required under *Chevron*. *Id.* at 1221.

At *Chevron*'s step one, the Eleventh Circuit found the statute to be ambiguous because, among other things, the word "waters" can be understood either in an individual or a collective sense. *Id.* at 1223-24. The court also noted the absence of the word "any" before "navigable waters" in the phrase "[a]ny addition of any pollutant to navigable waters from any point source," and the fact that Congress elsewhere uses the phrase "any navigable waters" when it refers to individual water bodies, supporting an understanding that in this provision "waters" are meant collectively. *Id.* at 1223-25. Holding that the statutory language

was susceptible to either interpretation, the court then concluded that the context of the statute as a whole did not resolve the ambiguity, but rather demonstrated conflicting purposes and a congressional understanding that not all pollution would be covered by the NPDES program. *Id.* at 1225-27.

At *Chevron* step two, the court concluded that "[b]ecause the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 1228 (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984)). As the court explained, "[a]ll that matters is whether the regulation is a reasonable construction of an ambiguous statute. In other words, there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways." *Id.* at 1219 (citations omitted). Concluding that the Water Transfers Rule met this test, the Eleventh Circuit held it to be valid. *Id.* at 1228.[7]

C. The Current Action, and the District Court's Decision

Plaintiffs in this action contend that the Rule is unlawful.

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[7] A district court in Oregon later followed *Friends I* and upheld the Water Transfers Rule under *Chevron*. *ONRC Action v. Bureau of Reclamation*, Civ. No. 97-3090-CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012), *appeal pending*, No. 12-35831 (9th Cir.).

The district court granted summary judgment to plaintiffs and intervenor-plaintiffs, remanding the Rule to EPA and vacating it in part. Applying *Chevron*, the court agreed with EPA that the statute is ambiguous, following *Friends I* and its conclusion that "'[t]he statutory context indicates that sometimes the term "navigable waters" was used in one sense [to refer to "the waters of the United States collectively,"] and sometimes in the other sense [to refer to "many individual water bodies"].'" (SPA 47 (quoting *Friends I*, 570 F.3d 1224-25; alterations in original)). The court further concluded that neither the statutory context nor legislative history removed the ambiguity. (SPA 59-60). Moreover, the district court held that this Court's decisions in *Catskill I* and *Catskill II* did not control the interpretation of the statute, as this Court expressly left open the possibility of applying *Chevron* to an agency interpretation with the force of law. (SPA 41).

However, the district court rejected the Water Transfers Rule at *Chevron*'s step two, holding that EPA failed to provide a "reasoned explanation" for its adoption. (SPA 47, 104). Although the court acknowledged that EPA's interpretation of the term "waters of the United States" was a "permissible" interpretation (SPA 92, 104-05), it criticized EPA's methodology in choosing that interpretation (SPA 79-85), the application of that methodology (SPA 85-91), and the agency's conclusions (SPA 91-103). The court rejected *Friends I*'s *Chevron* step two analysis because it believed that the Eleventh Circuit wrongly assumed that EPA had adopted a "unitary waters" view and failed to require a "reasoned explanation" for the

Rule. (SPA 104-10). The district court also held that the Rule implied EPA held a "status-based" view of the meaning of "waters of the United States" that was "manifestly contrary to the statute." (SPA 111-14). The court then addressed and rejected an argument that the court thought EPA "might" adopt on remand in an "attempt to save its interpretation," involving an application of the non-majority opinions in *Rapanos* to water transfers. (SPA 114-19). Ultimately, the court generally remanded the Rule without vacating it, but vacated it in part "to the extent it is inconsistent with the statute—and in particular the phrase 'navigable waters' as interpreted in *Rapanos* and in this Opinion." (SPA 119-21).

These appeals followed.

Summary of Argument

The Water Transfers Rule is a reasonable interpretation of an ambiguous statute, and should be upheld under the deferential framework of *Chevron*.

The district court correctly held, at *Chevron* step one, that the Clean Water Act is ambiguous. The relevant phrase—"any addition . . . to navigable waters"—can be read to mean either the waters of the United States collectively, or individual bodies of water; under the former interpretation, no NPDES permit would be required for water transfers. *See infra* Point B.1.a. Nothing in the structure, purpose, or history of the statute compels the choice of one or the other of those readings: while the Clean Water Act plainly aims to preserve and restore the integrity of national waters, it also seeks to preserve states' authority over

water use and allocation, and contains numerous other mechanisms for the regulation of water quality outside the NPDES program. *See infra* Point B.1.b. Nor do this Court's prior decisions hold that the Act is unambiguous, and EPA's Rule is therefore still entitled to *Chevron* deference. *See infra* Point B.1.c.

At *Chevron* step two, the district court correctly recognized that the Rule is based on a permissible interpretation of the statute: that an NPDES permit is only required in the case of an "addition" to the "waters of the United States" considered collectively. *See infra* Point B.2.a. It erred in nonetheless rejecting the Rule on the ground that EPA had not provided a "reasoned explanation" for adopting it. To the contrary, EPA carefully set forth numerous statutory and policy reasons for its decision. As Congress entrusted the agency to resolve those matters, EPA's determination deserved judicial deference. But instead, the district court undertook a searching critique of EPA's analysis, one that, among other errors, incorrectly perceived inconsistencies in the agency's reasoning and disregarded EPA's assessment of the best means of achieving the statute's water quality goals. *See infra* Point B.2.b. The district court also misunderstood EPA's interpretation in holding that the agency expanded the definition of "waters of the United States," and improperly relied on what the court perceived to be an interpretation that EPA "might" adopt. *See infra* Points B.2.c, B.2.d.

Finally, the district court erroneously ordered that the Rule be vacated in part. The court's order was improperly vague, and relied on a hypothetical construction the agency never adopted. Moreover, vacatur is only proper if there are "serious doubts" that the agency can justify its decision, a standard that is not met when, as here, EPA has substantial bases for its action, and the only court of appeals to have considered the Rule has upheld it. *See infra* Point C.

This Court, like the Eleventh Circuit in *Friends I*, should conclude that the Rule reflects a reasonable reading of the statute and is therefore valid. Accordingly, the district court's judgment should be reversed.

ARGUMENT

The Water Transfers Rule Should Be Upheld as a Reasonable Interpretation of an Ambiguous Statute

A. Standard of Review

"On appeal from a grant of summary judgment in a challenge to agency action under the APA, we review the administrative record and the district court's decision de novo." *Bellevue Hospital Ctr. v. Leavitt*, 443 F.3d 163, 173-74 (2d Cir. 2006). The Court "accords no deference" to the district court, "but instead conducts de novo review of the administrative record and renders its own independent judgment." *Ward v. Brown*, 22 F.3d 516, 521 (2d Cir. 1994).

B. The Water Transfers Rule Should Be Upheld

As the Eleventh Circuit did in *Friends I*, this Court should uphold the Water Transfers Rule as a reasonable interpretation of an ambiguous statute.

Because EPA has adopted an interpretation of a statute it administers through notice-and-comment rulemaking, "the deferential framework of *Chevron*" applies. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 979 (2005). At *Chevron* step one, "applying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-43).

But "if the statute is silent or ambiguous with respect to the specific issue," then "'the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). At *Chevron* step two, the agency's "view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843-84). In other words, "if 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter." *Ar-*

lington, 133 S. Ct. at 1874-75 (quoting *Chevron*, 467 U.S. at 842).

Here, at step one, the district court correctly concluded the statute is ambiguous, and that deference was therefore warranted. But the district court then failed to defer meaningfully at *Chevron*'s step two, applying a searching level of review wholly incompatible with *Chevron*'s premise that it is the role of the agency—not the courts—to resolve the ambiguity in the statute. *See Brand X*, 545 U.S. at 981 ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." (quotation marks omitted)). The district court's judgment should therefore be reversed.

1. The Clean Water Act Is Ambiguous

The district court correctly held that the statute is ambiguous on the matters at issue in this case. Ambiguity exists where, as here, there are "two reasonable, competing interpretations." *Friends I*, 570 F.3d at 1227 (quotation marks omitted); *accord Bell v. Reno*, 218 F.3d 86, 90 (2d Cir. 2000). That ambiguity is to be "resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *Arlington*, 133 S. Ct. at 1868.

In determining if a statute is ambiguous under *Chevron*, the Court first assesses the statutory text; "if its language is unambiguous, no further inquiry is necessary." *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007). "When the text of a statute is ambiguous, [the Court looks] to structure,

purpose, and history to determine whether these construction devices can convincingly resolve the ambiguity at *Chevron* step one." *Id.* at 120 (quotation marks omitted). "[A] court's task is not to infer what Congress might have said about the issue in dispute if it had considered the matter; a court decides only 'whether Congress has directly spoken to that precise question.'" *Id.* at 120-21 (quoting *Chevron*, 467 U.S. at 842) (alteration omitted).

This Court has held that the CWA can be read to prohibit any addition of any pollutant to a *particular* water body within the waters of the United States from any point source. *Catskill I*, 273 F.3d at 491. But the district court correctly held—as had the Eleventh Circuit in *Friends I*—that the statutory language may also be fairly read as prohibiting any addition of any pollutant to the waters of the United States *considered collectively* from any point source.

a. The Statutory Text is Ambiguous

The textual analysis begins with the phrase "any addition . . . to navigable waters." The word "addition" is not defined, and, as the Eleventh Circuit has explained, the statutory term "waters" is ambiguous:

> In ordinary usage "waters" can collectively refer to several different bodies of water such as "the waters of the Gulf coast," or can refer to any one body of water such as "the waters of Mobile Bay." An "addition . . . to navigable waters" could encompass any addition to a single body of navigable water regard-

> less of source (like water pumped from one navigable body of water to another), or it could mean only an addition to the total navigable waters from outside of them (like a factory pumping pollutants into a navigable stream).

Friends I, 570 F.3d at 1223-24.

The surrounding text supports the conclusion that the statute may refer to waters collectively. In defining a "discharge of pollutants" to be "*any* addition of *any* pollutant to navigable waters from *any* point source," 33 U.S.C. § 1362(12) (emphasis added), Congress omitted "any" in describing "navigable waters," thus indicating that it was not considering individual bodies of water. In contrast, elsewhere in the Clean Water Act, Congress did modify "navigable waters" or "waters" when it intended to refer to only individual parts of the collective "waters." *Friends I*, 570 F.3d at 1224-25 ("Congress knows how to use the term 'any navigable water[s]' when it wants to protect individual water bodies instead of navigable waters as a collective whole"; citing instances in CWA and other statutes). For example, the Act provides for the establishment of effluent limitations when discharges of pollutants threaten water quality "in a specific portion of the navigable waters." 33 U.S.C. § 1312(a). Similarly, the Act directs "[e]ach State [to] identify those waters or parts thereof" for which thermal-discharge controls are required. *Id.* § 1313(d)(1)(B).

Additional examples abound in the statute,[8] demonstrating that Congress frequently specified particular water bodies or subparts of the waters of the United States when that was its intention. Here, far from doing so, Congress used the unmodified term "navigable waters," which is defined as "the waters of the United States." "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States.*, 556 U.S. 568, 573 (2009) (quotation marks and alteration omitted). It is thus reasonable to construe "addition to . . . navigable waters"—*i.e.*, "addition to" "the waters of the United States"—as referring to those "waters" collectively. The existence of multiple reasonable interpretations demonstrates the statute's ambiguity.

b. The Structure, Purpose, and Legislative History Do Not Resolve the Ambiguity

Where the text is ambiguous, this Court turns "to structure, purpose, and history to determine whether these construction devices can convincingly resolve the ambiguity at *Chevron* step one." *Cohen*, 498 F.3d at 120 (quotation marks omitted). However, because "a court's task is not to infer what Congress *might*

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[8] *E.g.*, 33 U.S.C. §§ 1311(m)(4) ("the receiving waters"), 1313(c)(2)(A) ("the navigable waters involved"), 1314(f)(2)(F) ("any navigable waters").

have said about the issue in dispute if it had considered the matter," these factors should be used only sparingly: "[a] high level of clarity is necessary to resolve textual ambiguity in this manner. . . . [The Court] employ[s] traditional tools of construction to determine only if they *compel* a particular conclusion as to Congress's intent." *Id.* at 120-21 (emphasis added). That test is not satisfied here; to the contrary, the statutory structure and purpose provide additional support for EPA's interpretation.

The Act is a complex statute with a "welter of consistent and inconsistent goals." *Catskill I*, 273 F.3d at 494. To be sure, the Clean Water Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). However, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). As this Court has acknowledged, the CWA also reflects Congress's desire to limit interference with traditional state control of water use and allocation. *Catskill II*, 451 F.3d at 79. Thus, the statute states "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 the Act. 33 U.S.C. § 1251(g). More broadly, Congress emphasized its policy "to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhancement) of . . . water resources . . . ." *Id.* § 1251(b). Elsewhere in the statute,

Congress prohibits construction of the Act "as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* § 1370(2). These provisions do not, of their own force, "limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 720-21 (1994). They do, however, show that one of Congress's purposes was to avoid interference with state water allocation decisions.

Further, the Clean Water Act contains significant water quality regulatory programs other than the NPDES program and suggests that water transfers more naturally fit in those alternative programs, in particular the "nonpoint source programs" that states must establish. *See, e.g.*, 33 U.S.C. §§ 1288, 1329. In particular, the Clean Water Act refers to pollution from water transfers in the context of such a non-NPDES program: section 304(f) requires EPA to give states information regarding control of pollution resulting from "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." *Id.* § 1314(f)(2)(F). It is true that section 304(f) does not "explicitly exempt" a discharge otherwise subject to the NPDES program from the permit requirement. *Miccosukee*, 541 U.S at 106-07. But Congress's placement of its discussion of pollution

from water transfers in a section that generally "concerns nonpoint sources," *id.*,[9] supports an interpretation that Congress intended water transfers to be handled outside the NPDES program.

Additionally, Congress provided that states were free to adopt permitting programs that are broader than the NPDES program, *see* 33 U.S.C. § 1370(1), and knew that other federal laws existed that would apply to aspects of water quality potentially related to water transfers, *see* 33 U.S.C. § 1371; (JA 1244-45, 1269-70). Although not conclusive, Congress's knowledge of these protections demonstrates the reasonableness of the view that Congress did not intend the NPDES program to apply to water transfers.

Any argument relying on the broad and ambitious purpose of the CWA is undercut by the fact that the NPDES program was not intended by Congress to address all water pollution. *See Friends I*, 570 F.3d at 1226-27 (noting "serious water quality" issues concededly not addressed under NPDES); *Gorsuch*, 693 F.2d at 176 (had "Congress wanted to apply the NPDES system wherever feasible . . . it could easily have chosen suitable language.").

Nor does legislative history resolve the ambiguity. This Court has already explained that "[t]he legislative history is silent on the meaning of 'addition,'" *Catskill I*, 273 F.3d at 494, and there is no legislative

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[9] *See also* H.R. Rep. No. 92-911, at 109 (1972) ("[t]his section . . . on . . . nonpoint sources is among the most important in the 1972 Amendments").

history directly addressing whether "addition . . . to navigable waters" refers to "waters" in the individual or collective sense. In any event, the Court "has generally been reluctant to employ legislative history at step one of *Chevron* analysis, mindful that the 'interpretive clues' to be found in such history will rarely speak with sufficient clarity to permit us to conclude 'beyond reasonable doubt' that Congress has directly spoken to the precise question at issue." *Cohen*, 498 F.3d at 122-23 (citations omitted).

Thus, as the district court correctly held, the statute is ambiguous on whether the NPDES program applies to water transfers.

c. Prior Judicial Decisions Do Not Control or Contradict EPA's Interpretation

As the district court concluded, this Court's prior decisions in *Catskill I* and *Catskill II* do not preclude *Chevron* deference to EPA's interpretation of the Clean Water Act: those decisions did not hold the statute to be unambiguous, and therefore left room for EPA to exercise its *Chevron*-triggering power to make rules through notice and comment, as it has now done. *See Brand X*, 545 U.S. at 982-83 ("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").

Although *Catskill I* and *Catskill II* referred to the "plain meaning" of the word "addition" and to what the Court perceived to be an "absurd" scenario in which polluted water would be transferred to a "pristine" water body, those decisions did not hold the statute to be unambiguous. (SPA 40-41); *Catskill I*, 273 F.3d at 489; *Catskill II*, 451 F.3d at 81. To the contrary, the Court distinguished *Gorsuch* and *Consumers Power* on the basis that those cases involved *Chevron*-level deference, which did not apply in *Catskill I* and *Catskill II* because EPA had not adopted its interpretation in a regulation having the force of law. *Catskill I*, 273 F.3d at 490; *Catskill II*, 451 F.3d at 82, 83 n.5. The *Catskill I* Court emphasized that "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference . . . might be appropriate." 273 F.3d at 490-91. EPA has now adopted its position in just such a Rule, and *Chevron* now applies.

Moreover, *Catskill I* and *Catskill II* implicitly confirmed the ambiguity by applying *Skidmore* deference to EPA's interpretation, 273 F.3d at 490-91; 451 F.3d at 82, 83 n.5—a level of deference that is employed only if a statute is ambiguous, *see Exxon Mobil Corp. v. Comm'r*, 689 F.3d 191, 200 n.13 (2d Cir. 2012) ("Under [*Skidmore*], an agency's interpretation of an ambiguous statute is entitled to a degree of deference [depending on various factors of persuasiveness]."). *Catskill II* again confirmed the Court's view that the statute is ambiguous, noting that the defendant there had based its position that no permit was required for water transfers on "a reasonable, albeit incorrect, interpretation of a statute." 451 F.3d at 89.

In sum, nothing about *Catskill I* or *Catskill II* resolves the statutory ambiguity or precludes EPA's interpretation of the statute.

2. The Water Transfers Rule Is a Permissible Interpretation of the Statute and Supported by a Reasoned Explanation

At *Chevron*'s second step, a court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Mead*, 533 U.S. at 229-30; *accord Entergy Corp.*, 556 U.S. at 218 (agency's "view governs if it is a reasonable interpretation of the statute"); *Cohen*, 498 F.3d at 116. To meet this standard, an agency interpretation need only be "rational and consistent with the statute." *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (quotation marks omitted). At bottom, all that is required is that "there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways." *Friends I*, 570 F.3d at 1219; *accord Sash v. Zenk*, 428 F.3d 132, 136 (2d Cir. 2005) (Sotomayor, J.) ("The [agency's] interpretation of the statute is one of at least two reasonable interpretations . . . and must therefore be upheld."), *opinion on denial of reh'g*, 439 F.3d 61 (2d Cir. 2006).

The district court's central error was in misapplying this standard. This Court and others have emphasized that this "reasonableness test" is "highly deferential." *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 49 (2d Cir. 1993); *accord Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660, 665

(D.C. Cir. 2011) ("highly deferential standard"); *National Rifle Ass'n v. Reno*, 216 F.3d 122, 137 (D.C. Cir. 2000) (same). That deference is rooted in the fact that Congress "'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Arlington*, 133 S. Ct. at 1868 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)). But instead of deferring to the agency's authority to interpret ambiguous statutory provisions, the district court erroneously undertook a searching and skeptical examination of EPA's reasoning.

The district court appeared to find license for its exacting review in the formulation of step two that asks whether an agency's rule is "'arbitrary or capricious in substance, or manifestly contrary to the statute.'" (SPA 36 (quoting *Mead*, 533 U.S. at 227)). But that formulation too requires "deference to an agency's interpretation," and ultimately asks the same question: "whether the . . . rule is a 'reasonable interpretation' of the enacted text." *Mayo Found. for Medical Educ. v. United States*, 131 S. Ct. 704, 711-12, 714 (2011) (describing step two as asking whether rule is "arbitrary or capricious in substance," then applying step two by asking whether the rule is a "reasonable interpretation" of the statute); *accord Mead*, 533 U.S. at 227, 229. Indeed, in any context, review under the arbitrary and capricious standard is "narrow and particularly deferential." *Environmental Defense v. EPA*, 369 F.3d 193, 201 (2d Cir. 2004). The district court failed to apply this high level of deference re-

quired by *Chevron*, and instead subjected EPA's rationale to a searching critique.

a. The Water Transfers Rule Is Based on a Permissible Interpretation of the Clean Water Act

As discussed above, one of the permissible interpretations of "any addition of any pollutants to navigable waters" is that an addition occurs only when those pollutants are introduced from outside the waters of the United States considered collectively. Because the Water Transfers Rule is based on that reasonable interpretation, the Eleventh Circuit upheld it, *Friends I*, 570 F.3d at 1219, as should this Court.

EPA reasonably based the Water Transfers Rule on the importance of water transfers to the national infrastructure; Congress's intent reflected in 33 U.S.C. § 1251(b) and (g) and § 1370 to avoid unduly burdening state authority over water allocations and water resources, including for critical drinking water, agriculture, and flood control needs; and EPA's conclusion that Congress would have considered pollution effects of water transfers to be treated through nonpoint source programs. *See, e.g.*, 73 Fed. Reg. 33,698-99, 33,701-02; (JA 1245). The reasonableness of EPA's action is further supported by the authority of states to develop broader requirements than those required by the NPDES program, and by the existence of other federal statutes outside of the CWA that apply in appropriate cases notwithstanding the Water Transfers Rule. 33 U.S.C. §§ 1370, 1371(a); 73 Fed. Reg. at 33,699; (JA 1244-45, 1269-70).

Moreover, although *Chevron* does not require that agency interpretations be consistent over time, "agency interpretations that are of long standing come before [the Court] with a certain credential of reasonableness." *Smiley*, 517 U.S. at 740-41. "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion . . . that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp.*, 556 U.S. at 224-25. EPA has never required permits for water transfers, and has never interpreted the CWA in a manner that would do so. That long and consistent history supports the conclusion that the agency's interpretation is reasonable.

b. EPA Provided a Reasoned Explanation of Its Choice of a Permissible Interpretation

Although EPA chose one of the interpretations of the statute recognized as permissible by the district court, that court improperly required EPA to explain its choice in far more detail than the law requires.

i. An Agency's Explanation of Choices at *Chevron* Step Two

The district court held that "to help courts ensure that an interpretation is permissible, an agency must 'provide a reasoned explanation for its action.'" (SPA 62 (quoting *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011))). But the district court misconstrued the scope of this requirement, which courts have repeatedly recognized requires "considerable deference" to

agencies. *Detsel v. Sullivan*, 895 F.2d 58, 59, 63 (2d Cir. 1990) (requiring agency to "articulate a logical basis" for decision at step two, but still recognizing "considerable deference"); *Barrington*, 636 F.3d at 660, 665 (noting "reasoned explanation" requirement, but upholding agency decision and recognizing "highly deferential" *Chevron* step two review asks only "whether the [agency] has reasonably explained how the permissible interpretation it chose is 'rationally related to the goals of' the statute"). Indeed, although the D.C. Circuit has several times held that it "cannot defer to [an agency interpretation] that is unexplained," it has made clear that "unexplained" refers to extreme cases where an interpretation "contains no reasoning that [courts] can evaluate for its reasonableness" or "does not mention [the relevant factor] at all." *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012) (quotation marks omitted); *see Detsel*, 895 F.2d at 63-66 (rejecting agency action as lacking "reasonable explanation" where agency did not explain purpose or basis of rule, which rested on outdated assumptions and contradicted current understandings).[10]

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[10] *Judulang*, cited by the district court, is inapplicable, as the Supreme Court expressly held that it was not a *Chevron* case. 132 S. Ct. at 483 n.7 (while recognizing that "analysis would be the same" in that case, holding that "the more apt analytic framework in this case is standard 'arbitrary or capricious' review under the APA" rather than *Chevron*). And the agency's rule in that case was struck down for mak-

As the D.C. Circuit has explained, the requirement of a "reasoned explanation" is "quite a different enterprise" in a statutory-interpretation matter than in a standard arbitrary-and-capricious case. *Continental Air Lines, Inc. v. Dep't of Transportation*, 843 F.2d 1444, 1452 (D.C. Cir. 1988). "'Reasonableness' in this context means . . . the compatibility of the agency's interpretation with the policy goals . . . or objectives of Congress." *Id.* Under this "less exacting standard," even a "not particularly compelling" interpretation should be upheld if it is "not patently inconsistent with the statutory scheme"—only an "agency interpretation [that] actually frustrated the policies that Congress was seeking to effectuate" should be judicially disapproved. *Id.* (quotation marks omitted). And in determining that legislative purpose, courts must recognize that it is the agency's role "to decide the exact trade-off among conflicting goals that 'best promotes' the Congressional 'goal' in question." *Id.* at 1451. Thus, while it is clear that an agency may not decide policy by "picking a permissible interpretation out of a hat," *Barrington*, 636 F.3d at 660, the "reasoned explanation" requirement sets a low threshold, recognizing the great deference Congress has granted implementing agencies.

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ing deportation decisions turn on a "sport of chance," the very definition of an arbitrary policy. *Id.* at 484, 487 (quotation marks omitted). In any event, nothing in *Judulang* contradicts the analysis here.

ii. EPA Adequately Explained Its Statutory Interpretation

The district court misapplied these principles and reached the wrong result. The court criticized EPA's approach to determining and implementing Congress's intent regarding whether water transfers should be regulated under the NPDES program, chastising the agency for supposedly "ignor[ing]" certain of the statute's provisions, goals, or legislative history. (SPA 73). While EPA did not ignore these considerations, an agency may appropriately emphasize some of the statute's contradictory goals over others, as EPA did here. As the Supreme Court has recognized, "the resolution of ambiguity in a statutory text is often more a question of policy than of law," and "[w]hen Congress, through . . . introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited." *Pauly v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). In exercising its discretion, EPA only had to explain its actions reasonably, a threshold it easily cleared.

As reviewed in detail above, in its analysis, EPA first notes the statutory ambiguity—that is, the gap by which Congress delegated policymaking authority to the agency. The agency noted that some courts have accepted EPA's view that an "addition of pollutants" occurs "'when the pollutant first enters the navigable water,'" but others have concluded that a water transfer to a distinct water body constitutes an "addition." 73 Fed. Reg. at 33,700.

To "resolve the confusion created by these conflicting approaches," EPA looked to the statute as a whole to determine whether water transfers should require an NPDES permit. *Id.* at 33,701. The agency described the importance of water transfers to the national infrastructure, including for critical drinking water, agriculture, and flood control purposes. *Id.* at 33,698-99. It then emphasized the congressional policy, stated in the statute, to preserve primary state responsibility regarding water resources and not to unduly impair state authority over water allocations. *Id.* at 33,702. Although EPA acknowledged that water transfers typically convey pollutants and that such water management activities may be associated with pollution, *id.* at 33,699, 33,702, EPA also observed that the pollution potentially involved in water transfers is not the type of municipal and industrial pollution that Congress was focused on controlling at the source through the NPDES program, *see id.* at 33,702-03. EPA reviewed indications in the statute that Congress expected water transfers to be governed by the Clean Water Act's nonpoint source program rather than NPDES, such as the reference to water transfers in 33 U.S.C. § 1314(f), and further emphasized that its interpretation of the statute was consistent with the fact that states were free to adopt broader permitting programs that covered water transfers if they believed it necessary. 73 Fed. Reg. at 33,699, 33,702. EPA also noted that other statutes may apply to water involved in water transfers, such as the federal Safe Drinking Water Act. (JA 1244-45, 1269-70). Based on these considerations, the agency concluded that "Congress generally did not intend to

subject water transfers to the NPDES program. Interpreting the term 'addition' in that context, EPA concludes that water transfers . . . do not constitute an 'addition' to navigable waters to be regulated under the NPDES program." *Id.* at 33,703.

In short, in deciding between constructions of the ambiguous language "addition . . . to navigable waters," EPA carefully justified its decision based on what the Clean Water Act showed about Congress's intent and what EPA reasonably concluded were the pertinent policy concerns. These are "archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests." *Arlington*, 133 S. Ct. at 1873. Nothing more is required, and the Court should uphold the Water Transfers Rule as a reasonable interpretation of the statute, backed by a reasoned explanation of the agency's action.

iii. The District Court Erred in Its Analysis of Whether EPA Provided a "Reasoned Explanation"

In holding that EPA's explanation was not "reasoned," the district court departed from the deferential *Chevron* framework and applied a heightened scrutiny of the agency's rationale that permitted the court to supplant the agency's views with its own. Both in the degree of scrutiny the court applied, and in the specific conclusions it reached, the district court erred. While there is no need for EPA to refute each of the district court's points as long as the agen-

cy's explanation, taken as a whole, was logical and reasonable—as it was here—in fact the district court erred in each of its criticisms.

First, the district court incorrectly perceived an inconsistency between EPA's treatment of different CWA permitting programs. (SPA 80-81). Section 301(a)'s ban on "the discharge of any pollutant" contains exceptions for both the NPDES permitting program and others, 33 U.S.C. § 1311(a), one of which is the section 404 permitting program for fill and dredged material being discharged to the waters of the United States, *id.* § 1344(a). The district court considered it to be inconsistent for EPA to provide that the Rule affects only NPDES permits and not permits under section 404, when in particular cases either type of permit may authorize a discharge of pollutants. But there is no inconsistency, and EPA's conclusions are reasonable. First, as noted by EPA, the "'dredged spoil'" at issue in a 404 permit "by its very nature comes from a waterbody." 73 Fed. Reg. at 33,703. The nature of such material is that it only *becomes* a pollutant once it is "excavated or dredged." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(c). It is therefore not a pollutant "already in 'the waters of the United States'" prior to a transfer activity, and it is therefore outside the scope of the Water Transfers Rule. 73 Fed. Reg. at 33,701 (quotation marks and emphasis omitted). Moreover, as EPA observed, "Congress explicitly forbade discharges of dredged material" without a section 404 permit. 73 Fed. Reg. at 33,703. Congress's more specific treatment of dredged material—and EPA's statement that 404 permits are unaffected by the Rule—make sense in light of the unique na-

ture of that material. *See Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) ("a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere"). Indeed, the Fifth Circuit has held that section 402 and section 404 permits must be treated separately, noting that the "outside world" analysis relevant to what requires a permit under section 402 does not apply in the context of dredged material. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). For those reasons, EPA's limitation of its Rule to section 402 is both reasonable and consonant with the Clean Water Act.

The district court's other critiques fail as well. The court suggested that it "might be more reasonable" for EPA to have concluded that Congress meant to exclude water transfers from the NPDES program based on the meaning of "point source" rather than "addition." (SPA 77). But even if that were correct, it is irrelevant whether the same practical result would have occurred through a different interpretation. All that matters is that the agency adopted a permissible interpretation of an ambiguous statute—not the one the district court deemed most reasonable. *See Entergy Corp.*, 556 U.S. at 218. In any event, the district court did not suggest any reading of "point source"—defined as a "conveyance . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14)—that could accomplish this end.

Relatedly, the district court held that EPA could find no support for the rule in its conclusions that water transfers are "more sensibly addressed through

water resource planning and land use regulations" or through nonpoint source programs. 73 Fed. Reg. at 33,702. In the district court's opinion, "whether it is more appropriate to use other statutory provisions—or even other statutes—to regulate water transfers does not answer the precise question whether Congress intended *this* provision of *this* statute to regulate water transfers." (SPA 83). But it was appropriate, and reasonable, for EPA to consider the extent to which other provisions accomplish the statutory objective of "restor[ing] the . . . integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to exercise its judgment as to the "more sensibl[e]" way to address water pollution in this context in light of the statutory ambiguity, 73 Fed. Reg. at 33,702. Similarly, it was appropriate for EPA, reading the statute as a whole and applying its expertise, to consider that "Congress generally intended that pollutants be controlled at the source whenever possible" and that the NPDES program generally targets municipal and industrial effluents, even while acknowledging that the NPDES program will in some instances extend further. 73 Fed. Reg. at 33,702-03 & n.7 (citing legislative history). It was reasonable, and within the agency's discretion, for EPA to consider these factors to resolve an ambiguous provision.

The district court also faulted EPA for relying on section 304(f)—a provision concerning nonpoint sources that refers to pollution from water transfers—and its associated legislative history. (SPA 83-84); 73 Fed. Reg. at 33,703. EPA rationally observed that part of the legislative history that refers to water flow management—a House report—does so in the context

of nonpoint source programs, supporting EPA's view that water transfers are not covered by the NPDES program. 73 Fed. Reg. at 33,703. The district court called it "arbitrar[y]" for the agency to "ignore[ ]" a Senate report that does not mention water flow (SPA 83-84)—but no authority requires an agency to address every bit of legislative history, much less the ones that are silent on the topic being considered. And while the district court noted that agricultural and mining activities listed in section 304(f) have corresponding express statutory exemptions from the NPDES program, but water transfers do not, EPA does not contend that the mere mention of water transfer activities in section 304(f) exempts them from the NPDES program. *See Miccosukee*, 541 U.S at 106-07. EPA's point—a reasonable one—is simply that this reference to pollution from water transfers in the Clean Water Act appears in a section that "concerns nonpoint sources," *id.* at 106, and is "focused primarily on addressing pollution sources outside the scope of the NPDES program," 73 Fed. Reg. at 33,702. It was reasonable for EPA to consider that fact.

Having criticized EPA for relying too heavily on these alternative means of achieving the environmental goals of the Clean Water Act, the district court then accused it of having "entirely ignored" those same goals. (SPA 86). To the contrary, EPA fully recognized that the "purpose of the CWA is to protect water quality," 73 Fed. Reg. at 33,701, and acknowledged both that water transfers "typically move pollutants from one waterbody (donor water) to another (receiving water)," *id.* at 33,699, and that "Congress

was aware that there might be pollution associated with water management activities," *id.* at 33,702. EPA repeatedly emphasized that state authorities have many means to mitigate pollution caused by water transfers, including through the Clean Water Act's nonpoint source programs, and further that other federal statutes (such as the Safe Drinking Water Act, which sets drinking water contaminant levels and treatment standards) will apply in specific cases. *Id.* at 33,699, 33,706; (JA 1244-45, 1269-70). EPA balanced those environmental purposes against the sometimes-conflicting goal of preserving state power concerning water use and allocation, and exercised its authority to "decide the exact trade-off among conflicting goals that 'best promotes' the Congressional 'goal' in question." *Continental*, 843 F.2d at 1451; *accord id.* (it "will not do, when interpreting a statute embodying conflicting demands, for courts grandly to resort to a single 'broad purpose' of a statute and then employ a judicially idealized 'goal' to drive the interpretive process."); *Arlington*, 133 S. Ct. at 1873 (*Chevron* accords the agency the power to decide "how best to construe an ambiguous term in light of competing policy interests"). But it is entirely inaccurate to state, as the district court did, that EPA "ignor[ed] the environmental side of the balance" or rested on an "unexplained predetermination that that side of the balance did not matter." (SPA 90).

The district court also erred in criticizing EPA for giving insufficient consideration to two alternatives: requiring NPDES permits for water transfers and designating specific water bodies that would require NPDES permits. (SPA 91-97). As an initial matter,

Chevron does not require the agency to convince the courts that its chosen interpretation is the best; instead, the agency's interpretation must simply be among the permissible alternatives. *See Entergy Corp.*, 556 U.S. at 218. And "[t]he Chevron step two question . . . is not whether [a] proposed alternative is an acceptable policy option but whether the [agency's] rule reflects a reasonable interpretation of [the statute]." *Coalition for Common Sense in Government Procurement v. United States*, 707 F.3d 311, 317 (D.C. Cir. 2013). The only case cited by the district court for the proposition that an agency must review "alternatives" is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983). (SPA 62-63, 96-97). But that case involved an agency's detailed technical and factual findings, not a statutory construction, *id.* at 38-39—and expressly held that "rulemaking 'cannot be found wanting simply because the agency failed to include every alternative device and thought,'" and the agency at issue was only required to consider "a technological alternative within the ambit of the existing standard," *id.* at 50-51.

In any event, EPA did actually consider and reject the two alternatives identified by the district court. As for requiring an NPDES permit for water transfers generally, the entire preamble to the Rule reflects EPA's consideration of that alternative. For all the reasons discussed above, EPA concluded that Congress envisioned that pollution from water transfers would be addressed similarly to nonpoint source pollution, and would have wanted ambiguities to be resolved in a manner protective of states' authority

over water use and allocations. (SPA 91-97). Although the district court suggested that including water transfers in the NPDES program might have some benefits for some states (*i.e.*, those that have difficulty resolving disputes regarding transfers of pollutants from upstream states) (SPA 101-02), for the reasons already discussed—including Congress's stated policy to avoid undue burden to states' water allocation regimes—EPA appropriately concluded the best effectuation of Congress's intent is to treat water transfers not through the NPDES program but instead through the nonpoint source programs of the Clean Water Act and remedies under other laws.

With respect to the authority to "designate" specific waters bodies as requiring permits, EPA sought and received public comment on this issue, but ultimately rejected that approach. 73 Fed. Reg. at 33,706. Declining to adopt a designation approach was, as the agency said, consistent with its overall conclusion that the CWA does not require NPDES permits for water transfers. *Id.* Indeed, the district court did not suggest an interpretation of "addition to" "the waters of the United States" that would require permits only for some water bodies that are part of the waters of the United States but not others. EPA also explained that states retain "the ability to address potential in-stream and/or downstream effects of water transfers" through other programs and authorities. *Id.* Although the district court apparently believed these other regulatory tools would be insufficient (SPA 94-97), it was reasonable for EPA to point to the existence of applicable regulatory regimes as supporting its overall view of congressional intent.

Finally, the district court erroneously criticized the agency for failing to "articulate why water-transfer regulation is an 'unnecessary' interference" with state authority. (SPA 98). But application of concepts like "unnecessary" or "undue" is necessarily a line-drawing exercise, and it is within EPA's discretion to draw that line. Here, EPA concluded that adopting the Water Transfers Rule drew the appropriate line to guard against undue interference. Nor did EPA need to explain further why it was not unduly burdensome on states to apply the NPDES program to water flows subject to intervening municipal or industrial use (*contra* SPA 98-99). As noted above, the Water Transfers Rule rests on EPA's analysis that water transfers are part of the process of "allocat[ing]" water and "plan[ning] the development and use . . . of . . . water resources," 33 U.S.C. § 1251, and are unlike the "industrial, commercial or municipal operation[s]" that Congress focused on in establishing the NPDES program. 73 Fed. Reg. at 33702. The exclusion of "intervening industrial, municipal, or commercial uses" flows directly from this rationale.

c. The District Court's "Waters of the United States" Analysis Is Erroneous

As the final part of its *Chevron* step two analysis, the district court erroneously rejected the Rule in part for being "manifestly contrary" to the statute. (SPA 113). The court believed that, apart from its interpretation of the phrase "addition . . . to navigable waters," the Rule "separately adopted" a "status-based" interpretation of "waters of the United States," under which "waters that have been with-

drawn from navigable bodies of water but have not been subjected to an 'intervening use'" remain "waters of the United States." (SPA 110-11). The district court erred in holding the Rule unlawful on this ground.

At the outset, the district court misunderstood EPA's reasoning. The agency did not adopt an interpretation of the statute based on the "status" of transferred water, nor was its use of the word "status" important to its statutory construction. Rather, EPA's reference to the "status" of transferred water was merely a restatement of its interpretation that the waters of the United States are to be considered collectively. Indeed, the Rule's preamble first states the basic interpretation, that an NPDES permit is not required for a transfer because "'nothing is being added "*to*" "the waters of the United States" by virtue of the water transfer, because the pollutant at issue is already part of "the waters of the United States" to begin with.'" 73 Fed. Reg. at 33,701 (quoting brief in *Friends I*). It then notes, "'*[s]tated differently*, . . . [transferred] water never loses its status as "waters of the United States," and thus nothing is added to those waters from the outside world.'" *Id.* (quoting brief in *Friends I*; emphasis added). Similarly, EPA referred to water's status in explaining why the addition of water subjected to an intervening industrial use requires a permit, relying on *Consumers Power*, where the court invoked the water's "status" in accepting the same interpretation. *Id.* at 33,705 n.10 (citing 862 F.2d at 589).

Thus, the Rule makes clear that EPA's references to the "status" of water were made as another way of describing its interpretation that the waters of the United States should be considered collectively, rather than as individual water bodies. Moreover, the status of water while being transferred is substantively irrelevant to EPA's interpretation: whether a transfer of water from one water body to another constitutes an "addition" to "the waters of the United States" depends on whether the two water bodies are considered individually or collectively as part of the waters of the United States—but not on the "status" of the water while being transferred. There was accordingly no need for the district court, or this Court, to consider the question of transferred water's status.

In any event, the district court was incorrect that EPA's interpretation "expanded" the definition of "navigable water" (or "waters of the United States"). (SPA 111-12). To the contrary, the Rule expressly incorporates the existing definition at 40 C.F.R. § 122.2. 73 Fed. Reg. at 33,699 n.2. And if it were necessary to assess the status of transferred water, the view that water retains its status as waters of the United States while being transferred accords with *Consumers Power*, which held that water passing through a hydroelectric facility "never loses its status as water of the United States." 862 F.2d at 589. It is also consistent with *S.D. Warren Co. v. Maine Board of Environmental Protection*, where the Supreme Court rejected a state court's view—essentially the same as the district court's here—that "'water loses its status as waters of the United States' when diverted from its natural course, and becomes an addition to the

waters of the United States when redeposited into the river," and held instead that one cannot "denationalize national waters by exerting private control over them." 547 U.S. 370, 379 n.5 (2006) (quoting state court; alterations omitted).

The district court then erroneously speculated about another justification EPA had not advanced in its rulemaking, then rejected that hypothetical interpretation. Specifically, the court wrote that "EPA might attempt to save its interpretation . . . by interpreting water-transfer conveyances as defined in the rule to be navigable waterbodies." (SPA 114). The court then held that this speculated EPA interpretation would be contrary to *Rapanos*, 547 U.S. 715—a decision of the Supreme Court addressing the meaning of "waters of the United States" but with no majority opinion. The district court violated basic rules of administrative law in purporting to adjudicate a potential legal theory that EPA had not advanced in support of its Rule. *See Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (reversing judicial decision that reached out to address issue not yet resolved by agency).

d. The District Court's Criticisms of *Friends I* and the "Unitary Waters" Theory Were Unfounded

For all these reasons, the district court rejected the Eleventh Circuit's reasoning, and held the Rule unlawful. It should not have done so, and this Court should follow the Eleventh Circuit.

The district court took issue with *Friends I* primarily because it believed that the court of appeals "attributed to EPA an interpretation that it did not actually adopt." (SPA 105). Specifically, the district court asserted that EPA did not adopt the "unitary waters" approach the Eleventh Circuit described. (SPA 107). But as *Friends I* explained, "[t]he unitary waters theory holds that it is not an 'addition . . . to navigable waters' to move existing pollutants from one navigable water to another. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." 570 F.3d at 1217; *accord id.* ("the navigable waters of the United States are not a multitude of different pots, but one pot," and accordingly no addition of pollutants to the "waters of the United States" occurs in a transfer). Although EPA did not use the phrase "unitary waters" in its justification for the Rule, the framework described by *Friends I* is precisely the construction that EPA adopted. *Compare* 73 Fed. Reg. at 33,699 ("water transfers," meaning water "conveyed from one water of the U.S. to another water of the U.S.," "do not result in the 'addition' of a pollutant") *with* 570 F.3d at 1217 (under unitary waters theory, "it is not an 'addition . . . to navigable waters' to move existing pollutants from one navigable water to another"). And the interpretation that EPA adopted is precisely the construction that the district court itself said was permissible. (SPA 42 ("navigable waters" may be used "to refer to 'the waters collectively' ")). While the district court suggested that, absent express discussion of the "unitary waters" theory under

that label, the court would be compelled to "guess" as to the agency's theory, as discussed above EPA adequately explained its rationale and the reasonableness of its statutory construction. (SPA 109).[11]

Although the district court thus erred in numerous ways in its treatment of the "unitary waters" theory and *Friends I*, ultimately it is the substance of the Water Transfers Rule, rather than any label applied to it, that is before the Court. The Eleventh Circuit persuasively explained why the Water Transfers

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[11] The district court cited a transcribed voicemail left by EPA's General Counsel in 2005, well before promulgation of the Rule, in which, as described by the court, she "expressly disclaimed" relying on "unitary waters." (SPA 107). As an initial matter, the mention of an undefined phrase by a single EPA official, informally left on a private party's voicemail, is irrelevant. *Smiley*, 517 U.S. at 743 (doubting that informal statement or statement made by individual agency officer to particular constituents could establish binding policy); *Dunbar v. Glickman*, 90 F.3d 681, 687 n.11 (2d Cir. 1996) (same). In any event, in promulgating the Rule, EPA did adopt the "unitary waters" theory (in substance if not by label), *see* 73 Fed. Reg. at 33,701, 33,705 n.10; (JA 1262), and only the agency's final action is under review. Indeed, the voicemail transcription itself is part of the administrative record only because it was submitted by a member of the public during the public comment period; it was not actually relied upon by EPA in promulgating the Rule. (JA 1127-34).

Rule embodies a permissible interpretation of the Clean Water Act and is a lawful exercise of EPA's authority. This Court should hold likewise.

C. The District Court Should Not Have Vacated the Rule

Finally, even if the district court were correct in holding the Water Transfers Rule invalid, it should not have vacated any part of the Rule. The court erred in vacating the Rule "to the extent it is inconsistent with the statute—and in particular the phrase 'navigable waters' as interpreted in *Rapanos* and in this Opinion." (SPA 121); *see supra* Point B.2.c (describing errors in district court's "navigable waters" analysis).

As an initial matter, the district court's vacatur is so unclear as to be improper. *Cf.* Fed. R. Civ. P. 65(d) (injunctive order must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required"); *Corning Inc. v. PicVue Electronics, Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (a party must be able "to ascertain from the four corners of the [injunction] precisely what acts are forbidden" (quotation marks omitted)). The court did not specify any parts of 40 C.F.R. § 122.3(i) that it believed should be vacated. Rather, the court appeared to reject a legal theory on which the Rule might rest, not a portion of the Rule itself. Thus, the court's decision to vacate the Rule "to the extent it is inconsistent with . . . the phrase 'navigable waters,'" and to otherwise remand the Rule for further consideration (SPA 116), appears to mean that the agency must reconsider the

Rule without relying on a "status-based" or *Rapanos*-based interpretation—but not to actually vacate any part of the regulation. It was incorrect for the court to express this as a vacatur.

Regardless, vacatur was improper. As the district court recognized (SPA 120), "[w]hen a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency." *Northern Air Cargo v. U.S. Postal Service*, 674 F.3d 852, 861 (D.C. Cir. 2012). Whether a court should also take the extraordinary step of vacating an inadequately explained agency action "depends on whether (1) the agency's decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly." *Id.* at 860-61 (citing *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

The district court appropriately concluded that the "disruption and costs" factor did not favor vacating the Rule (SPA 120), but nonetheless concluded that partial vacatur was warranted under the "serious doubts" prong of this test. This vacatur is improper because the court itself had held EPA's interpretation to be permissible, and rejected only what the court perceived to be the agency's justification for that interpretation, giving rise to no "serious doubts" about EPA's ability to support the Rule on remand. To the extent the district court believed EPA had adopted a "status" interpretation of "waters of the United States" without sufficient consideration

(SPA 111-12 & n.30), EPA should have an opportunity on remand to evaluate the issue. Moreover, the district court itself recognized that the theory it rejected as contrary to *Rapanos* had never been advanced by the agency. (SPA 119). Lastly, the court erred in concluding that there were "serious doubts" about EPA's ability to justify the vacated aspects of the Rule when the Eleventh Circuit has already held the regulation to be lawful.

CONCLUSION

The judgment of the district court should be reversed.

Dated: New York, New York
September 11, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,743 words in this brief.

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