14-1823-cv(L)

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

United States Court of Appeals
for the Second Circuit

Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Deleware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., Riverkeeper, Inc., Waterkeeper Alliance, Inc., Trout Unlimited, Inc., National Wildlife Federation, Environment America, Environment New Hampshire, Environment Rhode Island, Environment Florida, State of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington,

Plaintiffs-Appellees,

(For Continuation of Caption, See Inside Cover)

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

BRIEF OF INTERVENOR DEFENDANT-APPELLANT-CROSS-APPELLEE CITY OF NEW YORK

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of Counsel.

September 15, 2014

(Caption Continued)

Government of the Province of Manitoba, Canada,

Consolidated Plaintiff - Appellee,

Miccosukee Tribe Of Indians Of Florida, Friends of the Everglades, Florida Wildlife Federation, SierraClub,

Intevenor 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,

States of Colorado, State of New Mexico, State of Alaska, Arizona Department of Water Resources, State of Idaho, State of Nebraska, State of North Dakota, State of Nevada, State of Texas, State of Utah, State of Wyoming, Central Arizona Water Conservation District, Central Utah Water Conservancy District, City and County of Denver, by and through its Board of Water Commissioners, City and County of San Francisco Public Utilities Commission, City of Boulder [Colorado], City of Aurora [Colorado], El Dorado Irrigation District, Idaho Water Users Association, Imperial Irrigation District, Kane County [Utah] Water Conservancy District, Las Vegas Valley Water District, Lower Arkansas Valley Water Conservancy District, Metropolitan Water District of Southern California, National Water Resources Association, Salt Lake & Sandy [Utah] Metropolitan Water District, Salt River Project, San Diego County Water Authority, Southeastern Colorado Water Conservancy District, The City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities, Washington County [Utah] Water District, Western Urban Water Coalition, [California] State Water Contractors,
City of New York,

Intervenor Defendants - Appellants - Cross Appellees,

(For Continuation of Caption, See Next Page)

(Caption Continued)

Northern Colorado Water Conservancy District,

Intervenor Defendant,

v.

South Florida Water Management District,

Intervenor Defendant - Appellant - Cross Appellant.

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STATEMENT OF THE CASE

In 2008, defendant United States Environmental Protection Agency promulgated its Water Transfers Rule, which clarified that water transfers, which only convey or connect navigable bodies of water without subjecting the transferred water to intervening, industrial, municipal or commercial use, are not "discharges of pollutants" subject to the National Pollutant Discharge Elimination System ("NPDES") permitting program of the Clean Water Act, 33 U.S.C. section 1251 *et seq*.

The City's Department of Environmental Protection operates the Shandaken Tunnel in upstate New York, which tunnel is part of the City's water supply system that delivers safe, unfiltered drinking water to the eight million people who live in the City and approximately one million people in upstate New York (JA-331).[1] The Tunnel, a water transfer, has operated since before World War II, since before the Clean Water Act's enactment. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484 (2d Cir. 2001) (*Catskill I*).

Plaintiffs and intervenor-plaintiffs, environmental organizations, recreational fishing groups, and several states and the Province of Manitoba,

[1] Unless otherwise indicated, numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix, and numbers in parentheses preceded by the letters "SPA" refer to pages in the Special Appendix.

Canada, led by the State of New York, challenge the Water Transfers Rule, alleging, *inter alia*, that it is an unreasonable interpretation of what they believe to be unambiguous language in the Clean Water Act, such that the Rule is not entitled to the high degree of deference applied to administrative interpretations under the two-step analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The City, as intervenor-defendant, appeals from a final judgment and 116-page opinion of the District Court, Southern District of New York (Karas, U.S.D.J.), which denied its motion for summary judgment, vacated the Water Transfers Rule to the extent that it found it to be inconsistent with the Clean Water Act and remanded the Rule on the ground that EPA did not provide a reasoned explanation for its interpretation (JA-253-257; JA-258-262; SPA-1-121).

The District Court found that the Clean Water Act's language prohibiting the discharge of any pollutant to the waters of the United States was ambiguous, and, that, therefore EPA had the authority to determine the reasonable interpretation of that language under *Chevron* step one. Accordingly, the narrow issue on this appeal is whether EPA's Water Transfers Rule is a reasonable construction of the Act and should be upheld under *Chevron* step two. The interpretation reflected in the Rule is consistent with the "unitary waters theory," which treats all water bodies collectively, such that an addition of pollutants to the

waters of the United States may only occur once—that is, when they are first added to the waters of the United States. In other words, pollutants cannot be "added" once they are already in "the waters of the United States" and merely being moved by a water transfer.

The Eleventh Circuit in *Friends of the Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 643 (2010), the only appellate decision to address the Water Transfers Rule since its promulgation, determined that the "unitary waters theory" was one of two permissible readings of the Clean Water Act's language. Finding the Clean Water Act, therefore, to be ambiguous, the Eleventh Circuit held that the Water Transfers Rule was a reasonable interpretation of the statute that must be accorded deference. The Eleventh Circuit's detailed analysis is the correct analysis that should be followed by this Court.

In addition, not only do other federal and state laws provide a more appropriate regulatory framework for managing water quality impacts for the transfer of natural, untreated water than the NPDES program, but the Water Transfers Rule is necessary, because transfers and diversions of untreated water are essential to the design and operation of public water supply systems, such as the City's, municipal and regional flood control and water management efforts and

structures designed to assist in inland navigation (JA-1141-1152; JA-1229-1236; JA-1302-1307; SPA-124)

If the challenge to the Water Transfers Rule succeed, operators of water supply, flood control or other critical infrastructure may be forced to alter or even eliminate diversions or transfers of water in order to avoid potential liability under the Clean Water Act. The result in many cases will be a burden to operations as well as a net detriment to ecosystems that have come to depend on such diverted flows. Indeed, virtually none of the tens of thousands of aqueducts, canals and other structures used by federal, state and local governments for public water supply, flood control, commerce and other governmental and public purposes currently operates pursuant to an NPDES permit.[2]

As illustrated by the City's example, NPDES permits, which require strict compliance with effluent limits, are not compatible with transfers of natural, untreated water, such as the Shandaken Tunnel diversion. The City, and other similarly situated municipalities, may be faced with a startling dilemma: either be subjected to continual enforcement actions under the Clean Water Act, potentially involving heavy penalties, or cease—or modify, at great public expense, with no water quality benefit—fundamental public water supply and water management

[2]As the Water Transfers Rule itself explains, aside from permits apparently authorized to be issued by Pennsylvania, there have only been a few isolated instances where NPDES permits have been issued to entities responsible for water transfers (SPA-125).

activities, threatening, in the case of the City, the water supply of millions of people.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this action pursuant to 28 U.S.C. section 1331, as a civil action raising questions of federal law, and pursuant to the Clean Water Act, 33 U.S.C. section 1251 *et seq.*

The order and judgment are appealable as of right pursuant to 28 U.S.C. section 1291 as the final judgment of the District Court. On May 28, 2014, the City timely filed its notice of appeal from the District Court's final judgment and opinion and order (JA-253-257; JA-258-262).

QUESTIONS PRESENTED

1. Following Eleventh Circuit precedent in *Friends of the Everglades*, 570 F.3d 1210, should the Water Transfers Rule be upheld as a reasonable interpretation of the Clean Water Act under the second step of *Chevron*, 467 U.S. 837, where EPA has supported the Rule with a detailed holistic statutory analysis and where the Eleventh Circuit, the only appellate Court to review the Rule, clearly explained why it found the Rule reasonable?

2. Should the Water Transfers Rule also be upheld as a reasonable interpretation of the Clean Water Act, where (a) other provisions of the Clean Water Act evidence Congress's intent that facilities that merely change the flow of

water be regulated under the Act's nonpoint source program, rather than the NPDES point source program, and where other federal laws provide sufficient and more appropriate regulatory frameworks to address water quality impacts of transfers of untreated water; (b) other provisions of the Act evidence Congress's clear intent to allow states to maintain control over their water allocation systems and where, consistent with that intent, New York State has implemented several appropriate regulatory mechanisms pertaining to water quality standards for the transfer of natural, untreated water; and (c) the City's real-world example shows the incompatibility of the application of the NPDES program to water transfers?

STATEMENT OF FACTS

(1)

The Relevant Statutory Framework under the Clean Water Act

The federal Water Pollution Control Act, also known as the Clean Water Act, codified at 33 U.S.C. section 1251 *et seq*., makes it unlawful, except under certain circumstances, for any person to "discharge any pollutant" into the Nation's waters. 33 U.S.C. §1311(a). One such circumstance is found in 33 U.S.C. section 1342(a)(1), which authorizes the "discharge of any pollutant" if an NPDES permit has been issued.

The term "discharge of a pollutant" is defined under the Clean Water Act as "any addition of any pollutant to navigable waters from any point source."

33 U.S.C. §1362(12). "Navigable waters" is defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Section 1362(14) defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any . . . tunnel . . . from which pollutants are or may be discharged." [3]

Title 40 of the Code of Federal Regulations ("C.F.R."), section 122.1(a) reflects that "[t]he regulatory provisions contained in this part . . . implement" the NPDES program under the Clean Water Act.

Section 1342(b) of the Clean Water Act authorizes any State "to administer its own permit program for discharges into navigable waters within its jurisdiction . . . ." Pursuant to this section, Article 17, Title 8, of the New York State's Environmental Conservation Law ("ECL"), the State's analog to the federal Clean Water Act, establishes New York's SPDES program, which is administered by New York State's Department of Environmental Conservation ("NYSDEC"). The purpose of Article 17 is to "insure that the State of New York shall possess adequate authority to issue permits regulating the discharge of pollutants from new or existing outlets or point sources into the waters of the state, upon condition that such discharges will conform to and meet all applicable requirements of the [Clean

[3] Nonpoint source is not defined in the Clean Water Act. However, EPA has explained that the term "is defined by exclusion and includes all water quality problems not subject to [the permit program]." *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982).

Water Act] . . . ." ECL §17-0801. As such, pursuant to section 17-0803, "it shall be unlawful to discharge pollutants to the waters of the state from any outlet or point source without a SPDES permit . . . ."

The corresponding State regulations to implement the SPDES program are found in Title 6 of the New York Codes Rules and Regulations ("N.Y.C.R.R.").

(2)

The City's Water Supply System and the Shandaken Tunnel

The Shandaken Tunnel, located in Ulster County, has been in operation since before World War II and provides about one-fifth of the City's water supply. *See Catskill I*, 273 F.3d at 484; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 2008 N.Y. Misc. LEXIS 5923, at*2 (Sup. Ct., Ulster Co., August 5, 2008). "Under natural conditions [absent the Shandaken Tunnel], water from the Schoharie Reservoir would never reach Esopus Creek" and instead flow north. *See Catskill I*, 273 F.3d at 484.

The Catskill system includes the Ashokan and the Schoharie Reservoirs and supplies approximately 40 percent of the City's daily drinking water needs under historic normal operating conditions (JA-331); *see Catskill Mountains of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 46 (N.D.N.Y 2003), *aff'd in part, remanded in part*, 451 F.3d 77 (2006). The

Shandaken Tunnel carries water from the Schoharie Reservoir about 18 miles until the water is released into the Esopus Creek, a trout stream used for fly fishing and other recreational activities, which in turn flows into the Ashokan Reservoir. *Id*. From the Ashokan Reservoir, the water proceeds through the Catskill Aqueduct into the Kensico Reservoir in Westchester County, from which water then flows south through two aqueducts before entering the City's water distribution system. *Id.*

Water in the Schoharie Reservoir contains naturally occurring suspended solids caused by the geology of the drainage basin, erosion in the Schoharie watershed and the design of the Reservoir, whereby the diversions through the Shandaken Tunnel into the Esopus Creek are often more turbid than the receiving waters of the Creek (JA-332); *see Catskill Mountains*, 244 F. Supp. 2d at 46-47; NYSDEC, Shandaken Water Tunnel Hearing Decision on the City's Application for a SPDES Permit (July 27, 2006), available at http://www.dec.ny.gov/hearings/11594.html#N_2.

The Catskill system was designed with this episodic turbidity in mind, and the City operates the system to ensure that water entering the distribution system for public consumption is consistently clean and safe (JA-332). For example, the Ashokan Reservoir is designed to provide settling time to minimize the turbidity of Catskill water by the time it enters the aqueduct on its way to the

City so that the water entering the City's distribution system consistently meets drinking water standards. *See Catskill Mountains*, 244 F. Supp. 2d at 46.

The water diverted through the Shandaken Tunnel is also generally cold water, which is essential to maintaining the trout habitat in the Esopus Creek, particularly during the summer when the Creek's flow, absent the Tunnel's contribution, is diminished, and water temperatures in the Creek rise. *See* NYSDEC, Shandaken Water Tunnel Hearing Decision on the City's Application for a SPDES Permit (July 27, 2006), available at http://www.dec.ny.gov/hearings/11594.html#N_2.

(3)

The Current Regulation of the City's Water Supply System

The City's Catskill system is regulated under federal and state law. The City operates the Catskill water supply system under a Filtration Avoidance Determination ("FAD") issued by EPA pursuant to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. section 300f *et seq.*, and its implementing regulations, the Surface Water Treatment Rule ("SWTR"), 40 C.F.R. section 141.70 *et seq*.

The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems and set forth the criteria that must be met for a public water system to avoid filtration. *See* 40 C.F.R.

§§141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity prior to the first point of disinfection. *See* 40 C.F.R. §141.71(a)(2).

The City's most recent FAD, which was issued in July 2007, requires the City to address and control waters entering, and within, the City's Catskill and Delaware water supply systems from both point and nonpoint sources. *See* United States EPA, New York City Filtration Avoidance Determination, July 2007, at generally 40-69, available at http://www.epa.gov/region2/water/nycshed/2007finalfad.pdf. The 2007 FAD specifically requires the City to implement a feasible and cost-effective plan, developed pursuant to the previous FAD, to improve turbidity control in waters diverted through the Shandaken Tunnel. *Id.* at 67-68.

In addition to federal requirements, New York State regulates the Shandaken Tunnel outside of the NPDES point source permit program. Consistent with its delegated authority to administer the Clean Water Act, New York State has adopted and enforces water quality standards. *See* ECL §15-0313(2); *see also* ECL §17-0301; 6 N.Y.C.R.R. §700 *et seq*. The State classifies bodies of water in accordance with their best use and adopts and enforces water quality standards for specific water bodies based on those classifications. *See id.*

For example, the Esopus Creek downstream from the Shandaken Tunnel has been designated a class A stream, the best uses of which are as a water

supply for "drinking, culinary or food processing purposes, primary and secondary contact recreation, and fishing." 6 N.Y.C.R.R. §701.6 and §862.6, Item 555. Upstream of the Shandaken Tunnel, the waters of the Esopus Creek, prior to mixture with water from the Tunnel, have been designated a class C stream, the best use of which is fishing. *See* 6 N.Y.C.R.R. §701.8 and §862.6, Item 556.

Releases that violate State water quality standards are subject to enforcement by the Commissioner of NYSDEC. *See* ECL §17-0501. Releases from the Shandaken Tunnel are subject to these provisions, independent of the NPDES (or SPDES) program.

In addition, New York State laws are specifically tailored to address some of the activities that create turbidity in source waters of the Schoharie reservoir, and, thus, in releases from the Shandaken Tunnel. For example, State law prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. *See* ECL §15-0501. Under another provision, a permit is required to excavate or place fill in navigable waters. *See* ECL §15-0505.

New York State also regulates releases from reservoirs in order to protect natural resources and recreational uses in the receiving waters. *See* ECL §§15-0801 and 15-0805. Indeed, in part because of the concurrent benefit the Shandaken Tunnel provides to the trout fishery in the receiving water, the City is required, under regulations promulgated by the State pursuant to these statutes, to

make releases from the Tunnel in specified amounts and at specified times, without regard to the naturally occurring elevated turbidity levels, to protect the ecosystem and to advance the recreational use of the Esopus Creek. *See* ECL §15-0805; 6 N.Y.C.R.R. §670.3(i).

In addition, the City periodically adds alum to water from its Catskill water supply system for turbidity control (JA-677). However, the Shandaken Tunnel is not a significant source of turbidity when turbidity in the Catskill system reaches levels requiring treatment. *See, e.g.*, New York City Department of Environmental Protection, 2006 Long-Term Watershed Protection Program, December 2006, at 52, available at http://www.nyc.gov/html/dep/html/watershed_protection ("DEP has determined that contributions from the Esopus watershed to turbidity in the Catskill system as a whole, particularly at times when the turbidity in the Catskill system reaches levels of concern, are much more significant than contributions from the Schoharie Reservoir"). In any event, the City's interbasin water transfers do not give rise to the need for chemical treatment. *Id.*

(4)

The Prior Proceedings Relating to the Shandaken Tunnel

(a)

In March 2000, some of the same plaintiffs as here filed a complaint in the District Court of the Northern District of New York alleging that the City, as owner and operator of the Schoharie Reservoir and the Shandaken Tunnel, was in violation of the Clean Water Act, because it was allegedly discharging pollutants, including turbidity and heat, from the Shandaken Tunnel into the Esopus Creek without a SPDES or NPDES permit. The City moved, *inter alia*, to dismiss. The District Court dismissed the complaint, finding that, consistent with the position EPA had taken in prior litigation, *see National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the diversion of water from the Shandaken Tunnel into the Esopus Creek was not an "addition of any pollutant to navigable waters from any point source" as defined under the Clean Water Act, because the pollutant was not added from "the outside world" but, rather, was a "simple diversion of water from one navigable body of water to another." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 5:00-cv-515, Memorandum Decision and Order, at p. 12 (N.D.N.Y. October 6, 2000). Plaintiffs appealed.

In reversing the District Court on the permit issue, this Court first noted that EPA's position upon which the District Court relied was "never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act." *Catskill I*, 273 F.3d at 489-490. This Court held that, because EPA's position was "based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years, primarily in the 1970s and 1980s," it did not have the "force of law" and, thus, was not entitled to "broad deference," as articulated years earlier in *Chevron*, 467 U.S. 837. *Id.* at 491. This Court noted that, instead, EPA's position on what constituted a "discharge" and "addition" and what, therefore, required a permit, was only entitled to "respect" insofar as it had the "power to persuade." *Id.* at 490. However, this Court highlighted 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.*

In light of the foregoing, this Court found EPA's positions on the meaning of "addition" to be unpersuasive. 273 F.3d at 491-494. In rejecting the concept of "unitary waters," this Court distinguished *Gorsuch* and *Consumers Powers*, maintaining that both cases merely involved the "recirculation of water, without anything added 'from the outside world.' " *Id.* at 491 (*Gorsuch* pertaining to water released from a reservoir through a dam to the stream below, which water

was "arguably" the same; *Consumers Power* relating to water withdrawn from Lake Michigan and, after passing through hydroelectric generators, was returned to the lake).

This Court additionally looked to its prior holding in *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), in which it "implicitly" held that the release of polluted water from a water body (a pond) through a point source (a culvert) to a distinct, less-polluted water body (a surrounding marsh) was an addition of pollutants. 273 F.3d at 492.

This Court, therefore, held that, "[g]iven the ordinary meaning of the [Clean Water Act's] text and our holding in Dague, we cannot accept the Gorsuch and Consumers Power courts' understanding of 'addition' " to the extent that it implied acceptance of a singular water theory, which treats all navigable water bodies as a collective whole. 273 F.3d at 493. This Court also noted that the legislative history was silent on the meaning of "addition" and that "none of the [Act's] "broad purposes sway[ed it] from what [it] [found] to be the plain meaning of its text." *Id*. at 494.

As such, this Court held that, because the Shandaken Tunnel diverts water into the Esopus Creek from a source that is a different, distinct body of water, when water passes through the Shandaken Tunnel into the Esopus Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable

water," thereby requiring a permit. 273 F.3d at 492. This Court then remanded the matter to the District Court for further proceedings. *Id.* at 494.

(b)

On remand, plaintiffs moved for partial summary judgment, seeking a declaration that the City violated the Clean Water Act by not having the required permit for the diversion of water through the Shandaken Tunnel into the Esopus Creek. The District Court granted plaintiffs' motion on the issue of liability and subsequently held a trial to determine, *inter alia*, what form of civil penalties and injunctive relief should be imposed on the City.

In *Catskill Mountains Chapter of Trout Unlimited*, 244 F. Supp. 2d 41, the District Court, in determining the seriousness of the City's violations in operating the Shandaken Tunnel without a permit in order to assess civil penalties, held that several factors mitigated in favor of the City: the fact that "the turbidity and suspended solids which [the City] discharged through the Shandaken Tunnel were not toxic and, at least, in part, were the result of the natural conditions of the water that flowed through the Tunnel"; that, "although there was some evidence at trial that the trout below the Shandaken Tunnel were smaller than the trout above the Shandaken Tunnel, there was no evidence of a significant decrease in the number of trout or of any trout kill as a result of the discharges;" and the fact that "there was evidence that without the discharge of the water through the Shandaken

Tunnel, there would [be] less habitat for trout because of low water levels." *Id.* at 50.

The District Court also instructed the City to provide NYSDEC "with all of the information that [NYS]DEC needs to issue [the City] a SPDES permit as soon as practicable after [NYS]DEC requests any such information." 244 F. Supp. at 55. The District Court also ordered NYSDEC to reach a determination on the City's application within 18 months of the date of the order. *Id.*

(c)

Following *Catskill I* and the Northern District of New York's 2003 decision, the United States Supreme Court decided *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and EPA issued, in 2005, an agency interpretation addressing the water transfer issue.

(i)

In *Miccosukee*, the petitioner operated a pumping facility that transferred water from a canal into a reservoir a short distance away. 541 U.S. at 98-99. The respondents brought suit under the Clean Water Act claiming that the pumping facility was required to obtain an NPDES permit for the release of water into the reservoir. *Id.* at 99. The District Court agreed and granted the respondents summary judgment, and the United States Court of Appeals for the Eleventh Circuit affirmed. *Id.* The United States Supreme Court vacated the decision and

remanded the matter for further development of the factual record on the narrow issue of whether the canal and the reservoir were either two indistinguishable parts of a single water body, which would not require a permit, or were, instead, two meaningfully distinct bodies of water, for which a permit might be required. *Id.* at 99; 111-112. However, the Supreme Court did not resolve the question of whether water transfers required NPDES permits when the water bodies at issue were meaningfully distinct.

Although recognizing that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach" and that "the Act protects individual water bodies as well as the 'waters of the United States' as a whole," the Supreme Court did not address the merits of the "unitary waters theory" advanced by the Federal Government as *amicus curiae*. 541 U.S. at 107; 109. The "unitary waters" argument rests on the premise that all the waters of the United States are "one" for purposes of the NPDES permitting requirements, such that a permit would not be mandated when water from one navigable water body is moved, unaltered, into another navigable water body, regardless of whether the transfer introduces constituents not present in the receiving water. *Id.* at 105-106.

The Supreme Court noted that the Government requested it to adopt the "unitary waters theory" "out of deference to a long-standing EPA view that the process of 'transporting, impounding, and releasing navigable waters' cannot

constitute an 'addition' of pollutants to 'waters of the United States.'" 541 U.S. at 107. However, the Supreme Court admonished the Government for not identifying any administrative document in which EPA espoused that position and, additionally, for not raising it in the Court of Appeals or in its petition for certiorari. *Id.* at 108-109. Yet, the Supreme Court made it clear that the "unitary waters" argument "will be open to the parties on remand." *Id.* at 109.

(ii)

Thereafter, in August 2005, EPA issued an agency interpretation of the Clean Water Act, specifically regarding the applicability of NPDES permitting requirements to water transfers, such as the Shandaken Tunnel, which, by definition, "merely convey or connect navigable waters . . .without subjecting the water to intervening industrial, municipal, or commercial use." *See* http://www.epa.gov/npdes/pubs/water_transfers.pdf. EPA first noted it was a "longstanding Agency practice" that no permits had ever been issued for mere water transfers. It next pointed out that the Supreme Court in *Miccosukee* left the matter unresolved, remanding on the issue of whether the canal and the reservoir there were "meaningfully distinct water bodies," which would preclude the need for a permit. EPA also found import in the fact that the *Miccosukee* Court noted that it had not taken any position in an administrative document, thereby inviting EPA to "speak to the broad legal issues in the first instance."

EPA, therefore, ultimately found that "where two waters have been or are hydrologically connected, through human activity or otherwise, this factor strongly supports the conclusion that they are not 'distinct,'" but, rather, "integrated." Therefore, EPA concluded that Congress did not intend for such transfers between non-meaningfully distinct waters to be regulated by the Clean Water Act's NPDES requirements and that the Act was not intended to be construed to interfere with the ability of the states to allocate water within their boundaries.

(iii)

In light of the 2004 *Miccosukee* decision and the 2005 EPA agency interpretation, the City appealed the Northern District of New York's 2003 decision, 244 F. Supp. 2d 41, seeking, *inter alia*, a reconsideration of the holding in *Catskill I*. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2006) ("*Catskill II*"). This Court in *Catskill II* concluded that the City's arguments for reconsideration were "simply embellishments of those made in" *Catskill I* and that neither of the intervening developments demonstrated that the earlier holding was reached in error. *Id.* at 87. However, this Court did not disturb the District Court's evidentiary rulings that the heat and turbidity in question were the result of natural conditions and were not toxic; that there was no evidence that downstream fish were adversely affected by the

diversions through the Tunnel; and that the diverted water, although turbid, actually improved the habitat for trout by raising low water levels. *Id.* at 88.

The United States Supreme Court subsequently denied certiorari. 549 U.S. 1252 (2007).

(iv)

After this Court's decision in *Catskill I*, the City applied for a SPDES permit as ordered. Such permits must include effluent limits to "[a]chieve water quality standards . . . including State narrative criteria for water quality." 40 C.F.R. §122.44(d)(1). The New York State water quality standard for turbidity in waters is "[n]o increase that will cause a substantial visible contrast to natural conditions." 6 N.Y.C.R.R. §703.2.

After several draft permits, on September 1, 2006, following an issues conference and a separate adjudicatory hearing before a NYSDEC administrative law judge, NYSDEC issued a SPDES permit to the City to operate the Shandaken Water Tunnel. *See Catskill Mountains Chapter of Trout Unlimited*, 2008 N.Y. Misc. LEXIS 5923, *4-5. The permit contained exemptions to turbidity and other effluent limitations when, for example, "DEP determines that additional water is needed for reservoir balancing; for refill of the Ashokan Reservoir; . . . for 'proper water supply management[;]' . . . 'special recreational events on the Esopus Creek'

[and] 'for protection of fisheries, field monitoring, testing and research and for the prevention of spills from the Schoharie Reservoir.'" *Id.* at *12-13.

Shortly thereafter, the same group of plaintiffs that originally brought the prior *Catskill* litigation against the City to compel it to obtain a SPDES permit commenced a CPLR Article 78 proceeding in the Supreme Court of Ulster County, New York, seeking to annul and vacate the SPDES permit issued to the City. The plaintiffs maintained that the permit was issued in violation of lawful procedure, because it allowed for exemptions from the permit's effluent limitations and, thus, purportedly allowed for violations of water quality standards without a "variance" they claimed was required.

The Supreme Court held that no regulatory authority existed for exemptions from the requirements of the effluent limitations set by a permit without a variance granted pursuant to appropriate administrative mechanisms, which had not been obtained. *See* 2008 N.Y. Misc. LEXIS 5923, at *13-14. Therefore, the Court remanded the matter to NYSDEC for proper consideration of the City's request for variances. *Id.* at *16-17. In the meantime, the Supreme Court ordered that the SPDES permit previously issued to the City "shall remain in force as a temporary permit for a reasonable time, pending the issuance of an amended final permit consistent with the terms of" the decision. *Id.* at *19.

The City, thereafter, appealed.

(5)

The Water Transfers Rule

(a)

During the pendency of the appeal, but before the City filed its brief, EPA proposed a new rule to amend its Clean Water Act regulations. As noted above, on August 5, 2005, EPA had only issued an interpretative memorandum regarding the applicability of NPDES permitting requirements to water transfers. Having concluded that Congress did not intend for such water transfers to require an NPDES permit, but also recognizing that its informal interpretation was just that, EPA indicated that it "intend[ed] to initiate a rulemaking process to address water transfers."

Thereafter, on June 7, 2006, EPA proposed its new rule to clarify that water transfers are not covered by the NPDES program. *See* 71 Federal Register ("Fed. Reg.") 32887.

On June 9, 2008, EPA issued its Final Rule "to clarify that water transfers are not subject to the regulation under the [NPDES] permitting program." 73 Fed. Reg. 33697 (SPA-123-134). EPA made clear that the Final Rule was "consistent with EPA's June 7, 2006, proposed Rule, which was based on an August 5, 2005, interpretative memorandum . . . ." (SPA-123).

Therefore, effective August 12, 2008, EPA codified its interpretation that the Clean Water Act specifically excludes from the NPDES permitting requirement "discharges from a water transfer," defined as "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." 40 C.F.R. §122.3(i).

In issuing the Rule, EPA explained that it "reviewed the language, structure and legislative history of the [Clean Water Act]" and determined that, "[t]aken as a whole, the statutory language and structure of the [Act] indicate that Congress generally did not intended to subject water transfers to the NPDES program" (SPA-126). EPA noted that, instead, "Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities" (SPA-127).

EPA first discussed its interpretation of the word "addition" in the context of the statute and, while noting that it was undefined in the statute, highlighted its "longstanding position" that a pollutant is added when it is introduced into a water from the "outside world" by a point source—in other words, from outside the waters being transferred and not, as this Court advanced in

Catskill I, 273 F.3d at 491, from anywhere outside the particular water body receiving the pollutant (SPA-127).

Recognizing that various courts have reached different conclusions regarding "addition," EPA further explained that a "holistic approach to the text" of the Clean Water Act was also necessary "in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters" (SPA-127). EPA pointed out that "[l]ooking at the statute as a whole is necessary to ensure that the analysis herein is consonant with Congress's overall policies and objectives in the management and regulation of the nations' water resources" (SPA-127). In this regard, EPA noted that several sections of the statute evidence Congress's intent to not "unnecessarily interfere" with water resource allocation and that, additionally, the statute's discussion of changes in the movement, flow or circulation of any navigable waters as sources of pollutants that would not be subject to NPDES regulation allowed for the reasonable interpretation that "addition" did not include mere water transfers of navigable waters (SPA-128).

EPA also explained that, rather than discharging effluent, water transfers merely conveyed one water of the United States into another and that the operators of those water control facilities were generally not responsible for the pollutants present in the waters they transported (SPA-128). EPA highlighted that

"Congress generally intended that pollutants be controlled at the source whenever possible," such as through "water resource planning and land use regulations" (SPA-128).

Finally, EPA discussed that the legislative history of the Clean Water Act also supported the conclusion that Congress generally did not intend to subject water transfers to the NPDES program (SPA-129). In this regard, EPA pointed out that the legislative history discussed water flow management activities in the context of the nonpoint source program only and that the House Committee specifically mentioned water flow management as an area where EPA would provide guidance to States for their nonpoint source programs (SPA-129).

EPA, therefore, concluded that (SPA-129):

> [w]ater transfers are an integral part of water resource management; they embody how States and resource agencies manage the nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out. EPA's conclusion that the NPDES program does not apply to water transfers respects Congressional intent, comports with the structure of the Clean Water Act, and gives meaning to [the Act's sections [pertaining to State water allocation rights and nonpoint source programs].

(b)

In light of the Water Transfers Rule, in addition to challenging the variance requirement, the City argued on appeal to the Appellate Division, Third Department, that the new intervening Rule was the current state of the law and, thus, rendered null and void the SPDES permit previously issued to the City. However, the Third Department held that, "[w]hile, on its face, the Water Transfers Rule appears to apply to this transfer of water through the Shandaken Tunnel . . . the City must comply with the orders issued in federal court . . . and obtain a SPDES permit." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 AD3d 235, 238 (3d Dept., 2010). The Appellate Division reasoned that the Supreme Court was without authority to alter or modify the federal order requiring the City to obtain a permit. *Id.* The Appellate Division noted that, "[e]ven if we were to agree with the City that the Water Transfers Rule effectively eliminated the requirement that it obtain a SPDES permit, that rule only addressed the City's obligation under the Clean Water Act and did not prevent [NYSDEC] from applying applicable state law and requiring that a permit be obtained pursuant to the State's Water Pollution Control Act." *Id.* at 239.

With respect to the permit's exemptions, the Appellate Division agreed with the State Supreme Court and held that there was no regulatory authority that allowed for inclusion in a SPDES permit of multiple exemptions

from effluent limitations and water quality standards and that the only avenue of relief was via variances. 71 AD3d at 240.

The New York State Court of Appeals denied leave to appeal. 14 NY3d 713 (2010).

(6)

The City of New York's Application for Variances

Following the Appellate Division, Third Department's affirmance on the permit issue, the City applied for the ordered variances, but, to date, no determination has yet been made. As per the decision of the Supreme Court, Ulster County, the SPDES permit previously issued to the City is still in force as a temporary permit, pending the issuance of an amended final permit consistent with the terms of the decision. 2008 N.Y. Misc. LEXIS 5923, at *19.

When and if the variances are approved, they must, under New York State law, require that "reasonable progress be made toward achieving the effluent limitation." 6 N.Y.C.R.R. §702.17(e)(2). The City's investigation has determined that only an exorbitantly expensive treatment plant would consistently achieve State turbidity standards. *See Catskill Mountains*, 244 F. Supp. 2d at 41 (discussing testimony on potential costs of treatment plant); *see* United States EPA, New York City Filtration Avoidance Determination, July 2007, available at http://www.epa.gov/region2/water/nycshed/2007finalfad.pdf (discussing the City's

extensive analysis of engineering and structural alternatives for turbidity control at the Schoharie Reservoir and placing the focus of the Catskill turbidity control program on evaluation of alternatives for controlling turbidity leaving Ashokan reservoir).

DECISION BELOW

In its 116-page decision undertaking the two-step *Chevron* analysis, the District Court first noted that the "focal point" of the first step was "whether Congress clearly answered the precise question whether a transfer of water and any pollutants contained therein is an 'addition' of those pollutants 'to navigable waters'" (SPA-38).

In this regard, the District Court found unpersuasive plaintiffs' argument that *Catskill I* and *Catskill II* foreclosed EPA's interpretation at *Chevron* step one, finding that this Court "left open the door to *Chevron* analysis," because "EPA had not yet sufficiently formalized its interpretation" (SPA-41).

The District Court then reviewed the statutory text and agreed with EPA and the Eleventh Circuit in *Friends of the Everglades*, 570 F.3d 1210, that the "text alone" of the Clean Water Act was ambiguous, susceptible of the two constructions that treat navigable waters either collectively as a whole or as individual water bodies (SPA-41-47). The Court specifically noted that it was

"persuaded" by the Eleventh Circuit's analysis in *Friends of the Everglades* on this issue (SPA-47).

The District Court next undertook a holistic analysis of the statute's structure, purpose and history and determined that none of those construction devices resolved the aforementioned ambiguity (SPA-47-60). In this regard, the Court again agreed with EPA and the Eleventh Circuit that the broader context of the statute reinforced the ambiguity as to whether NPDES was intended to apply to water transfers (SPA-60). In so holding, the Court highlighted that the Clean Water Act was complex in that it undertook a delicate balance between, on the one hand, the federal goal of maintaining and restoring the quality of the nation's waters with, on the other hand, the goal of preserving the rights and responsibilities of individual states over water allocation within their own jurisdiction, which goals were at varying times throughout the Act seemingly consistent and inconsistent (SPA-47-51; SPA-52-57) (for example, the Clean Water Act "respects states' rights by sometimes removing a federal regulatory ceiling, but it also protects states' [water quality] by maintaining a federally enforce floor" [SPA-57]).

In light of the ambiguity it found at *Chevron* step one regarding whether Congress intended a water transfer to be considered an "addition" of pollutants to "navigable waters," the District Court next proceeded to *Chevron* step two and, after lengthy discussion, concluded that EPA failed to provide a reasoned

explanation for its construction of the Clean Water Act (SPA-66-103). The Court noted, however, that although it "conducted this analysis with reference to the specific issues the EPA failed to explain, it also note[d], in general, that the primary flaw underlying EPA's entire analysis [was] that EPA effectively attempted to use *Chevron*-step-one arguments to justify its interpretation at step two" (SPA-104).

It was "primarily" for the latter reason that the District Court "respectfully disagree[d] with" the Eleventh Circuit's decision in *Friends of the Everglades*, 570 F.3d 1210 (SPA-105). The Court took issue with the Eleventh Circuit's step-two analysis, opining that, by holding that, because the statute permitted the "unitary waters theory" interpretation as one of two permissible constructions (step one), EPA's choice of that interpretation was, thus, *per se* reasonable (step two), the Eleventh Circuit "render[ed] step two almost entirely unnecessary" (SPA-106). The Court held that, by "short-circuiting the step-two analysis," the Eleventh Circuit improperly "infer[red] permissible means from permissible ends" when it was, instead, required to "independently [] analyze the means" (SPA-106-107).

The District further found fault with the Eleventh Circuit's decision, opining that the Eleventh Circuit "relied on the incorrect assumption that EPA

actually adopted" the "unitary waters theory" that the Circuit had found permissible at the step-one analysis (SPA-107-109).

The District Court next pointed out that, while most of its decision focused on EPA's interpretation of "addition . . . to navigable waters," an independent analysis was also required of the Water Transfers Rule's separate status-based interpretation of "navigable waters" (SPA-110-111). The Court found that EPA failed to provide a reasoned explanation for its interpretation that (1) water is considered part of navigable waters, or the waters of the United States, as long as it retains its status as a navigable water; and that (2) such waters do not lose that status when they have been withdrawn from navigable bodies of water so long as they have not been subject to an intervening use (SPA-110-111). The Court highlighted, in particular, that EPA admittedly failed to consider the issue of "navigable waters" at all, such that "it is difficult to defer to an interpretation that EPA apparently did not even recognize that it had adopted" (SPA-111-112).

In light of this lengthy analysis, the District Court vacated the Water Transfers Rule to the extent it was inconsistent with the statute and remanded the Rule to give EPA "a chance to reexamine and reevaluate some new ideas" (SPA-120-121).

SUMMARY OF ARGUMENT

The District Court improperly vacated the Water Transfers Rule after undertaking a faulty *Chevron* step-two analysis.

As the District Court correctly found under its thorough and careful *Chevron* step-one analysis, the Clean Water Act is ambiguous. Finding persuasive the Eleventh Circuit's analysis on this issue in *Friends of the Everglades*, 570 F.3d 1210, the Court properly found that the statute may be read in at least two different ways, one of which, as urged by EPA, is that that the statute's structure, language and history support the interpretation that water transfers are not "discharges of pollutants."

However, the District Court, in contrast to the Eleventh Circuit, and this Court in a prior analogous *Chevron* case, inexplicably failed to recognize that a *Chevron* step-one statutory analysis of ambiguity can support a *Chevron* step-two finding of reasonableness and also, most importantly, failed to apply the high level of deference to EPA's interpretation that is appropriate at *Chevron* step two. Had the District Court correctly performed the *Chevron* analysis, it would have concluded, as the Eleventh Circuit had, that EPA's Water Transfers Rule is a reasonable construction of the statute.

In addition, the District Court also disregarded the factual scenario the City had presented that demonstrates the troubling real-world implications of

applying the NPDES program to water transfers, which directly supported the reasonableness of EPA's interpretation.

The NPDES program, which was crafted to address traditional discharges of pollutants from municipal wastewater and industrial point sources, is predicated on the assumption that a treatment facility can be operated or modified to remove pollutants in order to meet appropriate permit limits. *See Gorsuch*, 693 F.2d at 175 (noting that "[t]hroughout its consideration of the Act, Congress's focus was on traditional industrial and municipal wastes"). However, where the water manager is simply moving water without introducing pollutants, as is the City, requiring NPDES permits may have the anomalous effect of essentially requiring treatment of natural water.

Not only are these water transfers more appropriately regulated through the Clean Water Act's nonpoint source programs and other federal and state laws, which themselves demonstrate the reasonableness of EPA's Rule, but requiring the treatment of such transferred natural water would place an unfair and impossible burden on the City and other similar transferors. In particular, there may be no reasonably feasible and cost-effective mechanism to ensure that water diverted through the Shandaken Tunnel meets the New York State water quality standard for turbidity of "[n]o increase that will cause a substantial visible contrast to natural conditions." 6 N.Y.C.R.R. §703.2. Unless the variances requested in the

City's most recent permit application are granted and, once granted, remain in effect indefinitely, the City could be prohibited, absent the construction of an exorbitantly expensive treatment facility, from making diversions of water that are not only required by law under 6 N.Y.C.R.R. Part 670 but are also necessary for public health and safety as well as for the protection of the downstream ecosystem. However, removal of turbidity in the Esopus Creek through mechanical treatment is not required for water quality. As discussed above, the Creek's New York State water quality classification is higher downstream from the Shandaken Tunnel.

Even if the variances are granted, they may be shorter in duration than the actual permit and still must, by State law, require that "reasonable progress be made toward achieving the effluent limitation." 6 N.Y.C.R.R. §702.17(e)(2). In *Catskill II*, this Court previously opined that, "[b]ecause the City is investigating means of reducing the turbidity of the Tunnel's discharge pursuant to state requirements, a temporary variance might well provide the time necessary to implement any reasonable and feasible solutions to the turbidity problem." 451 F.3d at 86. However, given that only an excessively expensive treatment system could consistently achieve State turbidity standards, variances will provide only temporary respite to the City and do not offer a "reasonable and feasible solution[]." *See* United States EPA, New York City Filtration Avoidance Determination, July 2007, at pp. 67-68, available at http://www.epa.gov/

region2/water/nycshed/2007finalfad.pdf (discussing the City's extensive analysis of turbidity control methods at the Schoharie Reservoir).

Thus, the City's experience also demonstrates the reasonableness of the Water Transfers Rule.

POINT I

FOLLOWING ELEVENTH CIRCUIT PRECEDENT, THE WATER TRANSFERS RULE SHOULD BE UPHELD AS A REASONABLE CONSTRUCTION OF THE CLEAN WATER ACT UNDER THE SECOND STEP OF THE DEFERENCE ANALYSIS OF *CHEVRON*, 467 U.S. 837.

EPA's Water Transfer Rule must be upheld as a reasonable interpretation of the Clean Water Act.

When confronted with a challenge to an agency's construction of a statute which it administers, as here, this Court must determine whether the agency's interpretation is entitled to a high degree of deference pursuant to United States Supreme Court precedent in *Chevron*, 467 U.S. 837. The basic holding in *Chevron* is that "a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." *Christensen v. Harris Co.*, 529 U.S. 576, 587 (2000).

Thus, the analysis is two-fold. First, this Court must first ascertain if "Congress has directly spoken to the precise question at issue" or "if the statute is

silent or ambiguous"; if the statute is clear, then "that is the end of the matter." *Chevron*, 467 U.S. at 842-843. If, however, the statute is ambiguous, the second question for this Court is whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843. If the agency's interpretation is a reasonable construction of the statute, then the agency's view must be upheld. *Id.* at 844. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843, n.11.

As discussed earlier, the Clean Water Act prohibits the "discharge of any pollutant by any person" except when an NPDES permit has been obtained. 33 U.S.C §§1311(a); 1342(a)(1). The Act defines "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). "Navigable waters" is defined as "the waters of the United States." 33 U.S.C. §1362(7). "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any . . . tunnel . . ." 33 U.S.C. §1362(14).

As such, the issue here is whether the Clean Water Act's language prohibiting the discharge of any pollutant to the waters of the United States, which the District Court correctly found is ambiguous, can reasonably be read to support

EPA's Water Transfers Rule. The answer is yes. The Eleventh Circuit's 2009 detailed analysis of this very question in *Friends of the Everglades*, 570 F.3d 1210, should be followed by this Court.

(a)

The Eleventh Circuit's Two-Step *Chevron* analysis—finding the Clean Water Act's "discharge of a pollutant" language to be ambiguous and the EPA's Water Transfer Rule to be one of two reasonable constructions of that statute—is the correct analysis and should be followed by this Court.

(i)

In *Friends of the Everglades*, the Eleventh Circuit, like the District Court here, held that the applicable Clean Water Act language is ambiguous. 570 F.3d 1210. The Eleventh Circuit first pointed out that the central issue was whether the statutory language defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters," referred to "waters in the individual sense or as one unitary whole." *Id.* at 1223. If "navigable waters" denoted "all navigable waters as a singular whole," then pollutants could only be added to navigable waters once and those that are already in navigable waters are not added to navigable waters again when moved between water bodies. *Id*. On the other hand, if "navigable waters" meant "each individual water body," then pollutants existing

in one navigable water would be deemed to have been added to navigable waters when transferred into another navigable water. *Id.*[4]

In determining which position Congress intended, the Eleventh Circuit first reviewed the plain meaning of the word "waters" and concluded that it was not helpful, given that "[i]n ordinary usage 'waters' can collectively refer to several different bodies of waters such as 'the waters of the Gulf Coast,' or can refer to any one body of water such as 'the waters of Mobile Bay.'" 570 F.3d at 1223.

The Eleventh Circuit then reviewed the specific context in which the language was used, noting the significance of the absence of the word "any" before "navigable waters." 570 F.3d 1224. The Eleventh Circuit concluded, however, that, although Congress used the term "any navigable waters" in other places in the Clean Water Act to protect individual water bodies, it also used the unmodified "navigable waters" to mean the same thing. *Id.* at 1224-1225.

Finding neither the plain language nor the statutory context conclusive as to whether Congress intended "navigable waters" to mean the waters of the

[4] As explained earlier, in 2004 in *Miccosukee*, 541 U.S. at 107-109, the United States Supreme Court did not resolve the question of whether water transfers require an NPDES permit. The Supreme Court remanded the matter for further factual development and allowed the "unitary waters" theory to be explored on remand. *Id.* at 112. The Supreme Court noted that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach" and that the Clean Water Act might, therefore, protect "individual water bodies as well as the 'waters of the United States' as a whole." *Id.* at 107. By leaving open the possibility of the plausibility of the "unitary waters" argument, the Supreme Court implicitly found that the Clean Water Act's "discharge of a pollutant" language was ambiguous.

United States singularly or as a unitary whole, the Eleventh Circuit consequently examined the "broader context of the statute" for guidance, the "centerpiece" of which was the NPDES permitting program. 570 F.3d at 1225. The Eleventh Circuit noted that the purpose of the Clean Water Act was "broad and ambitious" in its desire to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *see* 33 U.S.C. section 1251(a), but recognized that exempting water transfers from the NPDES permitting requirement did not necessarily comport with that goal. *Id.* at 1226.

However, the Eleventh Circuit observed that there were other provisions of the Clean Water Act that also did not further its stated broad purpose. 570 F.3d at 1226. The Eleventh Circuit pointed out that it was similarly "inconsistent" with the goals of the Act to exclude nonpoint sources, such as runoff, from the NPDES permitting program, which is restricted to only point sources, despite such runoff being "widely recognized as a serious water quality problem." *Id.* at 1226-1227. The Eleventh Circuit also noted that Congress created a special exception to the definition of "point source" to exclude agricultural storm water discharges and return flows from irrigation, "despite their known, substantially harmful impact on water quality." *Id.* at 1227. The Eleventh Circuit concluded that it was, therefore, "not difficult to believe that the legislative

process resulted in a Clean Water Act that leaves more than one gap in the permitting requirements it enacts." *Id.*

Having pulled guidance from every possible avenue, the Eleventh Circuit concluded that "[t]here are two reasonable ways to read the §1362(12) language 'any addition of any pollutant to navigable waters from any point source'"—either (1) any navigable waters in the singular sense; and (2) navigable waters as a whole. 570 F.3d at 1227. The Eleventh Circuit, therefore, held that the Clean Water Act was ambiguous. *Id.*

(ii)

After concluding that the Clean Water Act was ambiguous with respect to what "discharge of a pollutant" denoted, the Eleventh Circuit was then required, under the *Chevron* analysis, to determine whether EPA's regulation was a permissible construction of the statutory language. 570 F.3d at 1227. In acknowledging that it could not determine that question based on how it would have read the statute had the issue been initially raised before it, the Eleventh Circuit held 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 (*citing Chevron*, 467 U.S. at 844).

In support, the Eleventh Circuit framed the issue "in the abstract using a hypothetical." 570 F.3d at 1228. The Eleventh Circuit

described a scenario in which there were two buckets side by side, one with four marbles in it and the other with none, and a rule prohibiting "any addition of any marbles to buckets." *Id.* The Eleventh Circuit noted that, if a person picked up two marbles from the first bucket and dropped them into the second bucket, under the unitary theory considering the buckets as one whole, "there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred." *Id.* However, under the same scenario, those who consider the buckets as two separate, individual buckets would conclude that there was an addition of marbles, because there are "now two marbles in a bucket where there were none before." *Id.* The Eleventh Circuit concluded that "we cannot say that either side is unreasonable." *Id.*

As such, the Eleventh Circuit held that it was required to give effect to EPA's regulation since it was a reasonable and, therefore, permissible, construction of the statute. 570 F.3d at 1228.

(iii)

The District Court's *Chevron* step two analysis is fatally flawed. This Court should, instead, follow the Eleventh Circuit's thorough and careful analysis.

As shown above, the Eleventh Circuit explained in detail why the Clean Water Act was ambiguous. In the course of its detailed and thorough statutory analysis on the ambiguity issue at *Chevron* step one, the Eleventh Circuit

also illustrated why the two possible interpretations, including EPA's interpretation, were reasonable for purposes of step two. Contrary to the District Court's holding here (SPA-106), the Eleventh Circuit did not find that, merely because the statute allowed the interpretation, EPA's choice of that interpretation was *per se* reasonable.

The District Court consequently, but erroneously, faults the Eleventh Circuit for finding that the Water Transfer Rule is a "permissible" interpretation of the statute based on its finding that the Rule is "reasonable" (SPA-106); *see* 570 F.3d at 1228. Based on the way courts applying the *Chevron* standard have used these two terms, however, the Eleventh Circuit's holding that the Rule "is a reasonable, and therefore permissible, construction of the statute," 570 F.3d at 1228, is appropriate.

Many cases undertaking the *Chevron* analysis, including several cited by the District Court here, hold that an agency's judgment must be upheld at *Chevron*'s step two "so long as it is a permissible construction of the statute, even if it differs from how the court would have interpreted the statute in the absence of an agency regulation." *Sebelius v. Auburn Regional Medical Ctr.*, 133 S. Ct. 817, 826 (2013) (SPA-35); *see also Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000) (step two inquiry is whether EPA's interpretation was "'a permissible construction of the statute'" [citation omitted]) (SPA-64). However,

other cases clarify that the term "permissible" in this context does not simply mean within the realm of statutory ambiguity but incorporates a degree of reasonableness as well. *See, e.g., Chemical Mfrs. Ass'n*, 217 F.3d at 866 (defining "permissible construction of the statute" as "whether it [was] reasonable and consistent with the statute's purpose" [internal quotation marks and citation omitted]) (SPA-64); *see also National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (agencies must resolve statutory ambiguities in a "reasonable fashion") (SPA-62).

In this regard, this Court's decision in *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007), is directly on point. That case involved an analysis of section 8(b) of the Real Estate Settlement Procedures Act of 1974 ("RESPA") and whether the bank's collection of an unearned "post-closing fee" in connection with the refinancing of the plaintiff's home mortgage was a violation of that section. In making that determination, this Court was required to determine whether RESPA was ambiguous, such that its protections could be applicable to undivided, as well as divided, unearned fees. *Id.* at 113.

This Court undertook a detailed analysis of the statute at *Chevron* step one, including a review of the statute's text, structure, purpose and history, and concluded that the statute was ambiguous, such that it could be interpreted as prohibiting all unearned fees, not just divided ones. 498 F.3d at 117-124. At

Chevron step two, in a much shorter analysis, this Court held that the Department of Housing and Urban Development's construction of the statute to apply to undivided fees, one of the two ways it found RESPA could be interpreted, was a reasonable interpretation of RESPA. *Id.* at 125. This Court explained that, in determining that the language was ambiguous [at *Chevron* step one], "we have already observed that the phrase can plausibly be construed to sweep broadly, prohibiting unearned fees regardless of whether or not they are divided." *Id.*

This Court's analysis in *Cohen* is precisely the proper analysis that the Eleventh Circuit undertook in *Friends of the Everglades* and which this Court should undertake here. Like this Court in *Cohen*, the Eleventh Circuit correctly relied on its extensive *Chevron* step-one analysis to reach its conclusion at step two. In its discussion as to why the Clean Water Act was ambiguous, the Eleventh Circuit in *Friends of the Everglades* already found that EPA's statutory interpretation in the Water Transfers Rule was one of two reasonable and permissible constructions of the Act. It was, therefore, proper for the Eleventh Circuit to conclude, at step two, that the Rule was a reasonable construction of the Act. Contrary to the District Court's characterization, the Eleventh Circuit did not "short-circuit[]" step two (SPA-106-107), but, rather, did precisely what it was required to do under *Chevron*. For the same reasons, therefore, the District Court

erred in finding fault with EPA's analysis for purportedly "attempt[ing] to use *Chevron*-step-one arguments to justify its interpretation at step two" (SPA-104).

To the extent that the District Court's holding requiring EPA to provide a reasoned explanation for its choice of interpretation is applicable here (SPA-66-103), the District Court erred. As the District of Columbia Circuit Court of Appeals pointed out, but which was ignored by the District Court here, courts "defer to an agency's statutory interpretations not only because Congress has delegated law-making authority to the agency, but also because that agency has the expertise to produce a reasoned decision." *Village of Barrington v. Surface Transportation Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). In that case, which the District Court cited here (SPA-39; SPA-62), the District of Columbia Circuit held that, at step two, where its review was "highly deferential," the Surface Transportation Board provided a reasoned explanation for its interpretation choice, which included, *inter alia*, an analysis of the statute's legislative history and various policy arguments. *Id.* at 666-667.

That is exactly what happened here. EPA exercised its expertise when it undertook a thorough analysis of the statutory language, purpose, structure and legislative history of the Clean Water Act in determining that Congress did not intend for water transfers to require a NPDES permit (SPA-123-129). EPA did not

"simply pick[] a permissible interpretation out of a hat," as cautioned by the Circuit Court in *Village of Barrington*. 636 F.3d at 660.

On the other hand, however, the District Court here did what it was forbidden to do under *Chevron*—it impermissibly chipped away at EPA's analysis and failed to undertake a "highly deferential" review. 636 F.3d at 665.

The District Court also erred in finding fault with the Eleventh Circuit's analysis to the extent that it "relied on the incorrect assumption that EPA" actually adopted the "unitary waters theory" (SPA-107). In so finding, the District Court played a game of semantics, elevating form over substance. It is of no moment that EPA did not articulate that its Water Transfers Rule was specifically premised on the "unitary waters theory." Indeed, the Eleventh Circuit did not base its holding on an analysis of specific conceptual theories but, rather, on the reasonableness of EPA's interpretation, regardless of the label attributed to it. 570 F.3d at 1228 (considering the question of reasonableness "in the abstract using a hypothetical"). As shown above, the Rule, in and of itself, is fully consistent with that theory. That theory, and EPA's essentially equivalent analysis of the language, structure and legislative history of the statute (SPA-127-129), are reasonable, as demonstrated by the Eleventh Circuit's careful analysis and EPA's reasoned explanation for issuing what is essentially an interpretive Rule.

As such, the interpretations in the prior analogous "dam cases" in the District of Columbia and Sixth Circuits support a finding of reasonableness and should have been followed by the District Court. *See Gorsuch*, 693 F.2d at 183 (dam-induced water quality changes where no pollutants are physically introduced "into water from the outside world" are not "additions" requiring NPDES permits); *Consumers Power Co.*, 862 F.2d at 589 (release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water does not constitute a "discharge of pollutants," since water at issue "never loses its status as water of the United States"); *see also United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) (highlighting the holdings in *Gorsuch* and *Consumers Power Co.* that "where 'pollutants' existed *in the waters of the United States* before contact with these facilities [power plants and dams], the mere diversion in the flow of waters did not constitute 'additions' of pollutants to the water" [emphasis in original]).

The Eleventh Circuit's finding that the Rule was "reasonable, and therefore permissible," was based on the statutory language and its structure and context. As this holding was itself well-reasoned, it is consistent with the analysis contemplated under *Chevron* and should be followed here.

(b)

As recently as last year, the Supreme Court of the United States has concluded that a discharge of pollutants does not occur when the constituent already exists in a water body, and the water is simply diverted from one portion of the water body to another.

EPA's interpretation is further given credence by recent case law from the Supreme Court of the United States.

Just last year, in *Los Angeles Co. Flood Control Dist. v. NRDC, Inc.*, 133 S. Ct. 710 (2013), the Supreme Court granted certiorari on the question of whether an "addition … to navigable waters" occurs when one portion of a river that is part of the waters of the United States flows through an engineered improvement—a concrete channel in the river—and then into a lower portion of the same river. *Id*. 712-713. The Supreme Court held that "[i]t follows, *a fortiori,* from *Miccosukee* that no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another," that is, "from an improved portion of a navigable waterway into an unimproved portion of the very same waterway." *Id*. at 713. The Supreme Court reasoned that this was because "no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." *Id.*

The Supreme Court's reasoning, therefore, squarely supports the Water Transfers Rule and is further evidence that the Rule should be upheld under *Chevron* step two.

POINT II

THE REASONABLENESS OF EPA'S WATER TRANSFERS RULE IS FURTHER SUPPORTED BY THE EXISTENCE OF OTHER, MORE APPROPRIATE FEDERAL AND STATE REGULATORY FRAMEWORKS AS WELL AS THE CITY'S REAL-WORLD EXAMPLE.

Other federal and state laws demonstrate the reasonableness of EPA's interpretation of the Clean Water Act that Congress intended that water transfers be regulated outside of the NPDES permitting program.

(a)

Federal programs

The Clean Water Act's nonpoint source program and other federal laws, including the SDWA and the SWTR, provide more appropriate regulatory frameworks than the NPDES point source program to address the transfers of untreated water.

In recommending consultation with appropriate federal and state agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, 33 U.S.C. §1314(f)(2)(F), Congress clearly contemplated that facilities that change the flow of water would be

evaluated differently from point sources of pollutants. *See Consumers Power Co.*, 862 F.2d at 588 (stating that section 1314(f) of the Clean Water Act supports the "view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution"); *see also* SPA-129 (EPA noting that "the legislative history of the Act discusses water flow management activities in the context of the nonpoint source program only. . . rather than an area to be regulated under [the NPDES permitting program]").

Indeed, as EPA recognized in its analysis (SPA-128), there is broad agreement that it is far better to address pollutants at their source, rather than trying to remove them, or compensate for their impacts, after they have been added to the nation's waters. *See, e.g.,* United States EPA, Water: Pollution Prevention & Control (last updated January 16, 2013), available at http://water.epa.gov/polwaste/ ("Water pollution prevention and control measures are critical to improving water quality and reducing the need for costly wastewater and drinking water treatment"). *See, e.g.*, *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377-1378 (4th Cir. 1976) (Clean Water Act does not make industrial dischargers responsible for removing constituents occurring naturally in intake water or introduced by upstream discharges).

As such, the appropriate place to address pollutants is where they enter the waters of the United States, not where they are subsequently transferred from one water body to another. The Clean Water Act's nonpoint source programs provide an important tool for addressing pollution that arises from farming, logging, development or disturbances to stream banks and streambeds. *See* 33 U.S.C. §1313(d) (total maximum daily load program); §1329 (other nonpoint source management programs, including state Water Quality Management Plans).

As also discussed above, the City's water supply system is closely regulated under the federal SDWA and SWTR, which set forth the criteria for avoidance of filtration, including, for example, maximum turbidity levels. *See* 42 U.S.C. §300f *et seq*. and 40 C.F.R. §141.71(a)(2) and (c)(2)(i).

The Catskill unfiltered water supply system operates under a FAD, the most recent of which, issued in July 2007, requires the City to address and control waters entering, and within, the Catskill and Delaware water supply systems from both point and nonpoint sources, including control of turbidity. *See* United States EPA, New York City Filtration Avoidance Determination, July 2007, at pp. 40-69, available at http://www.epa.gov/region2/water/nycshed/2007finalfad.pdf.

Thus, the diversions through the Tunnel are comprehensively addressed under the SDWA and SWTR. The FAD program administered under the SDWA and SWTR not only imposes more effective environmental controls

than the NPDES permitting program, it also resolves the underlying issues without losing sight of the fact that the main purpose of the Catskill system is to provide a safe and adequate supply of drinking water to the public.

(b)

New York State programs

Consistent with its delegated authority to administer the Clean Water Act, New York State has adopted and enforces water quality standards. *See* ECL §§15-0313(2); 17-0301; 6 N.Y.C.R.R. § 700 *et seq*. As discussed above, the State classifies bodies of water in accordance with their best use and adopts and enforces water quality standards for specific water bodies, including the Esopus Creek, based on those classifications. Releases that violate the state water quality standards are subject to enforcement by the Commissioner of NYSDEC. *See* ECL §17-0501.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. *See* ECL §15-0501. A permit is also required to excavate or place fill in navigable waters. *See* ECL §15-0505. Finally, New York State regulates releases from reservoirs, including the Schoharie Reservoir, in order to protect natural resources and recreational uses in the receiving waters. *See* ECL §§15-0801 and 15-0805.

Thus, New York State has a robust legal framework for managing surface waters, independent of the federal NPDES program.

(c)

The City's Experience

Application of the NPDES program to the City's water supply system could severely jeopardize the City's ability to provide a safe supply of water to nine million residents of the City and upstate New York and countless commercial users and workers who rely on the system.

Indeed, as explained above, the SPDES permit upon which this Court previously looked favorably was found to be unlawful by the State court. 2008 N.Y. Misc. LEXIS 5923, at *18-19. The City was also held liable for over $5 million dollars in statutory penalties for operating a water supply facility as it had been operated for nearly 80 years, including over 30 years after the adoption of the Clean Water Act. 244 F. Supp. 2d at 56.

Moreover, while under the State court decision the Shandaken Tunnel SPDES permit remains in effect, the water transfer remains in regulatory limbo, as NYSDEC has not yet acted upon the City's 2010 application for an amended permit with variances. Without the variances, the City could be prohibited, absent the construction of an exorbitantly expensive treatment facility, from making diversions of water that are necessary, and required by law, to supply drinking

water to millions of consumers as well as for the protection of the downstream ecosystem.

In light of the foregoing, EPA's Water Transfers Rule should be upheld as a reasonable interpretation of the Clean Water Act's permitting requirement.

CONCLUSION

THE ORDERS AND JUDGMENTS SHOULD BE REVERSED, WITH COSTS.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,263 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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