CHEVRON TO THE RESCUE: SHOULD *CHEVRON'S* STEP TWO HAVE SAVED THE DROWNING WATER TRANSFERS RULE OR LET IT SINK?

by

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Following the winding journey of the Water Transfers Rule, this Note uses that context to discuss the need for added clarification to Chevron*'s step two or reasonableness standard. This Note begins by tracing the history of the Water Transfers Rule from the EPA's position as an intervenor in early cases to the final rule. With that history as a backdrop, the Note's focus turns to the three federal court decisions applying* Chevron *to the Water Transfers Rule. Each court applied a different standard at* Chevron *step two and this Note addresses them in turn. The disparity between standards was dispositive to the outcome of each case.*

Ultimately, this Note concludes that a heightened review is the appropriate standard for Chevron *step two. A more searching standard, or hard-look review, is consistent with the standard applied in the landmark* Chevron *case and better suits the judiciary's role in reviewing agency interpretations. Redefining* Chevron *step two is essential to preserving the separation of powers and making* Chevron*'s widespread application worthwhile.*

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I. INTRODUCTION

Water allocation authorities across the country use a system of thousands of water transfers to meet the nation's water needs; many divert water from distant rural areas to meet the demand of growing urban centers.[1] In California, water transfers provide drinking water to 25 million of that state's 37 million residents.[2] The need for water transfers as a tool for water allocation is undisputed. However, interbasin water transfers may also result in significant harm to ecosystems. Interbasin transfers can introduce invasive species to water sheds and add pollutants to the receiving water body.[3] Due to the thorny nature of the issues surrounding water transfers, the issue of interbasin transfers has repeatedly made its way to the courts and ultimately, in 2008, into a federal regulation known as the Water Transfers Rule.[4]

This Note begins with a review of the Clean Water Act (the Act or CWA) and a review of the case law and history behind the Water Transfers Rule, then shifts to an analysis of the three federal court opinions that have ruled on the Water Transfers Rule's validity thus far.[5] While two of the three courts upheld the Water Transfers Rule applying *Chevron* deference,[6] one court found the Environmental Protection Agency's (EPA) interpretation of the rule to be unreasonable as a matter of *Chevron* step two.[7] Ultimately, this Note uses those cases as a study into how courts apply the *Chevron* two-step analysis. This Note concludes that the

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[1] Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 500 (2d Cir. 2017) [hereinafter *Catskill IV*].

[2] *Id.* at 503.

[3] *See id.* at 500.

[4] See *infra* Section I.B for a discussion of the litigation related to interbasin transfers; National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

[5] *See generally Catskill IV*, 846 F.3d at 492; Friends of the Everglades v. S. Fl. Water Mgmt.Dist., 570 F.3d 1210 (11th Cir. 2009) [hereinafter *Friends I*]; Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 8 F. Supp. 3d 500, 553–54 (S.D.N.Y. 2014) [hereinafter *Catskill III*].

[6] *Catskill IV*, 846 F.3d at 500–01; *Friends I*, 570 F.3d at 1228.

[7] *Catskill III*, 8 F. Supp. 3d at 553–54.

application of *Chevron's* step two reasonableness standard has become watered down to the point that there is a need for reexamination. The dangerous practice of equating permissible with reasonable at *Chevron* step two has a tendency to lead courts away from reviewing the reasonableness of the agency's decision making process. To maintain the separation of powers between the judiciary and executive branches, a court's reasonableness inquiry must go beyond the threshold question of permissibility and address the agency's rationale behind its decision making process. One solution is to incorporate the *State Farm* factors for arbitrary and capricious review.[8] However, requiring courts to follow the broad "interpretation" method of the *Chevron* Court would also remedy the problem.

A. *Clean Water Act*

Passage of the Federal Water Pollution Control Act of 1972 marked the beginning of what is commonly referred to as the Clean Water Act.[9] "The objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] To further underscore the remedial intentions of the Act, Congress set the objective—probably over-optimistically—of eliminating all discharges of pollutants into navigable waters by 1985.[11] Although discharges of pollutants continue to occur, the Act makes clear it was Congress's unequivocal intent to make protecting and rehabilitating navigable waters the primary concern.[12]

One of the CWA's most effective tools for limiting the discharge of pollutants into the nation's waters is its provision establishing strict effluent limitations: "[T]he Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act."[13] To understand the exact scope and impact of this section, it is important to review the definition of relevant terms. "Pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[14] "Dis-

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[8] Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[9] Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1275 (2012)).

[10] *Id.* § 1251(a).

[11] *Id.* § 1251(a)(1).

[12] "The *major purpose* of [the CWA] is to establish *a comprehensive long-range policy for the elimination of water pollution,* making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade." S. Rep. No. 92-414, at 80 (1971) (emphasis added); *see also* 33 U.S.C. § 1251(a).

[13] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)).

[14] 33 U.S.C. § 1362(6) (2012).

charge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."[15] "Navigable waters" means "the waters of the United States, including the territorial seas."[16] Finally, a "point source" "means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[17] Substituting each defined term for its definition in section 1311(a) results in a cumbersome to read but expansive prohibition on discharging pollutants into the nation's waters.[18] Nevertheless, the term most relevant to the debate over the Water Transfers Rule is left undefined by the CWA: "addition."

After categorically prohibiting the discharge of any pollutant, the Act establishes the National Pollutant Discharge Elimination System (NPDES), as the principal provision under which a discharger may comply with section 1311(a).[19] Under NPDES, the Administrator has the authority to review and approve permits, providing permittees a statutory safe-harbor for any discharges made within the parameters of the permit.[20] Such discharges are exempted from the effluent ban set out in section 1311(a).[21] Furthermore, the CWA allows states to take over administration of the NPDES program, subject to final approval by the Admin-

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[15] *Id.* § 1362(12).

[16] *Id.* § 1362(7). The scope of "navigable waters" is a contested issue. Historically, the EPA and the Army Corps of Engineers have interpreted the phrase broadly—expanding the agencies' jurisdiction to as many waters as possible. However, that trend was curtailed by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715, 732 (2006). For a detailed discussion on the jurisdictional debate, see Jamie J. Janisch, *Scope of Federal Jurisdiction Under Section 404 of the Clean Water Act: Rethinking "Navigable Waters" After* Rapanos v. United States, 11 U. DENV. WATER L. REV. 91 (2007).

[17] 33 U.S.C. § 1362(14). The point source does not need to be the source of the pollution. A pipe that conveys pollutants into the navigable waters without adding any is still a point source. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 493 (2d Cir. 2001) [hereinafter *Catskill I*] (citing United States v. Plaza Health Labs., Inc., 3 F.3d 643, 646 (2d Cir. 1993)).

[18] Substituting in each defined term, § 1311(a) reads as follows:

> Except as in compliance with [the CWA] . . . any addition of any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste to the waters of the United States, including the territorial seas, from any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, by any person shall be unlawful.

See § 1362 for all the definitions that make this tortured sentence possible.

[19] Arkansas v. Oklahoma, 503 U.S. 91, 101–02 (1992) (referencing 33 U.S.C. § 1342).

[20] 33 U.S.C. § 1342(a) (2012).

[21] *Arkansas*, 503 U.S. at 102.

Administrator.[22] State administered programs are subject to a federally proscribed floor and continued compliance monitoring by the EPA.[23] If at any time the Administrator determines a state's NPDES program no longer meets the minimum requirements of the CWA, and the state has failed to cure the issue, administration of the NPDES program shall revert to the EPA.[24] This mixed application of federal and state regulation within the NPDES program exemplifies the "cooperative federalism" Congress envisioned under the CWA.[25] Along the lines of balancing state and federal roles under the CWA, the 1977 amendments to the Act demonstrate Congress's express intent that the CWA not infringe on each state's authority over water allocations.[26] As discussed in the Section below, the complex and comprehensive structure of the CWA sets the foundation for the EPA's Water Transfers Rule.

B. EPA's Road to Developing the Water Transfers Rule

Prior to the promulgation of its final rule in 2008, the EPA enforced its interpretation of the CWA through a series of legal positions taken as an intervenor in litigation, then later, in an informal policy statement, and finally, as a product of formal notice-and-comment rulemaking. The following Sections address each phase of the EPA's progression.

1. EPA's Position as Intervenor in Cases: The Dam Cases

Before any formal agency action by the EPA, the issue of water transfers arose in the context of dam discharges. As *amicus curiae*, the EPA began clarifying its interpretation of the CWA that now underlies the Water

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[22] "[T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. § 1342(b) (2012). Upon receipt of an application, the EPA must approve state submitted programs unless they fail to meet the minimum requirements set forth in the Act. *Id.*

[23] *Id.* § 1342(c).

[24] *Id.* § 1342(c)(2)–(3).

[25] Congress declared the anticipated partnership between state and federal regulators a policy and goal of the CWA: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." § 1251(b); *see also Arkansas*, 503 U.S. at 101 (describing anticipated partnership between federal government and states). As an example, the NPDES program strives to balance power between states and the federal government. States have the primary responsibility of implementing the program and issuing permits but are subject to a federally mandated floor. Nat. Res. Def. Council v. EPA, 808 F.3d 556, 580 (2d Cir. 2015).

[26] The Clean Water Act of 1977, Pub. L. No. 95-217, § 5(a), 91 Stat. 1566, 1567 (1977) (codified as amended at 33 U.S.C. § 1251(g)) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter.").

Transfers Rule.[27] In 1982, in *National Wildlife Federation v. Gorsuch*, plaintiffs environmental groups argued that adverse changes in water quality occurring from impoundment in a reservoir fell within the definition of "pollutant," and the subsequent discharge into the downstream river was a direct violation of section 1311(a).[28] Plaintiffs presented well-documented evidence of dam-induced water quality changes including: low dissolved oxygen, dissolved minerals and nutrients, temperature changes, sediment, and supersaturation.[29] Furthermore, plaintiff environmental groups argued regulation of these discharges coincided with the remedial purpose of the CWA.[30]

Attempting to avoid triggering its nondiscretionary duty to issue NPDES permits, the EPA argued against regulation of dam discharges on two premises. First, the EPA asserted that there was no "addition."[31] According to the EPA's interpretation, to be an "addition" under the CWA the point source must introduce the pollutant to the navigable waters from the "outside world."[32] Second, EPA conceded that these dam-induced water quality changes fit the general definition of pollution—"the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water"[33]—but argued that they did not meet the narrower definition of "pollutant."[34] Distinguishing between the two, the EPA argued that section 1311(a) prohibits the discharge of *pollutants* not *pollution* thus, a discharge of the latter does not require a NPDES permit.[35]

Although this case was decided before the establishment of the *Chevron* two-step analysis, which provides a standard of review for cases such as this, the D.C. court held that in this case, the "EPA deserves great deference."[36] Applying its highly deferential standard, the court held that the EPA's interpretation of the "addition" and "outside world" was "not in-

[27] *Catskill III*, 8 F. Supp. 3d 500, 510–11 (S.D.N.Y. 2014) (summarizing the history of EPA's interpretation over water transfers as *amicus curiae*).

[28] Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982).

[29] *Id.* at 161–64.

[30] *Id.* at 161.

[31] *Id.* at 165.

[32] *Id.*

[33] *Id.* (quoting 33 U.S.C. § 1362(19)).

[34] EPA argued that the majority of terms listed under § 1362(6) are *substances* and the dam-induced water quality changes were water *conditions*, because the list predominantly addresses substances and the statute includes the language "means" rather than the more expansive "including, but not limited to," water *conditions* should be excluded from the term pollutants. *Id.* at 165.

[35] *Id.* at 165–66.

[36] *Id.* at 170. The Supreme Court decided *Chevron* in 1984, two years after the decision in *Gorsuch*.

consistent with congressional intent" and therefore, entitled to deference.[37]

Before the next case came up, in 1984, the Supreme Court laid out the landmark test for judicial review of agency interpretations in *Chevron v. Natural Resource Defense Council*.[38] Under the *Chevron* two-step, a court must first decide whether the statute is ambiguous using the tools of statutory construction.[39] If the statute unequivocally expresses Congress's intent, the analysis ends there.[40] On the other hand, if after applying the tools of statutory construction, a court cannot resolve the ambiguity, the court must defer to reasonable agency interpretation.[41] A reviewing court cannot substitute its own interpretation for an agency's unless the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the statute."[42] The following case applied the *Chevron* two-step test to the EPA's position in *Gorsuch*.

In 1988, in *National Wildlife Federation v. Consumer Power*, the EPA reestablished its position that an "addition" required introduction of a pollutant from the "outside world."[43] Once again, as an intervenor, the EPA defended its interpretation of "addition" in the context of a power plant that pumped water from Lake Michigan into manmade reservoirs which then flowed from the reservoirs through turbines and back into Lake Michigan.[44] Most fish or other aquatic organisms caught in this process were eviscerated upon reintroduction to Lake Michigan; however, some managed to survive.[45] Plaintiffs environmental groups alleged in their complaint that the discharge of fish parts into Lake Michigan was an "addition of pollutants" requiring a NPDES permit.[46] This time, applying *Chevron*, the Sixth Circuit affirmed the logic in *Gorsuch*, finding the EPA's interpretation as a reasonable construction of an ambiguous statute.[47]

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[37] *Id.* at 183. Applying something similar to *Chevron* step one, the Court reviewed the text and content of the CWA to see whether the EPA's interpretation was permissible. The Court observed that the EPA's interpretation may not be the best or the only reasonable interpretation, but this was not a matter before the Court. *Id.* at 171.

[38] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[39] *Id.*

[40] *Id.*

[41] *Id.* at 843.

[42] *Id.* at 844.

[43] Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 584 (6th Cir. 1988) ("There can be no addition unless a source 'physically introduces a pollutant into water from the outside world.'").

[44] *Id.* at 581.

[45] *Id.* at 582.

[46] *Id.* at 581. This challenge avoided the issue in *Gorsuch* of whether dam-induced water quality changes fit the definition of "pollutant" because entrained fish fit squarely within the definition of "biological materials" in 33 U.S.C. § 1362(6) (2012).

[47] *Consumers Power*, 862 F.2d at 585 (holding that the fish originate in Lake Michigan and through the normal operation of the hydroelectric dam become a mix of

Additionally, because the hydro-electric dam was arguably distinguishable from the instream dam in *Gorsuch*, the *Consumers Power* court provided a supplemental ground for excluding such water transfers from NPDES requirements. To refine the concept of the outside world, the Sixth Circuit added that water having the "status" as waters of the United States—as defined in section 1362(7)—is not part of the outside world.[48] Under the court's status approach, there cannot be an "addition" under the CWA if the receiving water body and the water being added are both waters of the United States.[49] According to the court, water that simply moved between Lake Michigan and the holding pond never lost its status as a "water of the United States" and therefore there was no "addition" on its return to Lake Michigan.[50] By distinguishing between the "passive diversion, or pumped movement of water" and the conversion of waters of the United States for intervening industrial uses, the court created a status test for defining the "outside world" requirement of an "addition."[51] In the latter case, diverted water "enters the industrial complex and absorbs heat and other minerals produced by the plant or electric generator" causing it to lose its status as a water of the United States.[52] Reintroducing water that has lost its status as a water of the United States would be an "addition." However, there is no "addition" when commingling separate waters of the United States, according to the *Consumers Power* court.[53]

Although factually distinguishable from the water transfers covered by the EPA's final rule, these cases are important because they provide the general framework relied on by the EPA in interpreting the Water Transfers Rule. For there to be an "addition," the pollutant must be introduced from the outside world, and the outside world does not include other waters of the United States. In the wake of the Dam Cases, environmental plaintiffs brought suits testing the outer limits of this interpretation. As described below, these cases marked a turning of the tides in favor of environmental group plaintiffs.

2. Attacking the Singular Entity Theory

Prior to promulgation of the Water Transfers Rule, *Consumers Power* represented the high-water mark for deference to the EPA's singular en-

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live fish and fish parts returned to Lake Michigan which is in no way an introduction of a pollutant from the outside world).

[48] *Id.* at 585.

[49] *Id.* at 589.

[50] Because the water in Lake Michigan and the water flowing through the holding ponds were both waters of the United States at all times, there was no introduction of something from the outside world. Due to the water's status, there could be no addition because the waters were part of same collective whole as waters of the United States. *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

tity interpretation of "addition." In the wake of the Dam Cases, other courts were quick to both factually distinguish cases from the dam context and reduce the amount of deference given to the EPA. Suddenly, the EPA was up a creek without a paddle while several courts held that NPDES permits were required for interbasin water transfers.[54] In 2001, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, the Second Circuit declined to give the "great deference" from *Gorsuch* and *Consumers Power* to the EPA's interpretation of addition because it was articulated through "informal policy statements and consistent litigation positions taken . . . over the years" and not formal adjudication or notice-and-comment rulemaking.[55] Lacking the force of law or promulgation using the processes delegated to the EPA to make rules carrying the force of law, the EPA's interpretation did not warrant *Chevron* deference.[56] Instead, the Second Circuit applied *Skidmore/Mead Corp.*'s "power to persuade" standard.[57] Under *Skidmore/Mead Corp.* an agency's "rulings, interpretations and opinions" make up "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[58] How much deference the agency's interpretation garners under the *Skidmore/Mead Corp.* standard depends on, *inter alia*, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors

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[54] *See, e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77, 83 (2d Cir. 2006) [hereinafter *Catskill II*] ("It is the meaning of the word 'addition' upon which the outcome of *Catskills I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context."); N. Plains Res. Council v. Fid. Expl. & Dev. Co., 325 F.3d 1155, 1163 (9th Cir. 2003) (discharging unaltered water from an aquifer into the Tongue River was a discharge of a pollutant); *Catskill I*, 273 F.3d 481, 491 (2d Cir. 2001) ("[T]he transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1299 (1st Cir. 1996) (holding that a transfer between two distinct water bodies, Pemigewasset River and Loon Pond, constituted an addition and required a NPDES permit); Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991) (concluding that a discharge of a pollutant includes cases where polluted water passes between one water body and another via a point source).

[55] *Catskill I*, 273 F.3d at 490.

[56] *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (holding that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); *see also*, United States v. Mead Co., 533 U.S. 218, 226–27 (2001) (explaining "[A] particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

[57] *Catskill I*, 273 F.3d at 490–91.

[58] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

which give it *power to persuade*."[59] The power to persuade standard allows courts to consider a number of factors and apply deference on a sliding scale, ranging from *Chevron's* great deference at one end, to near irrelevance at the other.[60]

After considering EPA's interpretation and its power to persuade under *Skidmore/Mead Corp.*, the Second Circuit rejected the singular entity theory. The court held that an "addition" occurred when a pollutant was introduced from outside world only when the "'outside world' is construed as *any place outside the particular water body to which pollutants are introduced*."[61] The EPA's singular entity theory failed to persuade the Second Circuit because "[s]uch a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation *is inconsistent with the ordinary meaning* of the word 'addition.'"[62]

Eventually, the dispute over whether interbasin water transfers were subject to the NPDES permitting requirements percolated its way up to the Supreme Court. In 2004, in *South Florida Water Management District v. Miccosukee Tribe of Indians,* Native American tribes and plaintiffs environmental groups challenged the South Florida Water Management District's pumping of water containing high levels of phosphorous from a canal to a nearby reservoir, arguing the discharge required a NPDES permit.[63] The District argued that the NPDES program only applied to point sources that introduce pollutants to waters of the United States, not point sources merely allowing water to pass through.[64] Under this interpretation, the pumping station at issue did not need a NPDES permit because the station itself was not adding any pollutants to the water it conveyed to the reservoir.[65] The Supreme Court rejected the District's position citing the definition of "point source," which includes point sources that do not themselves add pollutants to the water being conveyed.[66] In light of Congress's express intent, the District's contrary proposed reading of "discharge of a pollutant" was patently incompatible with the Act as a whole.[67]

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[59] *Id.* (emphasis added).

[60] *Mead Co.*, 533 U.S. at 228.

[61] *Catskill I*, 273 F.3d at 491 (emphasis added).

[62] *Id.* at 493 (emphasis added).

[63] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 99 (2004).

[64] *Id.* at 104.

[65] *Id.* at 105.

[66] *Id.*

[67] *Id.* ("[The] definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' § 1362(7). Tellingly, the examples of 'point sources' listed by the Act include pipes, ditches, tunnels, and con-

After deciding the issue brought on appeal, the Court addressed a second argument advanced by the EPA as *amicus curiae*—the unitary waters theory.[68] Whereby, for the purpose of determining whether there was an "addition" that triggered NPDES, all waters carrying the status as "navigable waters" under section 1362(7) should be viewed as unitary.[69] Applying its interpretation to the facts of the case, the EPA argued that the pumping station did not need a NPDES permit because there was no addition of a pollutant.[70] Both the canal and the reservoir were navigable waters thus, merely transferring unaltered water between the two would not constitute an addition to the *unitary navigable waters*.[71]

Leaving the theory open on remand, the Court expressed considerable doubt about the theory's compatibility with the CWA overall.[72] The EPA asserted its interpretation was in line with Congress's intent to have nonpoint source regulations cover water transfers, relying heavily on section 1314(f)(2)(F).[73] However, as the Court correctly noted, section 1314 covers nonpoint sources but does not explicitly apply to dams or levees that *also* fit within the definition of point source.[74] With rising skepticism, the Court also noted that other portions of the CWA protect individual bodies of water rather than a collective unitary entity.[75] Furthermore, the Court pointed out that the EPA's unitary waters theory was contrary to some of its own regulations.[76] NPDES permit holders may obtain "intake

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duits, objects that do not themselves generate pollutants but merely transport them.").

[68] *Id.* at 106–07.

[69] *Id.* at 105–06. The unitary waters theory and the singular entity theory are two names for the same principle. Compare the unitary waters theory advanced by the EPA in *Miccosukee*, 541 U.S. at 105–06, with singular entity theory described in *Catskill I*, 273 F.3d at 493 ("[A] 'singular entity' theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States.").

[70] *Miccosukee*, 541 U.S. at 106, 109.

[71] *Id.* at 109.

[72] *Id.* at 106.

[73] 33 U.S.C. § 1314(f)(2)(F) (2012) relates to identifying nonpoint sources which includes "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." *See also Miccosukee*, 541 U.S. at 106 (citing § 1314(f)(2)(F)).

[74] *Id.* at 107. Without an explicit application of § 1314(f) to point sources this section provides little help to the EPA's argument. Nonpoint sources are defined by exclusion as anything that is not a point source, so logically § 1314(f) does not apply to conveyances from point sources and only applies to conveyances from sources other than point sources as defined under the CWA. The examples in § 1314(f)(F) only apply to the extent that they are not covered by the definition of point source.

[75] *Id.* (discussing § 1313(c)(2)(A) and state's ability to set individualized water quality standards for separate bodies of water that impact the effluent limitations in NPDES permits, suggesting the CWA applies to individual bodies of water not the waters collectively).

[76] *Id.* at 107–08.

credits" for pollutants present in water when withdrawn if the permit holder discharges the water into the same body of water.[77] Nevertheless, because the unitary waters theory was not raised below the Court declined to rule on its validity and remanded the case for further review on the factual issue of whether the reservoir and canal were "meaningfully distinct water bodies."[78]

The Court's remand for additional fact finding on the issue of whether the two water bodies were "meaningfully distinct" completely undercuts the premise of the unitary waters theory. Under the unitary waters theory there is no need to consider if bodies of water are "distinct." The relevant question is limited to whether both waters are waters of the United States. If both are, there is no addition and the NPDES requirements are not triggered. By remanding for fact finding on the issue of "distinct," the Court implicitly rejected the unitary waters theory.

3. EPA Agency Action

After a wave of cases refusing to give the EPA deference, the agency was quick to right its sinking ship with formal agency action.

a. 2005 Interpretive Memo

In 2005, General Counsel for the EPA issued an interpretive memorandum explaining its position on water transfers.[79] As stated in the memo, "[b]ased on the statute as a whole, we . . . conclude that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA."[80] Water transfers are defined as "any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use."[81] The EPA dropped the prejudicial "unitary waters theory" label and instead relied on a holistic reading of the statute to conclude it was Congress's intent to preclude water transfers from NPDES regulation.[82] Viewed through EPA's holistic lens, the cooperative federalism created by the CWA was clear evidence of

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[77] *See* 40 C.F.R. § 122.45(g)(4) (2003); *Miccosukee*, 541 U.S. at 112 (highlighting that the NPDES program applies to individual water bodies at times).

[78] *Miccosukee*, 541 U.S. at 112.

[79] Memorandum from the EPA Office of Gen. Counsel on Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Aug. 5, 2005).

[80] *Id.* at 3.

[81] *Id.* at 1.

[82] *Id.* at 5–6 ("In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress did not intend to subject water transfers to the NPDES program.").

congressional intent to leave water transfers for state monitoring under nonpoint source regulations.[83]

Not only was the EPA careful to avoid the bad optics accompanying the "unitary waters theory" but it was also careful to explain how the new holistic approach for interpreting the CWA was consistent with the Supreme Court's decision in *Miccosukee*. The EPA cited three reasons for why its new interpretation fit with the *Miccosukee* decision: (1) the Court expressly reserved judgment on the unitary waters theory; (2) the Court alluded that the CWA may be construed in light of all its policy objectives; and (3) by taking a more expansive approach to evaluating whether two water bodies are meaningfully distinct, the Court undercut the prior district courts' interpretation of "addition" that foreclosed the unitary waters approach.[84]

Shortly after distribution of the interpretive memo, the Second Circuit had a chance to revisit its holding in *Catskill I*.[85] Unpersuaded by the recent developments proffered by the city and the EPA—the interpretive memo and the holding in *Miccosukee*—the court upheld its position in *Catskill I*.[86] Following the application of *Chevron* deference outlined in *Christensen v. Harris County* and refined in *United States v. Mead Corp.*, the court held that the interpretive memo deserved the *Skidmore/Mead Corp.* power to persuade rather than the stronger *Chevron* deference method.[87] Viewed in light of *Skidmore/Mead Corp.*, the court held that the EPA's holistic interpretation failed to address what it called the "plain language" interpretation of "addition" as applied to interbasin water transfers.[88] Addressing the decision in *Miccosukee*, the court concluded that the Supreme Court's decision supported its prior interpretation of "addition" in the interbasin water transfer context rather than undercut it, as the EPA suggested.[89] In light of these losses in court, the EPA initiated a for-

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[83] The EPA cited § 1251(g) and § 1370 as conclusive evidence of Congress's intent not to overburden state water allocation management with onerous federal regulation. *Id.* at 13–14.

[84] Memorandum from the EPA Office of General Counsel on Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 14 (Aug. 5, 2005).

[85] *Catskill II*, 451 F.3d 77, 82 (2d Cir. 2006).

[86] *Id.* ("The City basically serves us warmed-up arguments that we rejected in *Catskills I*, with the additional contention that either the Supreme Court's *Miccosukee* decision, the EPA interpretation, or both compel a result different from the one we reached earlier. We disagree.").

[87] *Id.* at 82 (quoting United States v. Mead Corp., 533 U.S. 218, 235 (2001) and applying *Skidmore* deference).

[88] *Catskill II*, 451 F.3d at 84 ("These 'holistic' arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for 'the discharge of any pollutant.'").

[89] *Id.* at 83 ("*Miccosukee* cited with approval our 'soup ladle' analogy and the distinction between inter- and intra-basin transfers. The Court remanded the case to the district court to determine whether the water bodies in question were 'two pots of

mal rulemaking process in 2006 and published a proposed rule based on the 2005 interpretive memo.[90]

b. Final Rule

Following the comment period on its draft rule, the EPA promulgated the final rule adding water transfers to the NPDES exclusions as follows:

> Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.[91]

Essentially unchanged from the 2005 interpretive memo, the foundation for the EPA's Water Transfers Rule is a holistic reading of the CWA and its multiple policy goals.[92] The EPA weighed the competing policy goals of the CWA—Congress's intent not to unduly burden *state rights to manage water quantity* and the remedial goals to *protect water quality*—concluding Congress did not intend to burden state water allocation rights by requiring NPDES permits for water transfers.[93] The EPA relied on sections 1251(b),(g), 1314(f), and 1370, arguing that these sections demonstrate Congress's intent to leave water allocation management to the states, including regulating interbasin water transfers with nonpoint source regulation.[94] Because water transfers are an essential element to state's infrastructure for delivering water to public users, these goals and policy sections evidence Congress's intent not to subject water allocation to burdensome and unnecessary federal regulation.[95] In effect, the final rule is an unchanged implementation of the 2005 interpretive memo—which was a dressed up version of the "unitary waters theory."[96]

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soup, not one.' This remand would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers." (internal citations omitted))

[90] National Pollutant Discharge Elimination System (NPDES) Water Transfer Proposed Rule, 71 Fed. Reg. 32, 887 (June 7, 2006) (to be codified at 40 C.F.R. § 122.3(i)).

[91] *Id.*

[92] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)) ("A holistic approach to the text of the CWA is needed here 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.").

[93] *Id.* at 33,702.

[94] *Id.*; *see also* 33 U.S.C. § 1251(b) (2012) (recognizing and protecting the primary responsibility's and rights of states); *id.* § 1251(g) (protecting state's authority over water allocation); *id.* § 1314(f)(F) (identifying nonpoint sources of pollution); *id.* § 1370 (preserving state authority to adopt or enforce water quality programs).

[95] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. at 33,702.

[96] See *supra* Section I.B.3.a for a discussion of the 2005 interpretive memo.

After promulgation of the final rule, the Eleventh Circuit had a chance to apply the Water Transfers Rule to a pending case, *Friends of the Everglades v. South Florida Water Management District*.[97] Conducting an extensive review of the facts, the district court concluded that Lake Okeechobee and the canal system at issue were meaningfully distinct bodies of water under the *Miccosukee* standard.[98] Addressing the Water District's main argument, that there cannot be an addition when existing pollutants are transferred between navigable waters—the unitary waters theory—the Eleventh Circuit noted, "[t]he unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate."[99] However, the promulgation of the Water Transfers Rule changed the landscape for judicial review.[100] According to the principles of *Mead*, agency interpretations promulgated with the force of law through notice-and-comment rulemaking deserve *Chevron* deference.[101] Finding *Chevron* rather than *Skidmore/Mead Corp.* as the appropriate level of deference, the Eleven Circuit disregarded the prior case law rejecting the unitary waters theory. With limited analysis, the Eleventh Circuit held that the Agency had adopted one of two or more reasonable interpretations of the statute making the Water Transfers Rule *per se* a "reasonable, and therefore, permissible, construction of the [CWA]." [102] For the first time since the Dam Cases, the court deferred to the EPA's interpretation.

Meanwhile, the Second Circuit was also addressing the new Water Transfers Rule. The procedural history leading to the challenge of the Water Transfers Rule in the Second Circuit developed as follows: While the Eleventh Circuit was deciding *Friends I*, plaintiffs environmental groups hastily brought challenges to the EPA's Water Transfers Rule in a number of district courts.[103] The cases were consolidated and randomly

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[97] This case challenged the pumping of agriculturally polluted water from canals into Lake Okeechobee and was not a direct challenge to the final rule. *Friends I,* 570 F.3d 1210, 1214 (11th Cir. 2009).

[98] *Id.* at 1216, n.4.

[99] *Id.* at 1217–18 (citing S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 107 (2004); *Catskill II*, 451 F.3d 77, 83 (2d Cir. 2006); N. Plains Res. Council v. Fid. Expl. & Dev. Co., 325 F.3d 1155, 1163 (9th Cir. 2003); *Catskill I*, 273 F.3d 481, 491 (2d Cir. 2001); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1296 (1st Cir. 1996); Dague v. City of Burlington, 935 F.2d 1343, 1354–55 (2d Cir. 1991)).

[100] *Friends I,* 570 F.3d at 1218 (11th Cir. 2009). The fact that the rule was enacted after litigation started or in response to similar litigation is irrelevant to the application of whether the rule receives *Chevron* deference. *See* Barnhart v. Walton, 535 U.S. 212, 221 (2002); Smiley v. Citibank, 517 U.S. 735, 740–41 (1996); United States v. Morton, 467 U.S. 822, 835 n.21 (1984).

[101] Applying the standard from *Mead Corp.*, rules promulgated with the force of law through the formal channels delegated by Congress is a "very good indicator" of deserving *Chevron* deference. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

[102] *Friends I,* 570 F.3d at 1228.

[103] *Catskill III,* 8 F. Supp. 3d 500, 515 (S.D.N.Y 2014) (listing cases brought in the First, Second, and Eleventh Circuit Courts of Appeal).

assigned to the Eleventh Circuit and stayed, pending the outcome in *Friends I.*[104] In *Friends of the Everglades v. EPA*, the Eleventh Circuit dismissed the consolidated cases citing lack of subject matter jurisdiction under 33 U.S.C. section 1369(b)(1).[105] After dismissal of the consolidated cases in the Eleventh Circuit, the district court in New York lifted the stay on its pending case.[106] With the stay lifted, numerous environmental groups and states intervened on behalf of the plaintiffs and defendants respectively.[107] The district court held the Water Transfers Rule was an unreasonable interpretation of the CWA as a matter of *Chevron* step two.[108] The EPA then appealed to the Second Circuit which overturned the district court.

II. APPLYING THE *CHEVRON* TWO-STEP TO THE WATER TRANSFERS RULE

After promulgation of the Water Transfers Rule, there is no question that *Chevron* is the appropriate standard of deference for the EPA's interpretation.[109] If Congress explicitly or implicitly left a gap in a statute, the gap acts as an automatic delegation of authority to the agency responsible for administering the statute to fill the gap with a reasonable interpretation.[110] To decide whether an agency's interpretation is reasonable, courts apply the *Chevron* two-step framework. At step one, a court asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[111] Effectively, step one asks the question of whether the agency has the authority to act in this area or if Congress has already specifically addressed the issue.

As a matter of step two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[112]

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[104] Catskill Mountains Chapter of Trout Unlimited Inc. v. EPA, 630 F. Supp. 2d 295, 304 (S.D.N.Y. 2009).

[105] Friends of the Everglades v. EPA, 699 F.3d 1280, 1287–88 (11th Cir. 2012).

[106] *Catskill III*, 570 F.3d at 516.

[107] *Id.*

[108] *Id.* at 553–54.

[109] "[A] particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Co., 533 U.S. 218, 230–31 (2001). Congress delegated the EPA the authority to promulgate rules with the force of law interpreting the CWA and the Water Transfers Rule was issued under that authority.

[110] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[111] *Id.* at 842–43.

[112] *Id.* at 843.

Courts hold agency interpretations to a reasonableness standard.[113] For the agency's interpretation to be a reasonable one, it need not be the only interpretation "or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[114] A court must give deference to an agency's interpretation that is supported by a reasoned explanation and is a "*reasonable policy choice* for the agency to make."[115] Thus, "any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[116] The step two analysis addresses whether the agency's decision was a product of a reasoned decision making process.

Litigation regarding the EPA's Water Transfers Rule has resulted in an interesting series of cases from which to view courts' application of the *Chevron* two-step. Wading through the overlapping sections and definitions of the CWA is a significant undertaking unto itself. Additionally, there is a long string of cases going all the way up to the Supreme Court addressing the unitary water theory to varying degrees.[117] Lastly, there are significant policy determinations in play. Applying the NPDES program to water transfers would have broad implications for water allocation infrastructure, and the lack of regulation carries irreversible environmental consequences. Applying its expertise to this entangled mix of statutory interpretation and policy concerns, the EPA responded with the Water Transfers Rule. Balancing policy concerns and interpreting an ambiguous statute is seemingly the exact kind of decision the *Chevron* Court envisioned as ripe for an agency rather than the courts to make.[118] However, just because difficult policy issues are in play, agencies do not have the latitude to regulate from a clean slate. The Administrative Procedure Act (APA) expressly preserves courts' right to review agency action and "decide all relevant questions of law, [and] interpret constitutional and statutory provisions . . . ."[119] After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[120]

The following Sections review the varying approaches to the *Chevron* two-step used by the *Friends I*, *Catskill III*, and *Catskill IV* courts in evaluating the Water Transfers Rule and explain how some of these approaches are problematic.

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[113] *Id.* at 844 ("a court may not substitute its own construction of a statutory provision for *a reasonable interpretation made by the administrator of an agency*" (emphasis added)).

[114] *Id.* at 844 n.11.

[115] *Id.* at 845 (emphasis added).

[116] United States v. Mead Corp., 533 U.S. 218, 227 (2001); *see also Chevron*, 467 U.S. at 844.

[117] *Catskill III*, 8 F. Supp. 3d 500, 558–61 (S.D.N.Y. 2014); *Catskill II*, 451 F.3d 77, 83 (2d Cir. 2006); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 105–06 (2004).

[118] *Chevron*, 467 U.S. at 844.

[119] Administrative Procedure Act, 5 U.S.C. § 706 (2012).

[120] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

A. *Step One—Ambiguity in the Statute*

Before a court can decide whether to give deference to an agency's interpretation, there must be ambiguity in the statute. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[121] Because it is the function of the judiciary to be the final voice on issues of statutory interpretation, it is the court's role to determine if the language of the statute is ambiguous without giving any deference to the agency.[122] To ascertain the specific intent of Congress, courts apply the traditional tools of statutory construction.[123] The traditional tools include the text, the context, the general framework of the statute as a whole, and the legislative history for some courts.[124] Prior judicial interpretations also come into play when reviewing a statute for ambiguity.[125] "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[126] Therefore, the doctrine of *stare decisis* only preempts an agency's ability to interpret statutes when the prior decision found the statute to be unambiguous.

Applying step one to the Water Transfers Rule, the question is whether the text, context, and other factors surrounding the CWA express Congress's unambiguous intent to subject interbasin water transfers to the NPDES program. Starting with the text of the statute, the CWA prohibits the "discharge of any pollutant by any person."[127] NPDES permits are required for the "discharge of any pollutant, or combination of pollutants."[128] "Discharge of a pollutant" is defined as "any addition of any

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[121] *Chevron*, 467 U.S. at 843.

[122] Wells Fargo Bank, N.A. v. FDIC, 310 F.3d 202, 205–06 (D.C. Cir. 2002) (holding that "an agency is given no deference at on the question whether a statute is ambiguous").

[123] *Chevron*, 467 U.S. at 843 n.9.

[124] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 609–14 (1991) (considering both the statutory text and the legislative history to interpret Congress's intent); *Chevron*, 467 U.S. at 862–64 (relying on legislative history to discern the intent of Congress). For a detailed statistical analysis of Supreme Court opinions relying on legislative history see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1135–36 (2008).

[125] Nat's Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 982 (2005).

[126] *Id.*

[127] 33 U.S.C. § 1311(a) (2012).

[128] *Id.* § 1342(a)(1) (2012).

pollutant to navigable waters from any point source."[129] And navigable waters are defined as "the waters of the United States."[130] According to the EPA, the CWA leaves unresolved the question of whether an addition occurs only when a pollutant is first introduced to the navigable waters as a collective whole, or if an addition can be the result of an interbasin water transfer between meaningfully distinct water bodies.[131]

1. Plain Meaning of the Text

Statutory interpretation begins with the text; if the language at issue has a plain and unambiguous meaning, there is no need to go any further.[132] Generally, the EPA and environmental groups agree that the plain meaning of "addition" is something akin to the "joining or uniting of one thing to another."[133] This definition is consistent with the Supreme Court's interpretation of the term as applied in the CWA.[134] Thus, in the context of water transfers, to constitute an "addition" there must be a joining or uniting of pollutants to navigable waters in a manner that causes an increase. However, agreeing on a plain meaning of the word "addition" does not resolve the issue. Additions do not happen in a vacuum. As demonstrated by the sea of metaphors used by courts, "addition," to some degree, depends on the definition of the transferring and receiving water bodies.[135] On one hand, if a court defines navigable waters as a collective body, an addition only occurs the first time the pollutants are joined with the collective waters. On the other, if a court considers navigable waters as individual water bodies, an addition may occur when wa-

[129] *Id.* § 1362(12) (2012).

[130] *Id.* § 1362(7).

[131] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,699 (June 13, 2008) (to be codified at 40 C.F.R. pt. 122.3(i)).

[132] Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning . . . .").

[133] *Addition*, Webster's Third Int'l Dictionary Unabridged 24 (2002).

[134] L.A. Cty. Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710, 713 (2013) ("'add' means to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate") (quoting Webster's Third New International Dictionary 24 (2002)).

[135] *See Friends I*, 570 F.3d 1210, 1228 (11th Cir. 2009) ("Two buckets sit side by side, one with four marbles in it and the other with none . . . . A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket . . . . On one hand . . . . there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand . . . there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred."); *Catskill I*, 273 F.3d 481, 492 (2d Cir. 2001) ("If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."); *Catskill II*, 451 F.3d 77, 81 (2d Cir. 2006) ("The Tunnel's discharge, in contrast, was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer. Interbasin transfers, we held in *Catskills I*, constitute 'additions,' rendering the City's reliance on the Dam Cases misplaced.").

ter is transferred between meaningfully distinct bodies. The EPA adopted the former approach in the Water Transfers Rule.[136] As evidence of the validity of its interpretation of "addition," the EPA cites the Dam Cases.[137] However, this is a red herring. As the definitions and metaphors make clear, the plain meaning of "addition" is not what creates the ambiguity. The difference in interpretation is entirely based on how you interpret "navigable waters"—a collective whole or individual bodies.[138]

Looking at the text of the statute there is one more, albeit less persuasive, argument not addressed by any of the parties or the courts. The statute reads "any addition," which could mean that Congress intended for "addition" to be applied in its broadest sense; that is, that both types of additions are covered.[139] This interpretation would be consistent with the general policy of construing the Act broadly to protect the quality of the nation's waters. If that is the case, the EPA's interpretation severely constrains the scope of "addition" and would be contrary to the clear intent of Congress.

However, all three courts considered the plain meaning of addition insufficient for resolving the ambiguity and moved on to the other tools of statutory interpretation to see if they could resolve the ambiguity.[140] Logically, the next place to look for a resolution of the ambiguity is the plain meaning of "navigable waters."

"Navigable waters" is defined as "the waters of the United States, including the territorial seas."[141] Finding ambiguity in these terms, the court in *Catskill IV* used an example from *Friends I*: "In ordinary usage 'waters' can collectively refer to several different bodies of water such as 'the waters of the Gulf coast,' or can refer to any one body of water such as 'the waters of Mobile Bay.'"[142]All three courts held, correctly, that the plain meaning of "navigable waters" was not enough to show Congress specifically intended to subject interbasin water transfers to NPDES requirements.[143] Beyond the plain meaning of the text, a court may consider whether prior judicial interpretations resolve the ambiguity.

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[136] *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. at 33,669.

[137] *Id.* at 33,701 (referencing the Dam Cases discussed *supra* part I.B.1 as support for its "outside world" interpretation of addition).

[138] *Catskill III*, 8 F. Supp. 3d 500, 524 (S.D.N.Y. 2014).

[139] This argument flows from the general canon of statutory construction that a statute should be interpreted "so as to avoid rendering superfluous" any statutory language. Hibbs v. Winn, 542 U.S. 88, 101 (2004).

[140] *Catskill IV*, 846 F.3d 492, 514 (2d Cir. 2017); *Friends I*, 570 F.3d at 1223; *Catskill III*, 8 F. Supp. 3d at 524–25.

[141] 33 U.S.C. § 1362(7) (2012).

[142] *Catskill IV*, 846 F.3d at 512–13 (quoting *Friends I*, 570 F.3d at 1223).

[143] *Id. Catskill III*, 8 F. Supp. 3d at 522.

2. Prior Judicial Interpretations

A prior judicial interpretation may end the analysis at step one and preclude a contrary agency regulation if the judicial precedent held that the statute was unambiguous.[144] By the time the Second Circuit reviewed the Water Transfers Rule in *Catskill IV*, it had *Catskill I* & *II* as precedent potentially preempting the EPA's interpretation. In both cases, the court considered the unitary waters theory and the particular phrase at issue: "any addition . . . to navigable waters."[145] Applying *Skidmore/Mead Corp.*, the Second Circuit held—twice—that the unitary waters theory appeared to be contrary to the plain meaning of "addition."[146] In the words of the *Catskill I* court:

> In any event, *none of the statute's broad purposes sways us from what we find to be the plain meaning of its text* . . . Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, *particularly where the balance struck in the text is sufficiently clear to point to an answer*. We find that the textual requirements of the discharge prohibition in § 1311(a) and the definition of "discharge of a pollutant" in § 1362(12) are met here.[147]

To skirt around the seemingly unequivocal holding of *Catskill I*—based on the plain meaning of the language in the statute—the *Catskill IV* court relied on single passing referencing to a different set of facts where the *Catskill I* court might have applied *Chevron* deference.[148] A mere mention that under a different set of facts *Chevron* might apply should not take away from what the court did decide on the facts in front of it—the plain language of the statute unambiguously expressed the intent of Congress. In *Catskill II*, the court reiterated its holding once again, rejecting EPA's holistic arguments because they "*simply overlook [the CWA's] plain language.* NPDES permits are required for 'the discharge of any pollutant,' which is defined as '*any addition of any pollutant to navigable waters* from any point source'"[149] Once again, the *Catskill IV* court dismissed this analysis by relying on a statement from the court that if the facts were different, *Chevron* would apply.[150]

Additionally, the *Catskill IV* court mentioned that *Catskill I* & *II* were decided on the plain meaning of "addition" and not the full phrase "ad-

[144] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S 967, 982–83 (2005).

[145] *Catskill I*, 273 F.3d 481, 493–94 (2d Cir. 2001); *Catskill II*, 451 F.3d 77, 84 (2d Cir. 2006).

[146] *Catskill I*, 273 F.3d at 493–94; *Catskill II*, 451 F.3d at 84.

[147] *Catskill I*, 273 F.3d at 494 (emphasis added).

[148] *Catskill IV*, 846 F.3d 492, 510 (2d Cir. 2017) ("If 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.") (quoting *Catskill I*, 273 F.3d at 490–91).

[149] *Catskill II*, 451 F.3d at 84 (emphasis added) (internal citations omitted).

[150] *Catskill IV*, 846 F.3d at 511.

dition . . . to navigable waters."[151] This argument is highly unpersuasive in light of the discussion on the plain meaning of "addition" presented above—"addition" cannot be interpreted with reference to what is receiving the addition. The inexorable link between an addition and the recipient of the addition supports the conclusion that *Catskill I* & *II* considered the full phrase "addition . . . to navigable waters."[152]

Interestingly, neither the *Catskill III* nor *Catskill IV* courts concluded that prior judicial constructions in *Catskill I* & *II* precluded the EPA from espousing its position in a formal rulemaking that would receive *Chevron* deference.[153] Looking at only one factor—prior application of *Skidmore/Mead Corp.* deference—as dispositive, the *Catskill III* court applied a cursory analysis to the issue providing little reasoning to support its conclusion.[154] The *Catskill IV* court also excluded the prior interpretations in *Catskill I* & *II* because those cases were decided under *Skidmore/Mead Corp.* deference, not *Chevron.*[155] To justify this distinction, the court explained that although *Skidmore/Mead Corp.* requires a threshold determination of ambiguity, courts are not compelled to decide the case on the grounds that the text is unambiguous; the text is just one of many factors a court may consider in deciding the interpretation's power to persuade.[156] That logic may be correct, but it does not address the fact that the court could still decide the statute is unambiguous under *Skidmore/Mead Corp.* The *Chevron-Skidmore/Mead Corp.* deference continuum determines the amount of deference the court gives to an agency's interpretation. It *does not* limit a court's ability to decide that an interpretation is unambiguously foreclosed by the language of the statute. Whichever deference test the court applies should not undercut a court's holding that the statute is unambiguous. Otherwise, the result is the series of illogical events that led to the Water Transfers Rule. Numerous courts held the EPA's interpretation of "any addition . . . to navigable waters" in an internal policy memo as contrary to the plain meaning of the word "addition" and the structure of the CWA.[157] Despite this backdrop, the EPA chose to promulgate a rule based on the same logic used in the memo

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[151] *Id.* at 512.

[152] In concluding that "the discharge of water containing pollutants from one distinct water body into another is an 'addition of [a] pollutant' under the CWA" the *Catskill I* & *II* courts considered the import of the full phrase "addition . . . to navigable waters." *Catskill II*, 451 F.3d at 80.

[153] The *Friends I* court was not reviewing a direct challenge to the Water Transfers Rule like the *Catskill III* & *IV* courts. Moreover, it was in the Eleventh Circuit rather than the Second Circuit so the *Catskill I* & *II* decisions were not precedent the court had to follow.

[154] *Catskill III*, 8 F. Supp. 3d 500, 521 (S.D.N.Y. 2014).

[155] *See Catskill IV*, 846 F.3d at 510–512.

[156] *Id.* at 510.

[157] *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,667, 33,701 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

and rejected by the courts. The EPA now asks that the rule receive *Chevron* deference. In his dissenting opinion in *National Cable & Telecommunications Association v. Brand X,* Justice Scalia posited a hypothetical warning of this kind of absurd result and expressed concerns over[158] agencies usurping judicial authority by overruling court precedent with notice-and-comment rulemaking. In response, the majority of the Court clarified that agencies do not overturn prior judicial interpretations of *ambiguous statutes.* Instead "the agency *may, consistent with the court's holding,* choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."[159] Agencies acting in the shadow of prior judicial interpretations are precluded from promulgating regulations contrary to unambiguous statues and from espousing positions *inconsistent with the court's prior holdings.*

In the circumstances surrounding the Water Transfers Rule, the *Catskill I & II* courts held that the plain language of the statute unambiguously foreclosed the agency's interpretation. Formal rulemaking does not fix the fact that the agency's interpretation is still *inconsistent* with the court's holding. For example, the *Catskill I* & *II* courts held that "'addition' means the introduction into navigable water from the 'outside world,' with the outside world being defined as 'any place outside the particular water body to which pollutants are introduced.'"[160] The EPA's interpretation in the Water Transfers Rule cannot be read as *consistent* with the Second Circuit's holding in either *Catskill I* or *II.* By dismissing the prior judicial precedent merely because it was decided under *Skidmore/Mead Corp.* deference, the *Catskill IV* & *III* courts are relying solely on form and missing the substance. To preserve the separation of powers, courts should apply a more nuanced test that accounts for the possibility that a court may decide the statute is unambiguous under any deference test. The prior judicial constructions of the plain meaning of "addition" should have compelled a ruling against the EPA at step one. Nevertheless, the statute is ambiguous, and the analysis flows on.

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[158] Justice Scalia stated:

> Imagine the following sequence of events: FCC action is challenged as ultra vires under the governing statute; the litigation reaches all the way to the Supreme Court of the United States. The Solicitor General sets forth the FCC's official position (approved by the Commission) regarding interpretation of the statute. Applying *Mead,* however, the Court denies the agency position *Chevron* deference, finds that the best interpretation of the statute contradicts the agency's position, and holds the challenged agency action unlawful. The agency promptly conducts a rulemaking, and adopts a rule that comports with its earlier position—in effect disagreeing with the Supreme Court concerning the best interpretation of the statute. According to today's opinion, the agency is thereupon free to take the action that the Supreme Court found unlawful.

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S 967, 1016–17 (2005) (Scalia, J, dissenting).

[159] *Id.* at 983 (emphasis added).

[160] *Catskill II,* 451 F.3d 77, 80 (2d Cir. 2006) (citing the court's prior holding in *Catskill I,* 273 F.3d 481, 491 (2d Cir. 2001)).

Not only is there ample precedent on the particular phrase "addition . . . to navigable waters," but the Supreme Court has also addressed the plain meaning and scope of "the waters of the United States" in a series of cases.[161] The controversy over the outer limits of navigable waters is not relevant to the Water Transfers Rule since most water transfers occur within what are considered traditionally navigable waters—lakes and rivers.[162]

What is relevant to this issue is whether "navigable waters" refers to a collective entity or individual bodies of waters. If "navigable waters" unambiguously refers to individual water bodies rather than a collective whole, that would preempt the EPA's interpretation of "addition to the waters of the United States." Tellingly, in *Rapanos v. United States*, the Supreme Court considered the jurisdictional limits of "navigable waters" as applied to a homeowner filling in wetlands on his property that were 11–20 miles away from the nearest traditionally navigable water, the Court held that "the waters of the United States" refers to individual water bodies, not a single collective water:

> The Corps' expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows *plainly that § 1362(7) does not refer to water in general.* In this form, "the waters" *refers more narrowly to water "[a]s found in streams* and *bodies* forming geographical features such as oceans, *rivers, [and] lakes,*" or "the flowing or moving masses, as of waves or floods, making up such streams or bodies."[163]

Once again avoiding preemption by prior judicial construction, the *Catskill IV* court held that *Rapanos* did not apply because as found in section 1362(12), Congress said "any addition of any pollutant to navigable wa-

[161] There is a line of cases attempting to define the outer contours of "the waters of the United States" in the § 1344 context because the CWA has only one definition for "navigable waters." 33 U.S.C. § 1362(7) (2012). These cases are equally relevant to interpreting the term as applied to the NPDES permit program. *See* Rapanos v. United States, 547 U.S. 715, 734 (2006) ("The Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively permanent *bodies of water*." (emphasis added)); Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs, 531 U.S. 159, 167–68 (2001) (reviewing the scope of waters of the United States as applied to isolated ponds); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985) ("We . . . conclude that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.").

[162] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,667, 33,698 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

[163] *Rapanos*, 547 U.S. at 732 (alterations in original) (emphasis added) (citations omitted).

ters" which excluded the use of the definite article, "the."[164] But that interpretation misses a critical point—"navigable waters" is a defined term.[165] After substituting the definition of "navigable waters" into section 1362(12) the statute reads: "any addition of any pollutant to *the waters* of the United States."[166] This is precisely the phrase the Court in *Rapanos* held applied to individual water bodies. Under *Brand X*, the EPA and Army Corps are free to create new regulations that interpret "the waters of the United States" as long as they are *consistent* with Supreme Court precedent.[167] To say that "the waters of the United States" is one collective body in the Water Transfers Rule is entirely inconsistent with the holding that "the waters of the United States" is made up of individual bodies of water. Nevertheless, the *Catskill IV* court found that *Rapanos* was persuasive but did not unambiguously resolve the precise question of "addition" to "navigable waters."[168]

3. Context, Structure, and Purpose

After reviewing the text and prior judicial constructions, the reviewing court may look to the context, structure, and purpose of the statute to resolve the ambiguity.[169] The EPA's position relies entirely on the system of cooperative federalism set up in the CWA as evidence of Congress's specific intent not to apply NPDES permits to water transfers.[170] The concept of cooperative federalism is important to the analysis because the CWA requires that states and the EPA work together to improve the quality of the nation's waters. States are the primary authority for nonpoint source regulation and states also have the ability to take over the NPDES permitting process.[171] While the states play an active role in protecting water quality, it is the EPA's responsibility to set the regulatory floor and enforce compliance with it.[172] Striking the correct balance of power between the federal agencies and the states is vital to creating programs that most efficiently maintain and improve water quality. The problem with the EPA's interpretation is that it relies almost exclusively on the policy and goals sections of the CWA and ignores the tension its interpretation creates with the rest of the Act. Although the policy sections may be helpful in defining the purpose of the Act, "no law pursues

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[164] *Catskill IV* says if the legislature intended for § 1362(12) to apply to individual water bodies it would have said "any addition of any pollutant to *a navigable water*" or "any addition of any pollutant to *any navigable water*" but the choice to use "navigable waters" expresses an intent to refer to the waters collectively. *Catskill IV*, 846 F.3d 492, 514 (2d Cir. 2017).

[165] 33 U.S.C. § 1362(7) (2012).

[166] *Id.* § 1362(12) (emphasis added).

[167] *Id.*

[168] *Id*; *Catskill IV*, 846 F.3d at 514.

[169] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

[170] For a discussion of the EPA's support for the Water Transfer see *supra* part I.B.3.

[171] 33 U.S.C. §§ 1329, 1342(b) (2012).

[172] *E.g.*, *id.* §§ 1342(b), 1313.

its purpose at all costs. . . ."[173] For the same reasons the EPA dismisses plaintiff environmental groups' reliance on the Act's policy to restore the biological and physical integrity of the nation's waters as controlling, the EPA's sole reliance on the goal of preserving state rights should also not be dispositive. While the EPA is only trying to show a level of ambiguity in the statute by highlighting the welter of purposes in the CWA,[174] when taken as a whole, the Act can be read to foreclose the EPA's interpretation.

As the Supreme Court pointed out in *Miccosukee*, other provisions in the CWA can be read to apply to "navigable waters" as individual water bodies.[175] Moreover, numerous sections of the CWA refer to "navigable waters" as individual bodies,[176] rather than as a single collective body as a whole.[177]

Additionally, after heavily relying on preserving state authority and cooperative federalism, the EPA's unitary waters theory has the potential for significant negative impacts on a state's ability to deal with interstate pollution caused by water transfers. In practice, the Water Transfers Rule

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[173] Rapanos v. United States, 547 U.S. 715, 752 (2006).

[174] 33 U.S.C. §§ 1251(a), (b), (g).

[175] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 107 (2004) ("several NPDES provisions might be read to suggest a view contrary to the unitary waters approach . . . a State may set individualized ambient water quality standards by taking into consideration 'the designated uses of the navigable waters involved.' 33 U.S.C. § 1313(c)(2)(A). . . . This approach suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.").

[176] *See, e.g.*, 33 U.S.C. § 1313(c)(2)(A) ("the designated uses of *the navigable waters involved* and the water quality criteria for such waters based upon such uses." (emphasis added)); *id.* § 1313(c)(4) ("new water quality standard for *the navigable waters involved*") (emphasis added); *id.* § 1313(d)(1)(B) ("those waters or parts thereof"); *id.* § 1313(e)(3) ("all navigable waters within such State"); *id.* § 1314(l)(1)(A)–(B) ("a list of those waters within the State[,]" "water quality standards for such waters reviewed" and "a list of all navigable waters in such State"); *id.* § 1315(b)(1)(A) ("a description of the water quality of all navigable waters in such State during the preceding year"); *id.* § 1315(b)(1)(B) ("an analysis of the extent to which all navigable waters of such State provide for the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities in and on the water"); *id.* § 1329(a)(1)(A) ("those navigable waters within the State which"); *id.* § 1329(a)(1)(B) ("to each portion of the navigable waters identified under subparagraph (A)"); *id.* § 1329(b)(1) ("controlling pollution added from nonpoint sources to the navigable waters within the State"); *id.* § 1329 (g)(1) ("if any portion of the navigable waters in any State"); *id.* § 1341(a)(1)(applicants for any "Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State. . .that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313"); *id.* § 1342 ("the navigable waters within the jurisdiction of such State," "navigable waters within [the State's] jurisdiction," and "any of the navigable waters,"); *id.* § 1344(a) ("discharge of dredged or fill material *into the navigable waters at specified disposal sites.*" (emphasis added)).

[177] The dissent in *Catskill IV* points out that the EPA failed to show any place where the Act referred to "navigable waters" as a collective whole. *Catskill IV*, 846 F.3d 492, 536 (2d Cir. 2017).

takes away a downstream state's ability to protect its water quality from pollution resulting from a water transfer in an upstream state. Under the new rule, a state's only recourse in such a situation is to file a common law nuisance or trespass claim in the polluting state court.[178] Because water transfers are exempt from NPDES permitting, the downstream state is left with minimal options for enforcing its water quality standards against the upstream-intrastate water transfer.[179] Removing the EPA's role in arbitrating interstate disputes over water quality appears to be inapposite with a system of cooperative federalism designed to improve interactions between the EPA and state regulators to reduce pollution "in concert with programs for managing water resources."[180] Addressing this inherent tension was a point of distinction between the *Catskill III* & *IV* courts. The former held it was evidence that the EPA's interpretation was not reasonable at *Chevron* step two, and the latter found it was just one "strike" against the EPA's interpretation but not enough to strike the EPA "out."[181]

Furthermore, EPA's own regulations would suggest that it considers "navigable waters" as individual water bodies. As the *Miccosukee* court pointed out, the EPA's regulations on intake credits is incompatible with the unitary waters theory.[182] NPDES permitees may ask for a credit towards their effluent limitations to reflect the presence of preexisting pollutants in the intake water.[183] If all the requirements are met, the permitee may exclude the preexisting pollutants from the total effluent discharges allowed under the permit. To be eligible for the intake credit, the discharger must demonstrate "that the intake water is drawn from the same body of water into which the discharge is made."[184] A discharger would not receive an intake credit if they withdrew polluted water from one water body and subsequently discharged it into a separate distinct

[178] *Catskill IV*, 846 F.3d. at 517.

[179] *Catskill III*, 8 F. Supp. 3d 500, 552 (S.D.N.Y. 2014)

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. . . . [A]n affected State does not have the authority to block the issuance of [a] permit [issued by another state] if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator. . . . Also, an affected State may not establish a separate permit system to regulate an out-of-state source. Thus the [CWA] makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.

Id. (quoting Int'l Paper Co. v. Ouellette, 479 U.S. 481, 490–91 (1987) (citations omited)).

[180] 33 U.S.C. § 1251(g) (2012).

[181] *Catskill III*, 8 F. Supp. 3d at 523–24, *Catskill IV*, 846 F.3d at 517.

[182] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 107–08 (2004).

[183] 40 C.F.R. § 122.45(g)(4) (2016).

[184] *Id.*

body of water. It seems evident that the EPA's intake credit regulations treat waters as individual bodies. The distinction between intrabody and interbody discharges under the intake credit program is wholly at odds with the Water Transfers Rule's position that all waters are a unitary whole. Not only are there inconsistencies in the EPA's interpretation of navigable water with regard to intake credits, but the EPA regulations defining "waters of the United States" contravene its position of waters as a collective whole.

The EPA defines "waters of the United States" as a list of individual water bodies.[185] "For purposes of the Clean Water Act . . . and its implementing regulations," waters of the United States means: (1) waters used in interstate commerce; (2) interstate waters and wetlands; (3) territorial seas; (4) tributaries to waters listed in 1-3; (5) waters adjacent to the waters defined in 1-4; (6) waters with a significant nexus to waters 1-5 determined on a case by case basis; and (7) waters located within the 100-year flood plain of waters listed in 1-3 and other waters determined on a case by case basis.[186] This definition severely undercuts the EPA's position in the Water Transfers Rule that the "navigable waters" are a collective whole. First, if the waters were a collective whole there would be no need to address waters that are "*adjacent to a water identified in paragraphs (1)(i) through (v)* of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters" because under the EPA's own logic those adjacent waters are part of one body.[187] It is not logically possible for something to be adjacent to itself.

Moreover, when discussing which waters are considered waters of the United States because of a significant nexus to a traditional navigable water, the regulation states: "*Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi)* of this definition when performing a significant nexus analysis."[188] This wording leads to the conclusion that "the waters of the United States" is composed of individual bodies of water, not a unitary whole. Additional regulatory provisions support this conclusion.[189]

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[185] 40 C.F.R. § 122.2 (2016).

[186] *Id.* (emphasis added).

[187] *Id.* (emphasis added).

[188] *Id.* (emphasis added).

[189] *E.g.*, 40 C.F.R. § 122.2 (vii) ("All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition."); *id.* § 122.2 (vii)(B) ("Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain."); *id.* § 122.2 (vii)(E) (Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast."); *id.* § 122.2 (viii) ("For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100–year floodplain of a water identified in (1)(i) through (iii)").

The amorphous boundaries of water systems make it nearly impossible to draw bright lines around the waters of the United States.[190] For this reason, even under the EPA's unitary whole interpretation it would have to consider individual water bodies to determine whether or not each should be included in the waters of the United States. A case-by-case determination for individual water bodies is incompatible with the EPA's interpretation that the waters of the United States is a unitary body of water.

The EPA does address the definition of "navigable waters" in the Water Transfers Rule but only to explain that the new rule does not modify the existing interpretation of the definition.[191] That may be the case, but are the two regulations logically compatible? 40 C.F.R section 122.2 applies to interpretations of "the Clean Water Act . . . and its implementing regulations" which would include the Water Transfers Rule codified at 40 C.F.R. section 122.3.[192] In one regulation applicable to the Water Transfers Rule, the EPA treats "the waters of the United States" as individual bodies. Then in the Water Transfers Rule, the EPA interprets "the waters of the United States" as a unitary body. By stating that the Water Transfers Rule has no impact on the definition of "the waters of the United States," the EPA misinterprets the effect of the Water Transfers Rule and completely misses the fact that the definition of "the waters of the United States" effectively precludes its interpretation in the Water Transfers Rule.

Moreover, reviewing the legislative history only reveals that Congress has not spoken directly to the issue of NPDES and water transfers.[193] There are bits and pieces of history that support the overall policies of the CWA but nothing that would be precise enough to resolve the ambiguity surrounding "addition . . . to navigable waters."

Taking all of the foregoing arguments into consideration, the CWA strongly suggests that "navigable waters" means individual water bodies but it does not rise to the level of Congress *directly* speaking to the issue as

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[190] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) ("The Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.").

[191] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,667, 33,699 n.2 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

[192] 40 C.F.R § 122.2 (2016).

[193] *Catskill IV*, 846 F.3d 492, 515 (2d Cir. 2017) ("Finally and tellingly, neither the parties nor amici have pointed us to any legislative history that clearly addresses the applicability of the NPDES permitting program to water transfers."); *Catskill III*, 8 F. Supp. 3d 500, 527–28 (S.D.N.Y. 2014).

required by *Chevron* at step one.[194] "In the face of ambiguity at *Chevron* step one, the Court's task is not to resolve it, but rather to determine whether Congress unambiguously resolved it."[195] Each of the three courts reviewing the Water Transfers Rule found the statute to be ambiguous despite the potential logical imperfections with the unitary waters theory and the CWA overall.[196] This is likely the correct conclusion under *Chevron* step one—Congress does not appear to have directly addressed the issue of interbasin water transfers and their application to the NPDES program. However, this is the last time all three courts agree with the *Chevron* analysis. The next sections of this Note address the varying degrees to which each court applied *Chevron's* step two.

Where there is a general consensus on the traditional tools of statutory interpretation, the opposite can be said for applying *Chevron's* reasonableness standard. Part of the problem arises from the fact that the two steps are just as much a singular analysis as they are separate inquiries.[197] Deciding whether an agency's interpretation is reasonable requires a court to look back through the text, context, and purpose of the statute to see if the agency has reached a *reasonable* interpretation—effectively step one. This unavoidable overlap can make *Chevron* step two's analysis resemble a rerun of the step one analysis with the same arguments for ambiguity being used to support reasonableness. In addition to the difficulty of separating *Chevron's* two steps, there is a perception that *Chevron* is a purely legal inquiry, and a highly deferential one at that. However, as discussed below, in the landmark *Chevron* case the Court "interpreted" both the legal issues of statutory interpretation and the agency's policy decisions for reasonableness.[198]

B. Chevron *Step Two—Reasonableness*

At *Chevron* step two, "the question for the court is whether the agency's answer is based on a *permissible construction* of the statute."[199] Right away, there are problems with *Chevron* step two. If the statute is ambiguous, it is hard to conceive when an agency's proffered interpretation would not be *a permissible construction* of an ambiguous statute. Therefore, most courts have instead phrased the step two inquiry as whether the

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[194] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[195] *Catskill III*, 8 F. Supp. 3d at 532.

[196] *Catskill IV*, 846 F.3d at 519; *Friends* I, 570 F.3d 1210, 1227 (11th Cir. 2009); *Catskill III*, 8 F. Supp. 3d at 532.

[197] *See* Matthew C. Stephenson and Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598–600 (2009).

[198] *See* Ronald B. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI. KENT. L. REV. 1253, 1268–70 (1997).

[199] *Chevron*, 467 U.S. at 843.

agency's interpretation is a "reasonable interpretation" of the statute.[200] Furthermore, agencies are required to resolve the ambiguity in a "reasonable fashion."[201] An agency's interpretation need not be the only permissible interpretation or the best interpretation of the statute.[202] Despite being a greatly deferential standard, courts retain the role of ensuring agencies conduct reasoned decision making.[203] Deference to agencies is not to be confused with categorical acquiescence of agency action.[204] A reviewing court may overturn an agency interpretation that is "arbitrary, capricious, or manifestly contrary to the statute."[205] It is worth noting that *Chevron* and the APA both incorporate an "arbitrary and capricious" standard for judicial review of agency action.[206] In 1983, in *Motor Vehicle Manufactures Association v. State Farm Mutual Automobile Insurance Company*, the Supreme Court provided a general framework for determining when agency decision making was arbitrary and capricious under the APA.[207] The *State Farm* framework requires agencies to support decision making with adequate reasons and allows courts to take a *hard look* into the agency's rationale. Factors a court may consider under the hard-look review include: "[whether] the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[208] Whether *State Farm's* hard look review should be incorporated into *Chevron's* step two reasonableness inquiry is an open question. Either way, as evidenced by the three courts reviewing the Water Trans-

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[200] Mayo Found. for Med. Educ. and Research v. United States., 562 U.S. 44, 58 (2011) ("The second step of Chevron, which asks whether the Department's rule is a 'reasonable interpretation' of the enacted text").

[201] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S 967, 980 (2005); *see also Chevron*, 467 U.S. at 863.

[202] Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009).

[203] Judulang v. Holder, 132 S. Ct. 476, 484–85 (2011).

[204] Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 508 (1992).

[205] *Chevron*, 467 U.S. at 844.

[206] 5 U.S.C. § 706(2)(A)(2012)("Hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

[207] The *State Farm C*ourt described the arbitrary and capricious standard as:

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[208] *Id.*

fers Rule, courts are adrift on how to apply *Chevron's* step two reasonableness standard.[209]

1. Applying the State Farm *test at* Chevron *step two*

The *Catskill III* court considered the *State Farm* factors as part and parcel of the step two inquiry. Employing the hard look review, the district court concluded that the EPA failed to provide a reasonable justification for its interpretation in the face of its duties under the CWA.[210] To support its application of hard look review at step two, the court held that both *State Farm* and *Chevron* step two require a court to review the adequacy of the agency's decisions under the "arbitrary and capricious" standard.[211] Because both standards include arbitrary and capricious review, *State Farm's* hard-look factors are entirely relevant to the inquiry into *Chevron's* reasonableness of the EPA's decision making process. Other courts have adopted the same approach.[212] In a case decided shortly after *Chevron*, in 1984, the D.C. Circuit—commonly considered the circuit with the most experience reviewing administrative law cases—expressed reservation that *Chevron* simply overturned the court's ability to review cases with the "arbitrary and capricious" standard and applied the "hard look arbitrary and capricious" standard at *Chevron* step two.[213] Agencies may have the expertise to interpret complex statutes and balance competing policy goals, but it is still the role of the judiciary to review agency action for "arbitrary and capricious" decision making as required under the APA.[214] Moreover, adding the arbitrary and capricious standard of review to *Chevron* step two distinguishes the analysis between step one and step

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[209] *Friends I*, 570 F.3d 1210, 1227–28 (11th Cir. 2009); *Catskill III*, 8 F. Supp. 3d 500, 557 (S.D. N.Y. 2014), *Catskill IV*, 846 F.3d 492, 522–23 (2d Cir. 2017).

[210] *Catskill III*, 8 F. Supp. 3d 500, 557 (S.D.N.Y. 2014).

[211] Applying *Chevron*, a court should set aside an agency's decision if it is arbitrary and capricious. *Id.* at 533–34 n.19.

[212] *E.g.*, Arent v. Shalala, 70 F.3d 610, 616 (D.C. Cir. 1995) (citing the arbitrary and capricious language in *Chevron* as rational for applying *State Farm* at step two); Athens Cmty. Hosp., Inc. v. Shalala, 21 F.3d 1176 (D.C. Cir. 1994); Gen. Am. Transp. Corp. v. Interstate Commerce Comm'n, 872 F.2d 1048, 1053 (D.C. Cir. 1989); *see also*, Verizon Cmmc'ns Inc. v. FCC, 535 U.S. 467 (2002) (applying a searching review of the agency's reasons for adopting a particular policy under step two similar to the *State Farm* inquiry); New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1 (2002) (using a hard look standard of review for agency action).

[213] Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133 (D.C. Cir. 1984).

[214] Cass Sunstein, *Law & Administration After* Chevron, 90 COLUM. L. REV. 2072, 2104 (1990).

> On the question of reasonableness, it seems clear that the agency must be given considerable latitude. But this is not to say that the agency may do whatever it wishes. The reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is 'arbitrary' or 'capricious' within the meaning of the APA. That inquiry requires the agency to give a detailed explanation of its decision by reference to factors that are relevant under the governing statute.

Id.

two. Step one uses the tools of statutory interpretation to decide if the statute is ambiguous or whether the agency is violating a clear mandate by Congress. At step two, applying the arbitrary and capricious standard, a court reviews the reasonableness of the agency's decision making process. Incorporating hard look review into step two of *Chevron* increases the likelihood that courts will conduct both parts of the *Chevron* inquiry—does the statute allow for such an interpretation, and is there a reasonable path between the statute and the final rule?[215] In addition to helping to distinguish the two inquiries, the combined *Chevron-State Farm* analysis gives teeth to the reasonableness analysis at step two. Under the *State Farm* factors, an agency cannot simply bootstrap its arguments for ambiguity to its arguments for reasonableness, which was the case in the Water Transfers Rule.[216]

Taking a hard look at the agency's rationale behind the Water Transfers Rule, the *Catskill III* court found the EPA used flawed methodology.[217] The EPA forced ambiguity into the statute by working backwards from its desired result in a way that was plainly inconsistent with the intent of section 1311(a).[218] Starting from its conclusion that Congress did not intend to apply water transfers to the NPDES requirements, it decided water transfers were not "additions" under section 1362(12) and thus not covered by section 1311(a).[219] This approach allowed the EPA to achieve its desired result but misses the general purpose of section 1311(a) and therefore is not the product of reasoned decision making. The effluent limitation restrictions in section 1311(a) prohibit all discharges of pollutants by any person except as in compliance with the Act. NPDES is only one of the listed sections.[220] Congress may not have intended to regulate water transfers under NPDES, but it is more than a leap to conclude from the statutory ambiguity that Congress did not intend interbasin water transfers to be additions and therefore not subject to *any* provision of CWA. To say that because NPDES does not apply means no section applies is false logic.[221] There is more than one exemption to the effluent limitations of section 1311(a) and other sections include likely avenues for regulation water transfers; for example, section 1312 water quality related effluent limitations or section 1316 and national standards for performance.[222] To arrive at its desired conclusion

[215] Levin, *supra* note 198, at 1270.

[216] After interpreting the CWA under its holistic approach, the EPA explained the reasonableness of the Water Transfers Rule as consistent with the Congress's specific intent not to apply NPDES to water transfers the agency divined with its holistic approach. *Catskill III*, 8 F. Supp. 3d 500, 539–40 (S.D.N.Y. 2014).

[217] *Id.* at 543–47.

[218] *Id.* at 544.

[219] *Id.* at 543.

[220] 33 U.S.C. § 1311(a) ("Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title.").

[221] *Catskill III*, 8 F. Supp. 3d at 544.

[222] *Id.*

the EPA "asked questions that were too narrow and thus could not logically support EPA's conclusion."[223]

Far from being finished, the *Catskill III* court went on to say that even if the methodology was sound the EPA's application was flawed.[224] The EPA's "holistic approach" to interpreting the CWA only considered one of the Act's competing policies. The court concluded that the approach completely failed to consider the remedial policy goals of the CWA, wholly relying on the creation of a federal-state regulatory system as its justification for the conclusion that it was not Congress's intent to regulate water transfers.[225] A holistic approach is *per se* not reasonable if it fails to consider one of two primary purposes of the CWA.[226] Not to mention, the other inconsistencies with the EPA's approach and the rest of the CWA discussed *supra* part II.A.[227] Moreover, when interpreting the CWA, the EPA is required "to interpret the statute in the context of both of its goals—including specifically, its environmental goals—and to provide a reasoned explanation justifying its interpretation in light of those goals."[228] Beyond just bootstrapping its arguments that it was Congress's intent not to regulate water transfers under NPDES, the EPA failed to provide any justification for why its holistic approach did not need to consider the environmental aspect of the Water Transfers Rule.[229] Furthermore, the "EPA failed to explain how its action was consistent with and why it does not frustrate the one goal it did consider."[230] For all these reasons, the court rejected the EPA's interpretation as arbitrary and capricious.

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[223] *Id.* at 546 (relying on the *State Farm* factor, the "path of analysis was misguided and the inferences it produced [were] questionable. . . ." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 44 (1983)).

[224] *Catskill III*, 8 F. Supp. 3d at 547.

[225] *Id.* at 548.

[226] *Id.*

[227] See *supra* Part II.A.3 for a detailed discussion of the problems with the EPA's interpretation and other provisions of the CWA, as well as inconsistencies with the EPA's own regulations.

[228] *Id.* at 549 (analogizing the Supreme Court's holding on the EPA's obligations under the Clean Air Act in *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) to the EPA's obligations under the CWA).

[229] The EPA's only rationale for excluding the environmental impacts from its analysis was its assertion that most water transfers do not result in substantial impairment. *Id.* at 550 n.26. An agency does not receive deference for its beliefs. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52–53 (1983) (rejecting an agency's finding that was not supported by direct evidences in the record); *Catskill III*, 8 F. Supp. 3d at 550.

[230] The EPA also failed to explain how the Water Transfers Rule would help the balance of federal and statute regulation when as discussed *supra* Part II.A.3, the new rules curtailed states ability to protect its water quality standards from interstate pollution. This presents a significant problem for the uniform regulation of water quality among the states, where the federal government normally steps in under the CWA to resolve disputes the Water Transfers Rule leaves states to fight water quality battles with common law nuisance claims in state court. *Catskill III*, 8 F. Supp. 3d at 557.

Applying the hard-look standard from *State Farm*, it was patently clear to the court that EPA was lacking a reasonable rationale for the Water Transfers Rule. EPA challenged the application of the *State Farm* factors, stating that because it was interpreting a statute, it was not required to "undertake a detailed scientific or technical analysis of the environmental impacts of water transfers." However, as the court aptly noted, the EPA is required to justify its reasoning with "*some* kind of analysis—scientific, technical, or otherwise."[231] Where at step one the arguments for ambiguity show a gap in the statute allowing for EPA intervention, at step two, the EPA must show a reasoned decision making process supports its final rule. Reasonableness requires more than showing the interpretation is one of two potential readings without explaining why it chose one over the other.[232] Randomly choosing between two permissible interpretations is not the *reasonable* decision making process envisioned by either *Chevron* or the APA. By applying a combined *Chevron-State Farm* analysis to the Water Transfers Rule, the *Catskill III* court correctly held that although there was room in the statute for agency regulation, the EPA's decision making process was wanting on reasonableness and thus, correctly rejected.

2. The Misapplication of the One-Step Chevron *Approach*

Unlike the court in *Catskill III*, the Eleventh Circuit took a much more deferential approach at *Chevron* step two. As the court put it, "there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways."[233] Aided by practical analogies and hypotheticals, the Eleventh Circuit waltzed through its one-step *Chevron* review, concluding the statute was ambiguous and that the EPA's interpretation was reasonable.[234] It focused its entire analysis on whether the statute was ambiguous or not—exclusively step one.[235] While certainly a simpler approach, the one step analysis conducted by the *Friends I* court misses the mark. *Chevron* requires two separate analytical inquires; does

[231] *Id.* at 533–34 n.19 (emphasis added).

[232] *Id.* at 558.

[233] *Friends I*, 570 F.3d 1210, 1219 (11th Cir. 2009).

[234] *Id.* at 1223 ("In ordinary usage 'waters' can collectively refer to several different bodies of water such as 'the waters of the Gulf coast,' or can refer to any one body of water such as 'the waters of Mobile Bay.'"); *id.* at 1228 ("Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting 'any addition of any marbles to buckets by any person.' A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover 'add[ed] any marbles to buckets'? On one hand, as the Friends of the Everglades might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the Water District might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other we cannot say that either side is unreasonable.").

[235] *Id.* at 1219.

the agency have authority for its actions, and if it does, is its interpretation a product of reasoned decision making?[236] The Eleventh Circuit's single step approach focused solely on whether the EPA had authority to regulate but never discussed whether the agency's final rule was supported by reasoned decision making.[237] Instead of asking if the EPA's Water Transfers Rule was a reasonable decision, the Eleventh Circuit looked into whether the EPA's position was a *permissible* one.[238] As one commentator has observed, framing the question as whether the agency's interpretation is permissible is "circular: obviously an interpretation that is not permitted is prohibited, but on what grounds would the Court refuse to 'permit' an interpretation?"[239] Unsurprisingly, the Eleventh Circuit found no reason why the interpretation not prohibited by the ambiguity should be prohibited.[240] What is perhaps the most frustrating part of the Eleventh Circuit's lack of analysis is how badly the court misinterprets the literature it cites as support for the application of a one-step *Chevron* test. The court cites to an article written by Stephenson and Vermeule on the topic of *Chevron*. In the article, the authors discuss the potential problems of trying to apply two steps under *Chevron* when the inquiries are so intertwined:

> Perhaps the consequences of *Chevron's* misleading two-step structure are not severe. After all, despite the regular, almost ritualistic, invocation of the *Chevron* two-step, most courts seem to have a clear understanding of the two relevant questions—Is the agency's construction permissible? Was it the product of a reasoned decision making process?—and they manage to address these questions without tripping over the superfluity of one or the other of *Chevron's* two steps.[241]

The irony is painful. Despite apparently reading this article, the Eleventh Circuit fell into the minority category of courts lacking a clear understanding of the two relevant questions raised by the *Chevron* analysis. Effectively, by failing to conduct any inquiry into the reasonableness of the EPA's decision making process the Eleventh Circuit's analysis is completely inadequate even under the one step *Chevron* approach. For these reasons, the *Friends I* court's watered down single step approach to the *Chevron* analysis should be avoided as precedent for interpreting the Water Transfers Rule and applying *Chevron*.

3. The Overlapping but Not Identical Theory of Chevron *and* State Farm

At *Chevron* step two, the Second Circuit departed from the approaches taken by both the *Catskill III* & *Friends I* courts. Reviewing the

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[236] *Catskill III*, 8 F. Supp. 3d 500, 559 (S.D.N.Y. 2014).

[237] *Id.*

[238] *Friends I*, 570 F.3d. at 1227.

[239] Levin, *supra* note 198, at 1260.

[240] *Friends I*, 570 F.3d at 1227–28.

[241] Stephenson & Vermeule, *supra* note 197, at 605.

Water Transfers Rule, the court held that "[a]lthough the Rule may or may not be the best or most faithful interpretation of the Act in light of its paramount goal of restoring and protecting the quality of U.S. waters, it is supported by several valid arguments—interpretive, theoretical, and practical."[242] In a change of course from the district court, the Second Circuit rejected the incorporation of the *State Farm* factors into step two of *Chevron*. Because in the court's view, S*tate Farm's* hard look review was too strict of a standard, and *Chevron's* step two analysis should be a separate and more deferential review of reasonableness.[243] The Second Circuit observed that *State Farm's* hard-look review may be appropriate "in a case involving a non-interpretive rule or a rule setting forth a changed interpretation of a statute; but that is not so in the case before us."[244] This distinction was justified because according to the court, *State Farm* is applied to determine whether a rule is *procedurally* defective as a result of flaws in the decision making process.[245] Whereas, the Second Circuit held that the *Chevron* standard applies to evaluating whether *the conclusion* reached as a result of that decision making process is a reasonable one.[246] The appropriate test depends on the distinction between the procedural process conducted by an agency in a rulemaking and the reasonableness of its conclusion as a result of that process. Despite the court's attempt to distinguish procedure and results, they are for practical purposes of interpretation, intertwined. Any inquiry into whether the agency's final conclusion is reasonable unavoidably depends on how the agency reached that conclusion; reasonableness requires an agency to explain how it got from the text of the statute to its final conclusion. Manufacturing a distinction between process and the conclusion based on the process creates an unnecessary distinction that will surely trip courts up. Some courts already have trouble applying the two prongs of *Chevron*.[247]

This attempt to distinguish the *State Farm* court's hard look review and the traditionally more deferential *Chevron* two-step may have ties to how the court considers agency interpretation of law as opposed to an agency's ability to make policy determinations—based on the record and developed from interpretations of fact. *Chevron's* step one inquiry into the statute using the tools of statutory construction sounds like an inquiry into distinctively legal issues. According to one commentator:

> [T]hat phrase, to many minds, connotes a set of distinctively 'legal' issues, involving (for example) statutory language, legislative history, structure and purposes, and canons of construction, as distinguished from the kind of inquiry a court makes when it is

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242 *Catskill IV*, 846 F.3d 492, 520 (2d Cir. 2017).

243 *Id.* at 521.

244 *Id.*

245 *Id.*

246 *Id.*

247 See the discussion of the *Friends I* court's mishandling of *Chevron*, *supra* Part II.B.2.

> overseeing an exercise of administrative discretion. On that assumption, a court should not even reach the question of whether an agency action is arbitrary and capricious until after the action has survived *Chevron* scrutiny.[248]

However, the preconception of a purely legal review departs from the actual analysis conducted by the *Chevron* Court at step two. "Interpretation," as applied in *Chevron*, was a much broader type of interpretation, blurring the black and white distinction between law and policy determinations the *Catskill IV* court is attempting to maintain.[249] In *Chevron*, "interpretation" included a review of the agency's discretion over making policy choices, rather than just a review of the legal issues: explaining that agency policy determinations warrant deference from the court "[i]f this choice represents *a reasonable accommodation of conflicting policies* that were committed to the agency's care by the statute, [courts] should not disturb it *unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.*"[250] This indicates that the Court's "interpretation" included a review of the agency's administrative discretion and an evaluation of whether it was supported by the evidence in the record.[251] The Court also noted that "the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. Indeed, its reasoning is *supported by the public record developed in the rulemaking process*, as well as by certain private studies."[252] *Chevron's* two-step was developed as a two-step process for a reason. Each step represents a separate inquiry.

In further support of its distinction, the Second Circuit mentioned, "agencies are not obligated to conduct detailed fact-finding or cost-benefit analyses when interpreting a statute—which suggests that the full-fledged *State Farm* standard may not apply to rules that set forth for the first time an agency's interpretation of a particular statutory provision."[253]

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[248] Levin, *supra* note 198, at 1266–67.

[249] *Id.* at 1268–69.

[250] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961)) (emphasis added).

[251] The *Chevron* Court reviewed the EPA's policy determinations for support in the record and whether they were reasonable given the purpose of the CAA. Levin, *supra* note 198, at 1269 n.68 (giving examples from the *Chevron* case, *e.g.*, *Chevron*, 467 U.S. at 845 ("EPA's use of [the bubble] concept here is a reasonable policy choice for the agency to make.")); *id.* at 863 ("[T]he agency primarily responsible for administering this important legislation has consistently interpreted it flexibly-not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena."); *id.* at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy False the challenge must fail.").

[252] *Chevron*, 467 U.S. at 863.

[253] *Catskill IV*, 846 F.3d 492, 523 (2d Cir. 2017). Recent Supreme Court cases described the cases where the hard-look review under APA § 706(2)(A) applied, suggesting that it is not applicable in every situation. *Id.* (citing *Brand X*, 545 U.S. at 981

Although the Second Circuit is correct that agencies are not required to do a detailed factual inquiry when interpreting a statute, its interpretation still must be supported by some rationale—factual or legal.[254] *State Farm's* factors address the soundness of an agency's d*ecision making process* which can be applied equally to legal or factual inquiries. The impracticality of the Second Circuit's procedural-conclusion distinction quickly rises to the surface when applied to the Water Transfers Rule. Here, the court says a deferential *Chevron* approach is necessary because the EPA is interpreting an ambiguous statute.[255] However, the EPA's "legal analysis" boils down to an unsupported policy determination that the cooperative federalism goals of the CWA outweigh the competing policies in favor of exempting water transfers from the NPDES requirements.[256] Hard look review under *State Farm* is the appropriate test for reviewing the agency's unsupported policy determinations masquerading as purely-legal analysis. EPA's interpretive policy conclusions cannot be reasonable if the decision making process used to reach them is arbitrary and capricious; separating process from conclusions does not fix the problem that faulty procedure produces faulty results. By attempting to separate the *State Farm* and *Chevron* tests, the Second Circuit is making a false distinction that will only cause confusion going forward. Nevertheless, the Second Circuit concluded that "applying a reasonableness standard to the agency's decision making and rationale at *Chevron* step two instead of a heightened *State Farm*-type standard promotes respect for agencies' policymaking discretion and promotes policymaking flexibility."[257]

Applying what it terms "*Chevron's* rather *minimal requirement* that the agency give a reasoned explanation for its interpretation" of the *Chevron* step two standard, the court floats right on to the conclusion that the EPA has provided a reasoned rational for its interpretation.[258] To support its analysis, the court cited the EPA's long history of applying its interpretation without intervention by Congress as weighing in favor of reasonableness.[259] Additionally, the court held that the EPA's interpretation was a permissible interpretation of the ambiguous language—which was enough for the *Friends I* court to conclude the Water Transfers Rule was reasonable.[260] Application of NPDES permits to water transfers may be prohibitively costly and infringe on state's rights regarding water allocation.[261] Lastly, the court held that the existence of other potential sources

(holding hard-look review under APA § 706(2)(A) is appropriate when an agency changes its interpretation); Fox Television Stations v. FCC, 556 U.S. 502, 516 (2009).

[254] *Id.* at 532.

[255] *Id.*

[256] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,667, 33,702.

[257] *Catskill IV*, 856 F.3d at 532.

[258] *Id.* at 524.

[259] *Id.* at 525.

[260] *Id.* at 527.

[261] *Id.* at 529.

of regulation for interbasin water transfers also supported the reasonableness of the EPA's interpretation.[262]

When faced with explaining the reasonableness of the EPA's choice in light of the potentially severe impacts on both the environment and states' authority to regulate water quality—both policy goals of the CWA—that may result from polluted water transfers occurring in upstream states, the court explained, "[w]hile this is a powerful argument against the EPA's position, we are not convinced that it establishes that the Water Transfers Rule is an unreasonable interpretation of the Clean Water Act."[263] The snake has begun to eat its tail and yet, the EPA has offered no explanation for how this could be considered reasonable. How the Second Circuit was able to overlook this glaringly problematic application of the Water Transfers Rule is a feat of judicial acrobatics. Even applying a low hurdle for reasonableness, the EPA failed to explain how an interpretation that does not further any policy set forth in the CWA, and in fact works against them, is reasonable. Simply being a complex federal statute that "balances a welter of consistent and inconsistent goals"[264] is not a *carte blanche* to create regulations that hinder, rather than further, the multiple policy goals of the CWA. *Chevron* deference should not be confused with acquiescence. *Chevron* step two provides courts the ability to overturn agency decisions that are "arbitrary or capricious in substance, or manifestly contrary to the statute."[265] By focusing only on the conclusion and not conducting a hard look, or any look for that matter, into the reasonableness of the EPA's decision making process, the Second Circuit has not answered the question of whether the agency's decision is arbitrary and capricious. Application of the full hard look analysis from *State Farm* may not be the answer, but the court is required to consider the EPA's policy determinations and whether they were a "*reasonable policy choice* for the agency to make."[266] *Chevron's* step two should not be a toothless analysis of whether a proffered interpretation is *permissible*. Courts should be required to review the reasonableness of the agency's decision making process, including policy determinations.

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[262] Possible alternative sources of regulation include the "the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, and the Surface Water Treatment Rule, 40 C.F.R. § 141.70 *et seq.*; the Federal Energy Regulatory Commission's regulatory scheme for non-federal hydropower dams; state permitting programs that have more stringent requirements than the NPDES program, *see* 33 U.S.C. § 1370(1); other state authorities and laws; interstate compacts; and international treaties." *Id.*

[263] *Id.* at 532.

[264] *Catskill I*, 273 F.3d 481, 494 (2d Cir. 2001) (explaining the complexity of the CWA and its multiple policy objectives but ultimately concluding the unitary waters theory was not supported by any of them).

[265] United States v. Mead Corp., 533 U.S. 218, 227 (2001); *see also Chevron*, 467 U.S. at 844.

[266] *Chevron*, 467 U.S. at 845 (emphasis added).

C. *The Need for Reining in the Wide Range of Standards Courts Apply Under* Chevron

Simply reviewing these three cases applying *Chevron* step two to the Water Transfers Rule shows how inconsistently the test is applied. It also reveals how easy it is for courts to misunderstand the scope of *Chevron* step two, which, in practice, leads to a watering down of the entire reasonableness standard. The *Friends I* court is a good example of how some courts place too much focus on the legal inquiry of step one and thus fail to apply both inquires required by *Chevron*, which provides incomplete results.[267] Applying the Eleventh Circuit's analysis is an exercise in futility, as it means a guarantee of finding the agency's interpretation permissible if a court finds the statute does not unambiguously foreclose that interpretation. The only benefit of the Eleventh Circuit's approach is that it is patently flawed. It is much harder to discover a court's errors when they are masked as a review of reasonableness, which was the case with the *Catskill IV* court.

It is well beyond the scope of this Note to conclude that courts are systematically misapplying *Chevron's* two separate inquires—"Is the agency's construction permissible? Was it the product of a reasoned decisionmaking process?"[268]—envisioned by the *Chevron* court. However, empirical evidence of cases suggests at least a correlation between cases find-finding ambiguity in the statute and the court siding with the agency's interpretation. If an agency is able to show ambiguity in the statute, it is significantly more likely to win at step two.[269] In a recent study of Circuit Courts applying the *Chevron* two-step, "[o]f the 70.0% of the interpretations that moved to Chevron step two . . . the agency prevailed 93.8% of the time."[270] Phrased another way, challengers to agency regulations must show the statute is unambiguous or be drowned out by the extremely deferential reasonableness standard at step two. The actual "interpretation" applied by the *Chevron* Court suggests that today's *Chevron* two-step has drifted away from what the Supreme Court envisioned as the judiciary's role in reviewing agency action.[271] Whether this is a product of courts not understanding the scope of the *Chevron* standard or an attempt to avoid overlapping "arbitrary and capricious" tests, it is high tide for the Supreme Court to add clarity to these murky waters.

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[267] See discussion of *Friends I, supra* Part II.B.2

[268] Stephenson & Vermeule, *supra* note 184, at 605.

[269] *See* Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the Chevron Doctrine in the United States Courts of Appeals*, 15 YALE J. REG. 1, 31 (1998) (finding in a study that agencies won 89% of cases resolved at step two compared to a win rate of only 42% at step one).

[270] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 6), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2808848.

[271] See discussion of *Chevron's* intended scope of "interpretation," *supra* Part II.B.3.

III. CONCLUSION

Although the debate over the Water Transfers Rule may have finally come to rest, it provides an example of the power of a misunderstood *Chevron* test.[272] All three reviewing courts decided the CWA to be ambiguous enough to allow the EPA to enact regulations; however, only one court actually reviewed whether the EPA's decision making process was reasonable. Despite expressly incorporating the arbitrary and capricious standard into the *Chevron* two-step, courts have resisted doing any kind of hard look review at step two. This may stem from the misconception that *Chevron* is a purely legal inquiry, but as discussed previously, the *Chevron* Court interpreted the CAA and the EPA's *policy determinations* for reasonableness. It may be the fact that *Chevron* deference has become synonymous with "great deference" to the agency, which has led courts away from conducting both inquires required under *Chevron*.[273] However, the test is only an effective safeguard for the separation of powers when both inquiries are applied. The solution may not be to wholly incorporate *State Farm's* hard look review into *Chevron* step two, but something is needed to turn courts back to doing a more searching review into the reasonableness of agencies' decision making process. The cases interpreting the Water Transfers Rule make it clear that there is a desperate need for clarity in *Chevron's* step two. Using *Chevron* deference, the EPA was able to revive an interpretation from the grave. Originally, *Chevron* was intended to protect the separation of powers by shielding agency decision making from overreaching judicial review. It was not, however, intended to be a sword for agencies to use to push unsupported policy determinations at the expense of judicial review.

[272] At the time of writing this Note petitions for a rehearing *en banc* had been filed but not approved. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492 (2d Cir. 2017), *petition for rehearing en banc filed*, (No. 14-01823).

[273] *See* Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 170 (D.C. Cir. 1982); *Friends I*, 570 F.3d 1210, 1227 (11th Cir. 2009); *Catskill IV*, 846 F.3d 492, 524 (2d Cir. 2017).