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

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

PREET BHARARA,
United States Attorney for the Southern District of New York,
Attorney for Defendants-Appellants United States Environmental Protection Agency and Gina McCarthy.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2722

ROBERT WILLIAM YALEN,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys,
Of Counsel.

WATERKEEPER ALLIANCE, INC., TROUT UNLIMITED, INC., NATIONAL WILDLIFE FEDERATION, ENVIRONMENT AMERICA, ENVIRONMENT NEW HAMPSHIRE, ENVIRONMENT RHODE ISLAND, ENVIRONMENT FLORIDA, STATE OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON,

Plaintiffs-Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

Consolidated Plaintiff-Appellee,

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

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

Preliminary Statement

Faced with ambiguous text in a complex statute with multiple goals, the Environmental Protection Agency exercised its discretion to interpret that text and resolve the issue of whether water transfers require a permit under the National Pollutant Discharge Elimination System. The plaintiffs in this action contend that the resulting Water Transfers Rule —the codification of EPA's longstanding and consistently held position—is unlawful. But their attack rests on a misunderstanding of the Clean Water Act, whose competing purposes they essentially ignore; on an overbroad understanding of the NPDES program; and on a distortion of EPA's regulation, in which plaintiffs claim EPA considered all the "waters of the United States" to be a "single water body." To the contrary, EPA reasonably understood the balance of goals struck by Congress: the agency construed the statutory term "addition . . . to navigable waters" to mean addition to those waters collectively, with the

result that water transfers are not governed by the NPDES program, which focuses on preventing the introduction of pollutants to the Nation's waters from the outside world while at the same time preserving states' prerogatives and flexibility in the management and allocation of those waters. EPA's Rule lay well within the agency's discretion, and accordingly must be upheld under the deferential *Chevron* standard.

ARGUMENT

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

A. The Statute Is Ambiguous

As EPA explained in its opening brief, the text of the statutory provision is ambiguous: "any addition of any pollutant to navigable waters" can refer to an addition to a particular water body or to navigable waters considered collectively. While this Court has previously adopted the first of these two interpretations, it did so on a blank slate, without an agency construction it was required to defer to. Thus, nothing in this Court's precedent forecloses EPA's interpretation—nor do the purposes, structure, or legislative history of the statute. Because Congress cannot be found to have "directly spoken to the precise question at issue," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013), the statute must be viewed as ambiguous at *Chevron*'s first step, as both the district court and the

Eleventh Circuit held (SPA 47, 59-60); *Friends of the Everglades v. South Florida Water Management District (Friends I)*, 570 F.3d 1210, 1227 (11th Cir. 2009); *accord 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.).

1. The Statutory Text

Plaintiffs do not persuasively dispute that the text is subject to the reading adopted by EPA: that the words "any addition of any pollutant to navigable waters from any point source" can reasonably be read to refer to an addition to navigable waters considered collectively. 33 U.S.C. § 1362(12). There is no dispute that the word "addition" is undefined, and plaintiffs concede that "'waters' can refer to multiple water bodies, such as 'the waters of the Gulf coast.'" (Brief for the States of New York *et al.* ("States Br.") 40).

The plaintiff States maintain that the statute's reference to "waters in the plural" means Congress did not mean "one, unitary water." (States Br. 40). But the Rule does not, contrary to plaintiffs' position, adopt a view that the waters of the United States are a "single water body." Instead, the Rule reflects the view that the multiple water bodies of the United States should be considered collectively when referred to in the phrase "addition . . . to navigable waters"—consistent with that statute's plural usage, as well as the definition of "navigable waters" to mean "*the* waters of the United States." 33 U.S.C. § 1362(7) (emphasis added). For the same reason, the Supreme Court plurality's statement in *Rapanos v. United*

States, 547 U.S. 715, 732 (2006) (plurality opinion), that "waters of the United States" cannot refer to "water in general" is immaterial. (States Br. 41-42).[1]

Plaintiffs assert that the use of "navigable waters" in provisions regarding states' activities under the Clean Water Act means that "navigable waters" cannot refer to all of the waters of the United States collectively, as those provisions are limited to waters within the respective states. (States Br. 43). But that limitation is clearly spelled out in the text of all of the provisions plaintiffs point to. *See* 33 U.S.C. §§ 1313(c)(2)(A) & (c)(4) ("the navigable waters involved"), (e)(3) ("navigable waters within such State"), 1314(*l*)(1)(A)-(B) ("those waters within the State . . . navigable waters in such State"); 1315(b)(1)(A)-(B) ("navigable waters in such State . . . navigable waters of such State"); 1329 (navigable waters "within the State," "in the State," and "in such State"). Thus, if anything, these provisions imply that when Congress meant to limit the broad, collective

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[1] The phrase "unitary waters" may arguably, but misleadingly, suggest a single water body. But the inaccurate implication of this shorthand—a term not used by EPA in the Rule—should not be held to control what EPA actually said or did in its rulemaking. As the Eleventh Circuit recognized, the "unitary waters" theory merely means the interpretation of the Act under which no "addition" occurs when existing pollutants are moved from one water body within the waters of the United States to another. *Friends I*, 570 F.3d at 1217, 1227.

term "navigable waters" to a portion of those waters, it did so expressly.

Nor do plaintiffs dispute that Congress routinely qualified the terms "waters" or "navigable waters" in the Act when it wanted to make clear that it referred to individual water bodies. *See, e.g.*, 33 U.S.C. §§ 1254(a)(3) ("any navigable waters"), 1311(m)(4) ("the receiving waters"), 1312(a) ("in a specific portion of the navigable waters"), 1313(d)(1)(B) ("those waters or parts thereof"), 1314(f)(2)(F) ("any navigable waters"); *see also Friends I*, 570 F.3d at 1223 (noting the use of "any" to modify "navigable water" or "navigable waters" in other statutes when individual water bodies were intended). Congress's use of qualifiers (including the word "any") elsewhere in the statute to refer to individual bodies of water suggests that it did not mean individual bodies in § 1362(12). *See Dean v. United States*, 556 U.S. 568, 573 (2009) ("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." (quotation marks and alteration omitted)). While other provisions of the Clean Water Act might not unambiguously use "navigable waters" in a collective sense (States Br. 42, 45-46), that does not show that this provision is unambiguous in the opposite direction. Instead, by modifying the phrase "navigable waters" elsewhere, Congress has showed that it knows how to eliminate ambiguity when it desires. Congress's decision not to do so in § 1362(12) demonstrates that, at the least, the meaning can reasonably

be construed collectively. *Friends I*, 570 F.3d at 1223-25.

In the clause at issue, § 1362(12)(A), Congress uses the word "any" three times, modifying every noun *except* "navigable waters." As the Eleventh Circuit held, plaintiffs' reading would add a fourth "any" to the three already in the statutory phrase, a textual addition that is inconsistent with plaintiffs' argument that the plain language is unambiguously in their favor. *Friends I*, 570 F.3d at 1224. Although plaintiffs try to avoid the significance of that omission by arguing that § 1362(12) uses "any" only to eliminate the possibility of exceptions (States Br. 45-47), they do not advocate the logical consequence of their own argument, that the omission of the fourth "any" should be read to imply that exceptions exist to the unmodified "navigable waters." Regardless, the more natural reading is that Congress omitted "any" because it intended to refer to "navigable waters," defined as "the waters of the United States," collectively.

Plaintiffs rely on the Supreme Court's statement that "[e]very point source discharge is prohibited unless covered by a permit," *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (emphasis omitted), to conclude that water transfers require a permit. (*E.g.*, States Br. 29-30). But that analysis begs the question: by its terms, *Milwaukee*'s broad statement only applies to a "discharge"—and a "discharge of a pollutant" exists only where there is an "addition of any pollutant to navigable waters," 33 U.S.C. § 1362(12)(A), precisely the language in dispute in this appeal.

Plaintiffs similarly characterize the Rule as "'exempt[ing] categories of point sources'" from the NPDES program. (States Br. 30 (quoting *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977)); Brief for Catskill Mountains Chapter of Trout Unlimited *et al.* ("Trout Br.") 24, 25-28, 30-35; Brief for Miccosukee Tribe of Indians *et al.* ("Tribe Br.") 4, 11, 34, 36). But nothing in the Rule purports to exempt a category of point sources from the statutory discharge prohibition (33 U.S.C. § 1311); rather, EPA has reasonably interpreted the prohibition on "any addition of any pollutants to navigable waters from any point source" as not including water transfers in the first place. Thus, there is no conflict with *Miccosukee*'s statement that § 1314(f), which refers to "changes in the movement, flow, or circulation of any navigable waters," "does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004). The plaintiff States omit the word "explicitly" from this quotation (States Br. 59), but no one disputes that § 1314(f) has no such explicit exemption. Instead, the question is whether Congress's reference to water transfers in a provision "which concerns nonpoint sources," *Miccosukee*, 541 U.S. at 106, either implicitly suggests that water transfers be addressed through nonpoint programs, or, at the least, demonstrates the ambiguity of the statute. (Brief for EPA Defendants-Appellants ("Gov't Br.") 30-31).

To some degree, plaintiffs' objection to this point appears to rest on a misunderstanding: they insist

that because water transfers occur through a "point source" (e.g., a tunnel or ditch), they cannot logically be addressed by nonpoint source programs. (States Br. 59-60). This argument misapprehends the scope of such programs. EPA has explained that the term "nonpoint source" generally includes all "[s]ources not regulated under [33 U.S.C. § 1342, i.e., NPDES] or [§ 1344 for fill and dredged material]." 73 Fed. Reg. 33,697, 33,702 n.6 (June 13, 2008) (citing *National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988) ("'nonpoint source' is shorthand for and includes all water quality problems not subject to [§ 1342]" (quotation marks omitted))). Thus, nonpoint source programs are not limited to addressing runoff (States Br. 10 n.2); if water transfers are not regulated under the NPDES program, any pollutants transferred may be addressed under other CWA provisions, including those addressing nonpoint sources of pollution.

Moreover, the fact that the caption of the section containing the codified Rule is "exclusions" is irrelevant. 40 C.F.R. § 122.3; (Trout Br. 27). The text of the regulation itself plainly states that a water transfer does not require a permit, 40 C.F.R. § 122.3(i), and "the title . . . cannot limit the plain meaning of the text." *INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001) (quotation marks omitted). And in any event, "exclusions" and "exemptions" are not the same: to say that water transfers are "excluded" from NPDES permit requirements is merely to say they are not included in those requirements. *See* American Heritage Dictionary of the English Language (5th ed. 2014) (available at www.ahdictionary.com) (defining "ex-

empt" as "[t]o free from an obligation, duty, or liability to which others are subject," and "exclude" as "[t]o prevent from being included, considered, or accepted").

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

The core of plaintiffs' argument stems not from the statutory text, but from a one-sided view of the policies underlying the Clean Water Act. (*E.g.*, States Br. 33-38 Trout Br. 28-29; Tribe Br. 8-9, 20). This Court has viewed such arguments skeptically, because it takes a "high level of clarity" in purpose and structure "to resolve textual ambiguity" at *Chevron* step one. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007). Because the "court's task is not to infer what Congress might have said about the issue in dispute if it had considered the matter," but only to decide "'whether Congress has directly spoken to [that] precise question,'" *id.* at 120-21 (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984)), the Court will only deem the structure and purpose of a statute to eliminate a textual ambiguity "if they *compel* a particular conclusion as to Congress's intent." *Id.* at 121 (emphasis added).

Plaintiffs cannot meet this test. Although they suggest that Congress's only relevant intent was to improve water quality (States Br. 33, 41, 42), that is simply not so. As the government's opening brief explained, while the Clean Water Act has the objective of restoring and maintaining the integrity of the Nation's waters, Congress coupled this goal with a

strong policy preference, expressed in the statute itself, to respect the roles and rights of states and avoid burdening state authority over water allocation. (Gov't Br. 28-32). Thus, Congress provided that the statute may not be construed as impairing states' rights or jurisdiction over their waters. 33 U.S.C. § 1370(2). Further, in the same section in which Congress stated its water quality objective, *id.* § 1251(a), Congress announced its policy to "recognize, preserve, and protect the primary responsibilities and rights of States" to address pollution, *id.* § 1251(b), not to impair states' authority "to allocate quantities of water within its jurisdiction," *id.* § 1251(g), and to require federal and state authorities to address pollution and water management programs "in concert," *id.*[2]

This "welter of consistent and inconsistent goals," *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (*Catskill I*), 273 F.3d 481, 494 (2d Cir. 2001), negates plaintiffs' argument that the purposes of the Clean Water Act are so clear that they can resolve the textual ambiguity in "any addition . . . to navigable waters." *See Friends I*, 570 F.3d at 1225-27. Plaintiffs ignore the Act's competing goals and fo-

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[2] While plaintiffs correctly observe that § 1251(b) and (g)'s statements of policy were enacted five years after the original CWA (Trout Br. 29 n.11), it was still reasonable for EPA to take account of the statutory purposes as expressed by Congress, even though expressed some time later. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

cus exclusively on pollution prevention, but "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). The Act's other goals, as stated by Congress, inform a fair construction of the statute as a whole, and demonstrate that Congress's purposes do not compel the reading of the text advocated by plaintiffs. Though it is true that the Supreme Court has held that the CWA's allocation provisions do not "limit the scope of water pollution controls," *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 720-21 (1994), they do indicate Congress's objectives and priorities, which EPA may properly consider in determining (and resolving) ambiguity in the statute. *See Miccosukee*, 541 U.S. at 108 ("It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired' by the Act.").

Moreover, the existence of "nonpoint source" programs under the Act that apply even in the absence of an "addition . . . to navigable waters," supports EPA's interpretation of the statute. *See, e.g.*, 33 U.S.C. §§ 1288, 1314(f), 1329; (Gov't Br. 8-9, 30-32). These provisions—along with state clean water laws and federal statutes like the Safe Drinking Water Act—provide a mechanism for addressing water pollution even where the NPDES program does not apply.

Congress's discussion of water transfers in section 1314(f), "which concerns nonpoint sources," *Miccosukee*, 541 U.S. at 106, and the dissimilarity of pollution associated with water transfers from the type of municipal and industrial pollution that Congress was focused on controlling at the source through the NPDES program, *see* 73 Fed. Reg. at 33,702-03, supports EPA's conclusion that it is reasonable to interpret "addition . . . to navigable waters" in a fashion that leaves pollution associated with water transfers to programs outside of the NPDES program. (Gov't Br. 30-32, 41).

Plaintiffs characterize the CWA as focusing almost exclusively on individual water bodies, which they maintain means that "addition . . . to navigable waters" cannot reasonably be read to address waters collectively, and point to various provisions addressing individual water bodies. (States Br. 33-35, 40-41; Tribe Br. 12-20). That conclusion simply does not follow: Congress can reasonably require individualized treatment of water bodies in some provisions governing the details of water body protection, but not in an overarching provision that provides the distinct function of deciding when permits are required in the first instance.[3]

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[3] Plaintiffs rely on *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003), to argue that the CWA focuses on receiving waters. (States Br. 36, 41). But in that case, neither a water transfer nor the meaning of "addition . . . to navigable waters" was at

Nor does interpreting "any addition . . . to navigable waters" to refer to additions to waters collectively somehow "conflict[] with the intended jurisdictional purpose of the term 'navigable waters.'" (States Br. 44-45). It is true that "navigable waters" and "waters of the United States" define the scope of the CWA's coverage. *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 171-72 (2001). But that jurisdictional scope is the same for the Act as a whole whether the waters are considered collectively or individually. That the Water Transfers Rule adopts the collective view does not change this jurisdictional scope. In any event, the Rule expressly does not purport to define the meaning of "waters of the United States." (SPA 125 n.2).[4]

In sum, neither the text, structure, nor purposes of the CWA give unequivocal guidance to the meaning of "any addition . . . to navigable waters," such that plaintiffs' reading is "compel[led]." *Cohen*, 498 F.3d at 120. Under *Chevron*, then, it is the agency, not the courts, that is authorized to choose among the

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issue; the question was whether unaltered groundwater (which is not part of the navigable waters) discharged into navigable waters was a "pollutant."

[4] Ironically, the district court accused the government of expanding the meaning of "navigable waters" (SPA 111-12), while plaintiffs now object to EPA's supposed contraction of that term (States Br. 44-45). Neither contention is correct.

permissible interpretations of the statute. *City of Arlington*, 133 S. Ct. at 1868.[5]

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

Plaintiffs assert that this Court has already held that the CWA's language is unambiguous, and that a permit is therefore required for water transfers. That argument rests on a misreading of the precedent and a misunderstanding of how *Chevron* deference works.

Chevron itself contemplated that deference is still accorded to an agency construction when it differs from the "reading the court would have reached if the question initially had arisen in a judicial proceeding." 467 U.S. at 843 n.11. Indeed, deference is due to an agency's construction even when a court has already interpreted the statute in a different way, unless it held the statute to be unambiguous. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005).

Contrary to plaintiffs' view (States Br. 24-28; Trout Br. 1-2, 15-22; Tribe Br. 8, 12-15), as both the district court and the Eleventh Circuit have concluded, neither *Catskill I* nor *Catskill II* held that the CWA unambiguously requires an NPDES permit for water transfers. *Friends I*, 570 F.3d at 1221-22;

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[5] As noted in EPA's opening brief, the legislative history also does not resolve the ambiguity. (Gov't Br. 31). The plaintiffs do not seriously argue to the contrary.

(SPA 41); (Gov't Br. 32-33). If this Court had meant to do so, it would have distinguished *Gorsuch* and *Consumers Power* on the basis of this unambiguous meaning; but instead it differentiated those cases because EPA had not yet adopted its opinion on water transfers in a regulation with the force of law entitled to deference. (Gov't Br. 32-33); *see Catskill I*, 273 F.3d at 490; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill II)*, 451 F.3d 77, 82, 83 n.5 (2d Cir. 2006). Had EPA promulgated such a regulation—as it now has—the Court explained that "[*Chevron*] deference might be appropriate." *Catskill I*, 273 F.3d at 490-91. But *Chevron* deference does not apply to an unambiguous statute. *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1363 n.12 (2012); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007). Nor does the *Skidmore* framework the Court actually applied in *Catskill I* and *Catskill II*. *Christensen v. Harris Cnty.*, 529 U.S. 576, 591 n.* (2000) (Scalia, J., concurring) (both *Chevron* and *Skidmore* deference inapplicable if "the statute is unambiguous"). Although plaintiffs describe this Court's decisions as merely "referenc[ing] *Skidmore* . . . as background law" that "would apply" only "*if* there were ambiguity in the Act" (States Br. 26-27 (emphasis added)), the Court's language flatly contradicts that reading: "the deference described in [*Skidmore*] is applicable. We thus defer to the agency interpretation according to its 'power to persuade' [according to *Skidmore*]." *Catskill II*, 451 F.3d at 82 (quotation marks omitted).

The Court's conclusion that the statute is ambiguous was repeated when *Catskill II* stated that the

New York City had relied on "a reasonable, albeit incorrect, interpretation of a statute." 451 F.3d at 89. Although plaintiffs suggest that this language is taken out of context (States Br. 27), the meaning is perfectly clear: even though the Court disagreed (outside *Chevron*'s deferential framework) with it, the collective interpretation of "navigable waters" was "reasonable." And being "susceptible to two or more reasonable meanings" is the very definition of ambiguity. *NRDC v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

In addition, neither *Miccosukee* nor *L.A. County* forecloses a finding of ambiguity at *Chevron* step one. (States Br. 31; Trout Br. 20-22). In *Miccosukee*, the Court held that no NPDES permit is required for a water transfer if the donating and receiving water bodies are not "meaningfully distinct." 541 U.S. at 109, 112. But plaintiffs commit the logical fallacy of inverting this proposition to mean that if the bodies are distinct, then a permit is required for a transfer. The Court did not say that, and expressly left open the question of whether a permit is required for a transfer between distinct water bodies. *Id.* Similarly, in *Los Angeles County Flood Control Dist. v. NRDC*, the Court simply applied its holding in *Miccosukee* that the flow of water from one portion of a water body to another did not constitute a "discharge of a pollutant" because the two portions were part of the same water body. 133 S. Ct. 710, 713 (2013). Plaintiffs suggest that *L.A. County*'s statement that, under *Miccosukee*, "a water transfer would count as a discharge of pollutants under the CWA only if the canal and the reservoir were 'meaningfully distinct water bodies'" means the Supreme Court has decided that

permits are required for water transfers. *Id.* at 713; (Trout Br. 21-22; State Br. 32). That paraphrase of *Miccosukee*'s holding suggests only that meaningfully distinct water bodies are a necessary prerequisite for a permit, but not the only one. Regardless, this imprecise dicta cannot have answered the very question that *Miccosukee* left open: it is entirely implausible that the Supreme Court meant to resolve this question by addressing it in passing where it was not necessary to resolution of the case, much less without discussing EPA's already-issued interpretation in the Water Transfers Rule.

4. EPA Considered the Ambiguity at Issue

Plaintiffs attempt to avoid these issues at the threshold, claiming EPA "may not defend the Rule" by relying on ambiguity in the term "navigable waters," because the Rule's preamble stated the "legal question" is the meaning of "addition." (States Br. 39 (citing SPA 126)). But it is clear that EPA's position is no "post hoc rationalization": the preamble makes clear that EPA considered the meaning of "addition" in the context of the phrase "any addition . . . to navigable waters" based on its considered view that navigable waters must be considered collectively. 73 Fed. Reg. at 33,701; (Gov't Br. 15-16). This Court, the Supreme Court, and the Eleventh Circuit have all recognized that the term "addition" cannot be understood outside that context. *Catskill I*, 273 F.3d at 492 (in section entitled "Defining 'Addition,'" observing that one has not "added" soup to a pot by lifting and redepositing a ladlefull); *Miccosukee*, 541 U.S. at 109-10 (same); *Friends I*, 570 F.3d at 1217 (same). In

short, one cannot sensibly define "addition" without considering what one is adding to.

Along similar lines, the Trout plaintiffs argue that no deference is due because EPA allegedly did not rely on "unitary waters theory." (Trout Br. 6-14). First of all, their argument rests on their suggestion that "unitary waters" means a single body of water, rather than a collection of water bodies. *See supra* at 4 n.1; (Trout Br. 9). Second, it depends on a 2005 EPA interpretive memorandum that lacks the more developed interpretation of the statutory text included in the agency's explanation of its ultimate decision (*compare* 73 Fed. Reg. at 33,701, 33,705 n.10, *with* JA 271)—and, in any event, did not "walk-away" from a collective understanding of "navigable waters" (Trout Br. 10-11). Third, their argument depends on an inconclusive and irrelevant telephone message from 2005. (Trout Br. 12-13; *see* Gov't Br. 55 n.11). It is the promulgation of the Rule that is the "final agency action" that is reviewable in the courts, 5 U.S.C. § 704, and the documents explaining EPA's rationale—the Rule's preamble and EPA's response to public comments—are replete with evidence that EPA considered and reasonably resolved the relevant ambiguities. 73 Fed. Reg. 33,697-33,708 (preamble); (JA 1238-94) (response to comments); (Gov't Br. 54-56 & n.11).

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

Although the district court correctly concluded that the Water Transfers Rule is a permissible interpretation of the statute, it erred in holding that EPA had failed to provide a reasoned interpretation. (Gov't Br. 34-56). Nothing in plaintiffs' arguments warrants holding otherwise.

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

The interpretation of the statute as "any addition . . . to navigable waters" considered collectively is one of the interpretations to which the statute is reasonably subject, and thus a permissible interpretation, as both the district court and the Eleventh Circuit held. (SPA 92, 104-05); *Friends I*, 570 F.3d at 1219; *see Sash v. Zenk*, 428 F.3d 132, 136 (2d Cir. 2005) (agency's interpretation is one of two reasonable ones, and "must therefore be upheld").

As discussed above, the statutory text is ambiguous, and the purposes and structure of the Act support the collective interpretation of "addition . . . to navigable waters." EPA has adopted the reasonable collective interpretation in light of the importance of water transfers to the national infrastructure; Congress's intent to avoid burdening state control over water allocations and resources, as reflected in 33 U.S.C. §§ 1251(b), 1251(g), and 1370; and the fact that nonpoint source programs and other federal and

state laws will apply in appropriate cases to pollution associated with water transfers. *See, e.g.*, 73 Fed. Reg. 33,698-99, 33,701-02; (JA 1244-45, 1269-70); (Gov't Br. 16-17, 36-37).

That EPA's interpretation is one of long standing, while not a requirement under *Chevron*, provides additional support for the interpretation's reasonableness. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224-25 (2009); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996); (Gov't Br. 37). Plaintiffs' claim that a 1975 opinion of EPA's general counsel took a different view is incorrect: that opinion involved return flows of water after use for agricultural irrigation, and such flows are not water transfers within the meaning of the Rule because they involve an intervening "industrial, municipal or commercial use." 40 C.F.R. § 122.3(i); (Trout Br. 55); *In re Riverside Irrigation Dist.*, EPA Off. Gen. Counsel, Opinion No. 21, 1975 WL 23864, at *1-4 (June 27, 1975); (JA 1246-47, 1275, 1279 (EPA response to comments)). Nor does plaintiffs' reliance on the statements of certain former EPA officials in their personal capacities deserve any weight. (Trout Br. 54-56); *see, e.g.*, *Smiley*, 517 U.S. at 743 (doubting that statement made by even current individual agency officer to particular constituents could establish binding policy). Plaintiffs cannot dispute that 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 to the waters of the United States. (Gov't Br. 11); 73 Fed. Reg. at 33,699-700.

2. EPA Provided a Reasoned Explanation for Its Adoption of the Rule

a. An Agency's Explanation of Its Choice at *Chevron* Step Two

Plaintiffs ask the Court to review the agency's explanation of its choice between reasonable interpretations of the statute far more strictly than permitted by *Chevron*. As discussed in more detail in the government's opening brief, although an agency may not choose among permissible interpretations by picking an interpretation "out of a hat," *Village of Barrington v. Surface Transportation Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011), the courts nonetheless owe "considerable deference" to the agency's explanation of its choice, *Detsel v. Sullivan*, 895 F.2d 58, 59, 63 (2d Cir. 1990); *accord Barrington*, 636 F.3d at 660, 665 ("highly deferential" review). An agency's explanation of its choices on a matter of statutory interpretation should be upheld unless it is "patently inconsistent with the statutory scheme." *Continental Air Lines, Inc. v. Dep't of Transportation*, 843 F.2d 1444, 1452 (D.C. Cir. 1988); *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925, 932 (D.C. Cir. 1993); (Gov't Br. 37-39).

b. EPA Adequately Explained Its Choice Among Permissible Interpretations

EPA's explanation of its decision, described at length in the preamble to the Rule and EPA's response to comments, and reviewed in the government's opening brief, is not "patently inconsistent with the statutory regime," but rather directly in furtherance of it. (Gov't Br. 40-42). After identifying the

individual and collective interpretations of the statute (Gov't Br. 40); 75 Fed. Reg. at 33,700, EPA carefully described the role and importance of water transfers and Congress's policy to preserve primary state authority over water resources and water allocations. (Gov't Br. 41); 73 Fed. Reg. at 33,698-99, 33,702. The agency considered that water transfers typically convey pollutants (Gov't Br. 41); 75 Fed. Reg. at 33,699, 33,702, but observed that the pollution potentially associated with water transfers is not the type of municipal and industrial pollution that Congress was focused on controlling at the source through the NPDES program; that other provisions, such as the reference to water transfers in 33 U.S.C. § 1314(f), supported an understanding of water transfers as generally governed by the Act's nonpoint source provisions; and that these nonpoint source provisions, and other provisions of the Clean Water Act and other federal and state law, may apply to address issues arising from pollution in water transfers. (Gov't Br. 41); 73 Fed. Reg. at 33,699, 33,702-03; (JA 1244-45, 1269-70). EPA thus reasonably explained why, in light of the various indications of congressional intent, it adopted what the district court acknowledged to be a permissible interpretation: that "water transfers . . . do not constitute an 'addition' to navigable waters to be regulated under the NPDES program." 73 Fed. Reg. at 33,703; (SPA 92, 104-05).

Plaintiffs err in suggesting that courts defer to an agency only where the government can demonstrate that "the agency has applied expertise." (States Br. 65). Rather, "*Chevron* is rooted in a background

presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, '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.'" *City of Arlington,* 133 S. Ct. at 1868 (quoting *Smiley*, 517 U.S. at 740-41)); *Brand X*, 545 U.S. at 980-81; *Chevron*, 467 U.S. at 843-44. It is this implied delegation of authority, rather than a record of the application of special expertise in a particular case, that gives rise to *Chevron* deference. Consistent with that framework, courts routinely uphold agency constructions of statutes even if the agencies did not rely on their expertise. For instance, in *Mayo Foundation for Medical Education and Research v. United States*, the Court upheld the Treasury Department's interpretation of whether medical residents were "students" within the meaning of a tax statute. 131 S. Ct. 704, 708 (2011). The Court concluded that the "'ultimate question'" did not turn on application of specific expertise, but only on whether Congress "'would have intended, and expected,'" the agency to fill the statutory gap, *id.* at 714 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007)). "Regulation, like legislation, often requires drawing lines"; in affirming the agency's exercise of that discretion, the Court simply noted that the agency's statutory interpretation was "perfectly sensible," that it had determined it "would further the purpose" of the statute, and it "did not act irrationally"—with no mention of any Treasury "expertise" in physicians' employment or training. *Id.* at 714-15. The cases cit-

ed by plaintiffs do not say otherwise. *See Brand X*, 545 U.S. at 1003 (noting agency's "expert policy judgment" in that case, but not making expertise a prerequisite for *Chevron* deference); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (describing the existence of "practical agency expertise" not as a requirement for deference, but as one of multiple underlying justifications for *Chevron* deference).

Of course, EPA did consider the policies underlying the statute in detail. Plaintiffs incorrectly maintain that EPA failed to sufficiently consider the statute's water quality goals or standards. (States Br. 68-69; Trout Br. 42-44; Tribe Br. 34). But EPA expressly considered the CWA's water quality objective, the potential for the transmission of pollution through water transfers, and the role of water quality standards. (Gov't Br. 46-47); 73 Fed. Reg. at 33,699, 33,701-03, 33,705-06. EPA recognized that water quality standards were among the tools that would remain available to states to mitigate potential pollution from water transfers outside the NPDES program, 73 Fed. Reg. at 33,705-06—and plaintiffs agree (Trout Br. 44). Although plaintiffs accuse EPA of merely "mentioning" these issues without properly considering them (States Br. 69), that argument is belied by the record (*e.g.*, 73 Fed. Reg. at 33,699, 33,701-03, 33,705-06) and reflects plaintiffs' true complaint, which is merely their disagreement with the result.[6]

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[6] Indeed, plaintiffs criticize EPA for reaching a conclusion that the plaintiff States affirmatively as-

Plaintiffs also insist that EPA failed to consider the rights of downstream states. (States Br. 17, 69-70). But EPA explained that states can make use of their water quality standards and related Total Maximum Daily Load ("TMDL") programs to address water transfer problems. 73 Fed. Reg. at 33,705. When establishing water quality standards, states must ensure that those standards "provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b). Moreover, NPDES permits must include effluent limits to the extent necessary to achieve those water quality

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serted as fact in the administrative process, and that the intervenor plaintiffs have subsequently conceded in litigation. (*Compare* Trout Br. 45 (arguing that EPA improperly concluded that "most of the thousands of Water Transfers in the United States do not result in substantial impairment"; States Br. 72 n.13 (same); (Tribe Br. 33) (same), *with* (JA 526) (comment submitted in the administrative process on behalf of all of the plaintiff States except Washington, conceding that the "vast majority" of water transfers "will not degrade the quality of the receiving waters"); *Friends of the Everglades v. EPA*, No. 08-13652 & consolidated cases, Corrected Initial Brief [for] Friends of the Everglades *et al.*, at 46 (11th Cir. Aug. 26, 2011) (brief filed by three of the intervenor plaintiffs, stating: "EPA opined that 'most of the thousands of the water transfers in the United States do not result in substantial impairment.' The record supports that conclusion.")).

standards and to comport with wasteload allocations in TMDLs. 40 C.F.R. §§ 122.44(d)(1), 122.44(d)(1)(vii)(B) and 130.7. Thus, when states—whether upstream or downstream of a water transfer—issue NPDES permits to entities discharging pollutants, the limitations in those permits must be set to achieve water quality standards in the downstream state. To the extent that the pollution in question is not covered by an NPDES permit, as EPA explained, its management and mitigation may generally be addressed as part of nonpoint source programs or state water quality permitting programs outside the scope of NPDES. 73 Fed. Reg. at 33,706. Although plaintiffs allege that these programs will not provide the same degree of water quality protection as requiring NPDES permits for water transfers, this argument again boils down to their disagreement with the balance among the competing interests of concern to Congress that the agency struck, something that is within the agency's discretion. *City of Arlington*, 133 S. Ct. at 1868.

Along the same lines, plaintiffs criticize EPA's reference to Congress's intent to avoid "unduly" or "unnecessarily" interfering with state authority over water allocation, arguing that the Rule therefore must "depend[] on factual assumptions that EPA did not support or explain" (States Br. 2-3, 71-73) or that those burdens could have been reduced by "general permits" or "variances" (States Br. 56-57, 75-78). But EPA did not suggest that it relied on a cost-benefit review of the type suggested by plaintiffs, and nothing requires EPA to have done so. *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510

(1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."). To the contrary, the Rule was not premised on assumptions about specific costs or benefits but on the conclusion that EPA's interpretation of the statute was more conducive to Congress's goal of avoiding undue interference. (Gov't Br. 50). An agency is permitted to take those goals into account, even without making specific findings of fact to support them. *See Mayo*, 131 S. Ct. at 715 (upholding agency decision as "further[ing] the purpose" of a statute without reference to agency factfinding on that issue); *LTV Corp.*, 496 U.S. at 651-52 (upholding agency interpretation based on conclusion that certain pension plans would "frustrate one of the objectives" of statute because they would reduce "employee resistance" to plan termination, without referring to factfinding on those issues). As long as the decision is within Congress's delegation and the agency acts permissibly, it may rely on its "judgments about the way the real world works" without formal findings of fact.[7] *LTV Corp.*, 496 U.S. at 651.

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[7] Nor is there any support for plaintiff's contention that EPA "affirmatively refus[ed] to consider any facts on either side of that line." (States Br. 74). The agency simply drew a line that, in its judgment, honored the statutory purposes best. *See Mayo*, 131 S. Ct. at 715. The case plaintiffs cite, *NRDC v. Daley*, 209 F.3d 747, 754-56 (D.C. Cir. 2000), concerned a highly fact-bound inquiry, and is therefore inapposite.

Plaintiffs next accuse EPA of failing to consider "alternatives," including giving EPA the authority to designate certain water bodies not to be covered by NPDES. (Trout Br. 46-48; Tribe Br. 34-35). But EPA was not crafting a program from whole cloth; rather, it was interpreting statutory language—"any addition . . . to navigable waters." That language can be read to refer to water bodies collectively, and can be read to refer to water bodies individually, but cannot be read to refer to some but not all water bodies. (Gov't Br. 49).

C. The District Court Should Not Have Vacated the Rule

The government has explained that even if the district court's decision correctly held that EPA failed to provide a reasoned explanation for selecting what the district court acknowledged to be a permissible interpretation of the Act, the district court erred in partly vacating the Water Transfers Rule, as opposed to merely remanding the Rule for further consideration by the agency. (Gov't Br. 56-58). Plaintiffs do not respond to the government's arguments on this issue, and have therefore waived those points. *Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998). Thus, at a minimum, this Court should reverse the district court's partial vacatur of the Rule.

Further, although two of the plaintiff groups ask this Court to vacate the rule in its entirety (Trout Br. 3, 22, 58; Tribe Br. 37), the Court lacks jurisdiction to do so, as the plaintiffs have not cross-appealed and therefore may not "'enlarge[e] [their] own

rights'" or "'lessen[] the rights of [their] adversary'" under the judgment being appealed. *Jennings v. Stephens*, __ U.S. __, No. 13-7211, 2015 WL 159277, at *5 (Jan. 14, 2015) (quoting *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)).

CONCLUSION

The judgment of the district court should be reversed.

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January 26, 2015

Respectfully submitted,

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for Defendants-Appellants United States Environmental Protection Agency and Gina McCarthy.

ROBERT WILLIAM YALEN,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

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 6973 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: ROBERT WILLIAM YALEN,
Assistant United States Attorney