CHIN, *Circuit Judge*, dissenting:

I respectfully dissent.

The Clean Water Act (the "Act") prohibits the "discharge of any pollutant by any person" from "any point source" to "navigable waters" of the United States, without a permit. 33 U.S.C. §§ 1311(a), 1362(12)(A). The question presented is whether a transfer of water containing pollutants from one body of water to another -- say, in upstate New York, from the more-polluted Schoharie Reservoir through the Shandaken Tunnel to the less-polluted Esopus Creek -- is subject to these provisions.

The United States Environmental Protection Agency ("EPA") takes the position that such a transfer is not covered, on what has been called the "unitary waters" theory -- all water bodies in the United States, that is, all lakes, rivers, streams, etc., constitute a single unit, and therefore the transfer of water from a pollutant-laden water body to a pristine one is not an "addition" of pollutants to the "navigable waters" of the United States because the pollutants are already present in the overall single unit. Consequently, in a rule adopted in 2008 (the "Water Transfers Rule"), EPA determined that water transfers from one water body to another, without intervening industrial, municipal, or commercial

activity, were excluded from the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES"), even if dirty water was transferred from a polluted water body to a clean one. The majority holds that the Water Transfers Rule is a reasonable interpretation of the Act. I disagree.

As the majority notes, we evaluate EPA's interpretation of the Act under the two-step framework of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). At step one, we consider whether Congress has "unambiguously expressed" its intent. *Riverkeeper Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004). If so, we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If the statute is "silent or ambiguous," however, we turn to step two and determine "'whether the agency's answer is based on a permissible construction of the statute,' which is to say, one that is 'reasonable,' not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Riverkeeper*, 358 F.3d at 184 (quoting *Chevron*, 467 U.S. at 843-44).

I would affirm the district court's decision to vacate the Water Transfers Rule. First, I would hold at *Chevron* step one that the plain language and structure of the Act is unambiguous and clearly expresses Congress's intent to prohibit the transfer of polluted water from one water body to another distinct

water body without a permit. In my view, Congress did not intend to give a pass to interbasin transfers of dirty water, and excluding such transfers from permitting requirements is incompatible with the goal of the Act to protect our waters.[1] Second, prior decisions of this Court and the Supreme Court make clear that the unitary waters theory is inconsistent with the plain and ordinary meaning of the text of the Act and its purpose. Third, even assuming there is any ambiguity, I would hold at *Chevron* step two that the Water Transfers Rule is an unreasonable, arbitrary, and capricious interpretation of the Act. Accordingly, I dissent.

I

I begin with the language of the Act, its structure, and its purpose.

A. *The Statutory Language*

The Act provides that "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a), except to the extent allowed by other

[1] The term "interbasin transfer" refers to an artificial or man-made conveyance of water between two distinct water bodies that would not otherwise be connected. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 489-93 (2d Cir. 2001) ("*Catskill I*"); *see also* 40 C.F.R. § 122.3(i) ("water transfer" is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use").

provisions, including, for example, those provisions establishing the NPDES permit program, 33 U.S.C. § 1342.

The Act defines "*discharge* of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). It defines "*pollutant*" to include solid, industrial, agricultural, and biological waste. *Id.* § 1362(6) (emphasis added). It defines "*navigable waters*" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7) (emphasis added). And it defines a "*point source*" as "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." *Id.* § 1362(14) (emphasis added). The Act does not define the word "*addition*."

In my view, the plain language of the Act makes clear that the permitting requirements apply to water transfers from one distinct body of water through a conveyance to another. As noted, the Act prohibits "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). The transfer of contaminated water from a more-polluted water body through a

conveyance, such as a tunnel, to a distinct, less-polluted water body is the "addition" of a pollutant (contained in the contaminated water) to "navigable waters" (the less-polluted water body) from a "point source" (the conveyance). In the context of this case, as we held in *Catskill I*:

> Here, water is artificially diverted from its natural course and travels several miles from the [Schoharie] Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sentiment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

273 F.3d at 492.

EPA contends that such a transfer of contaminated water, from a polluted body of water to a distinct and pristine one, is not an "addition" because all the waters of the United States are to be "considered collectively," EPA Br. at 2, that is, because the polluted and pristine bodies of water are both part of the waters of the United States and all the waters of the United States are considered to be one unit, the transfer of pollutants from one part of the unit to another part is not an "addition." I do not believe the words of the Act can be so interpreted.

The critical words for our purposes are "addition" and "navigable waters." I take them in reverse order.

1. ***"Navigable Waters"***

EPA's position -- accepted by the majority -- requires us to add words to the Act, as we must construe "navigable waters" to mean "*all* the navigable waters of the United States, considered *collectively*." *Contra Dean v. United States*, 556 U.S. 568, 572 (2009) (courts must "ordinarily resist reading words or elements into a statute that do not appear on its face") (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)).

EPA also argues that if Congress had intended the NPDES permitting requirements to apply to individual water bodies, it would have inserted the word "any" before "navigable waters." *See* 33 U.S.C. § 1362(12)(A) ("any addition of any pollutant to navigable waters from any point source"). This interpretation is flawed, for the use of the plural "waters" obviates the need for the word "any." The use of the plural "waters" indicates that Congress was referring to individual water bodies, not one collective water body. The Supreme Court addressed this precise issue in its discussion of "the waters of the United States" in *Rapanos v. United States*. There the Court considered the issue of

whether § 1362(7)'s definition of "navigable waters" meant "waters of the United States," and the Court squarely held that "waters" referred to "individual bodies," not one collective body:

> 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*." Webster's New International Dictionary 2882.

547 U.S. 715, 732 (2006) (alterations in original) (emphases added). Hence, the Supreme Court concluded the plural form "waters" does not refer to "water in general," but to water *bodies* such as streams, lakes and ponds.[2]

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[2] The majority writes that the Supreme Court's holding in *Rapanos* "does not compel the conclusion that the statutory phrase 'navigable waters' is unambiguous because that phrase, unlike the phrase in *Rapanos*, is not limited by a definite article." Op. at 44, n.24. While *Rapanos* may not "compel" that conclusion, it certainly supports it. In *Rapanos,* the Supreme Court was interpreting the same definition of "navigable waters" in operation here, § 1362(7), which defines "navigable waters" as "the waters of the United States." The lack of the word "the" before "navigable waters" in § 1362(12)(A) hardly negates the Supreme Court's holding that the definition of "navigable waters" as found in § 1362(7) does not refer to water in general, but water bodies. Moreover, the existence or non-existence of a definite article before a noun, on its own, has no bearing on the plural or singular nature of a noun. "The" can be used to refer to a particular person or thing or a group. *See* Bryan A. Garner, *Garner's Modern American Usage: The Authority on Grammar, Usage and Style*, 883 (3rd Ed. 2009) ("The definite article can be

As the majority acknowledges, the Act contains multiple provisions suggesting that the term "navigable waters" refers to multiple water bodies, not one national collective water body. Op. at 43 (citing 33 U.S.C. §§ 1313(c)(2)(A), (c)(4), 1313(d)(1)(B), 1314(2), 1314(f)(2)(F), 1314(l)(1)(A)-(B), 1342)).[3] Likewise, EPA's own regulations suggest that "navigable waters" refers to individual water bodies. For example, 40 C.F.R. § 122.45(g)(4) regulates intake credits. As the Supreme Court has observed, this regulation is incompatible with the "unitary waters" theory:

> The "unitary waters" approach could also conflict with current NPDES regulations. For example, 40 C.F.R. § 122.45(g)(4)(2003) allows an industrial water user to obtain "intake credit" for pollutants present in the water that it withdraws from navigable waters. When the permit holder discharges the water after use, it does not have to remove pollutants that were in the water before

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used to refer to a group <the basketball team> or, in some circumstances, a plural <The ideas just keep on flowing>.").

[3] There are additional sections in which the term "navigable waters" clearly refers to individual water bodies. *See, e.g.*, 33 U.S.C. §§ 1341 (requiring any applicant for federal license or permit "to conduct any activity, including but not limited to, the construction or operation of facilities which may result in any discharge in the navigable waters" to obtain a state certification that any discharge of pollutants will comply with the *receiving* water body's water-quality standard), 1344(a) (requiring permits for "[d]ischarge into navigable waters at specified disposal sites" by establishing a separate permit program for discharges of "dredged or fill material," which by definition come from water bodies); *see also* 33 U.S.C. §§ 1313(a), (d)(1)(A), 1313(e)(4), 1314(l)(1), (b)(1), (d)(2)(D), (h)(9), (h)(11)(B).

> it was withdrawn. There is a caveat, however: EPA extends such credit "only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made." The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times.

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 107-08 (2004). In all of these instances, the phrase "navigable waters" refers to individual water bodies and not one collective national water body. Indeed, neither the majority nor the parties have identified a single provision in the Act where "navigable waters" refers to the waters of the United States as a unitary whole.

2. ***"Addition"***

EPA's interpretation also requires us to twist the meaning of the word "addition." Because the word "addition" is not defined in the Act, we consider its common meaning. *See S.D. Warren Co. v. Me. Bd. of Environ. Prot.*, 547 U.S. 370, 376 (2006) (in considering the definition of "discharge" in 33 U.S.C. § 1362(12), noting that where a word is "neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning'" (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994))); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979) (words should be interpreted according to their "ordinary, contemporary, common meaning").

The ordinary meaning of "addition" is "the result of adding: anything added: increase, augmentation." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1968); *see also Webster's New World Dictionary of the American Language* 16 (2d College ed. 1970 and 1972) ("a joining of a thing to another thing"). Transferring water containing pollutants from a polluted water body to a clean water body is "adding" something to the latter; there is an "addition" -- an increase in the number of pollutants in the second water body. In this context, "addition" means adding a pollutant to "navigable waters" when that pollutant would not otherwise have been in those "navigable waters." Words should be given their "contextually appropriate ordinary meaning," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012), and the context here is a statute intended to eliminate water pollution discharges. *See Catskill I*, 273 F.3d at 486. That context makes clear that the word "addition" encompasses an increase in pollution caused by an interbasin transfer of water.

The plain words of the statute thus make clear that Congress did not intend to except water transfers from §§ 1311 and 1362 of the Act.

B. ***The Structure of the Act***

Congress's intent to require a permit for interbasin water transfers is even clearer when we consider the statutory language in light of the Act's structure. In determining whether Congress has spoken to the precise question at issue, we consider the words of the statute in "their context and with a view to their place in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), because "the meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Brown & Williamson*, 529 U.S. at 133); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole'" (citations omitted)); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (a "fundamental canon of statutory construction" is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Here, EPA's "unitary waters" theory, when considered in the context of other provisions of the Act, contravenes Congress's unambiguous intent to

subject interbasin transfers to permitting requirements and is therefore unreasonable. *See King*, 135 S. Ct. at 2489 (a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law" (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988))).

First, the Water Transfers Rule creates an exemption to permitting requirements, in violation of the canon *expressio unius est exclusio alterius*, which cautions against finding implied exceptions where Congress has created explicit ones. Section 1311(a) of the Act prohibits "[t]he discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Supreme Court has held that "*every* point source discharge" is covered by the Act:

> Congress' intent in enacting the [1972] Amendments [to the Federal Water Pollution Control Act] was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The "major purpose" of the Amendments was clearly to "establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95, 2 Leg. Hist. 1511 (emphasis supplied). No Congressman's remarks

> on the legislation were complete without reference to the "comprehensive" nature of the Amendments.

See City of Milwaukee v. Illinois, 451 U.S. 304, 318 (1981).

Congress created specific exceptions to the prohibition on the discharge of pollutants, as § 1311(a) bans such discharges "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344." 33 U.S.C. § 1311(a). These include specific exemptions to the NPDES permitting requirements for, *e.g.*, return flows from irrigated agriculture, 33 U.S.C. § 1342(l)(1), stormwater runoff, 33 U.S.C. § 1342(l)(2), and discharging dredged or fill material into navigable waters, 33 U.S.C. § 1344(a). Congress did not create an exception for interbasin water transfers.

It is well-settled that when exceptions are explicitly enumerated, courts should not infer additional exceptions. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent." (citing *Andrus v. Glover Constr., Co.*, 446 U.S. 608, 616-617 (1980))). This prohibition against implying exceptions has been applied to the Act's permitting requirements. *See NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) ("The wording of the statute, legislative history and

precedents are clear: the EPA Administrator does not have authority to except categories of point sources from the permit requirements of § [1342]"); *Nw. Envir. Advocates v. EPA*, 537 F.3d 1006, 1021-22 (9th Cir. 2008) (EPA may not "exempt certain categories of discharge from the permitting requirement"); *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003) ("Only Congress may amend the CWA to create exemptions from regulation."). Defendants' position that all water transfers between water bodies are exempt from § 1342 permitting requirements is a substantial exemption that Congress did not create.

Second, the Act also sets forth a specific plan for individual water bodies. The Act requires States to establish water-quality standards for each distinct water body within its borders. *See* 33 U.S.C. § 1313(c)(1), (2)(A). To establish water-quality standards, a State must designate a use for every waterway and establish criteria for "the amounts of pollutants that may be present in [those] water bodies without impairing" their uses. *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) (citing 33 U.S.C. § 1313(c)(2)(A)). The NPDES permit program is "the primary means" by which the Act seeks to achieve its water-protection goals. *Arkansas v. Oklahoma*,

503 U.S. 91, 101-02 (1992). The NPDES program covers all "point sources," including "any pipe, ditch, channel, [or] tunnel," 33 U.S.C. § 1362(14), and a broad range of pollutants, including chemicals, biological materials, rock, and sand, *id.* § 1362(6).

This carefully designed plan to fight water pollution would be severely undermined by an EPA-created exception for water transfers. A State's efforts to control water-quality standards in its individual lakes, rivers, and streams would be disrupted if contaminated water could be transferred from a polluted water body to a pristine one without a NPDES permit. It is hard to imagine that Congress could have intended such a broad and potentially devastating exception. Indeed, exempting water transfers from the NPDES program would undermine the ability of downstream States to protect themselves from the pollution generated by upstream States. The NPDES program provides a procedure for resolving disputes between States over discharges. *See Upper Blackstone Water Pollution Abatement Dist.*, 690 F.3d at 15 (citing *City of Milwaukee*, 451 U.S. at 325-26). When a State applies for a permit that may affect the water quality of a downstream State, EPA must notify the applying State and the downstream State. If the downstream State determines

that the discharge "will violate its water quality standards, it may submit its objections and request a public hearing." *Id.* If water transfers are exempt from NPDES requirements, the ability of downstream States to protect themselves from upstream states sending their pollution across the border will be severely curtailed.[4]

The City and certain of the States argue that subjecting water transfers to permitting requirements will be extremely burdensome. As we have repeatedly recognized, however, there is ample flexibility in the NPDES permitting process to address dischargers' concerns. *See Catskill Mountains v. EPA*, 451 F.3d 77, 85-86 (2d Cir. 2006) (*"Catskill II"*); *see also Nw. Envtl.*, 537 F.3d at 1010 ("Obtaining a permit under the CWA need not be an onerous process.").

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[4] Downstream states would have to resort to common law nuisance suits in the courts of the polluting state, instead of addressing permit violations with EPA. As the district court points out, "EPA never explains how states, post Water Transfers Rule, can address interstate pollution effects 'through their WQS [water quality standards] and TMDL [total maximum daily loads] programs' or 'pursuant to state authorities preserved by section 510,' given that states do not have authority to require other states to adhere to effluent limitations or state-based regulations. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987)." *Catskill Mountains Chapter of Trout Unlimited v. U.S. E.P.A.*, 8 F. Supp. 3d 500, 552 (2014). Indeed, at oral argument before the district court, counsel for the State of Colorado conceded that a downstream State's only remedy for interstate pollution of this sort is a common-law nuisance suit and "drink[ing] dirty water until this case makes its way up to the courts." *Id.* at 553. This cannot be what Congress intended.

The draft permit issued in this case allows for variable turbidity level restrictions by season and exemptions from the limitations in times of drought to remedy emergency threats or threats to public health or safety. *Catskill II,* 451 F.3d at 86. Point source operators can also seek a variance from limits. *See* 40 C.F.R. § 125.3(b).

In addition, much of the concern over water transfers involved agricultural use, but water diversions from a "navigable water" for agricultural use direct water *away* from a "navigable water," and thus do not trigger the need for a § 402 permit. Waters returning to a "navigable water" which are "agricultural stormwater discharges" and "return flows from irrigated agriculture" are specifically exempted from the statutory definition of "point source." 33 U.S.C. § 1362(14); *see also* 33 U.S.C. § 1342(l) (exempting "discharges composed entirely of return flows from irrigated agriculture" from permitting requirements). Thus, the catastrophic results of applying NPDES permits to water transfers bemoaned by appellants are exaggerated.[5]

[5] In addition, general permits can be issued to "an entire class of hypothetical dischargers in a given geographic region," and thus covered discharges can commence automatically without an individualized application process. *Nw. Envtl.*, 537 F.3d at 1011 (citations omitted); *see* 40 C.F.R. § 122.28.

Third, as discussed above, Congress used the phrase "navigable waters" to refer to individual water bodies in numerous provisions of the Act. Another well-settled rule of statutory interpretation holds that the same words in a statute bear the same meaning. *See Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) ("the 'normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.'" (internal citations omitted)); *Prus v. Holder*, 660 F.3d 144, 147 (2d Cir. 2011) ("the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning"). When the Act is read as a whole, it is clear that Congress did not intend the phrase "navigable waters" to be interpreted as a single water body because that interpretation is "inconsisten[t] with the design and structure of the statute as a whole." *Utility Air*, 134 S. Ct. at 2442; *see also* Scalia & Garner, *Reading Law* 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

Accordingly, in my opinion, the structure and context of the Act show clearly that Congress did not intend to exempt water transfers from the permitting requirements.

C. *The Purpose of the Act*

The Act was passed in 1972 to address environmental harms caused by the discharge of pollutants into water bodies. As the Act itself explains, its purpose was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *accord Miccosukee*, 541 U.S. at 102; *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 490-91 (2d Cir. 2005); *see also Catskill I*, 273 F.3d at 486 ("[T]he Act contains the lofty goal of eliminating water pollution discharges altogether.").

The Water Transfers Rule is simply inconsistent with the purpose of the Act and undermines the NPDES permit program. It creates a broad exemption that will manifestly interfere with Congress's desire to eliminate water pollution discharges. As the majority acknowledges, water transfers are a real concern. Artificial transfers of contaminated water present substantial risks to water quality, the environment, the economy, and public health. If interbasin transfers are not regulated, there is a substantial risk that industrial waste, toxic algae, invasive species, and human and animal contaminants will flow from one water body to another. Accepting the argument that water transfers are not covered by the Act on the theory that pollutants are not being added but merely

moved around surely undermines Congress's intent to restore and maintain the integrity of our waters. *See* Robert A. Katzmann, *Judging Statutes* 31 (2014) ("The task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes.").

In sum, based on the plain words of §§ 1311 and 1362, the structure and design of the Act, and its overall purpose, I would hold that Congress has "unambiguously expressed" its intent to subject water transfers to the Act's permitting requirements.

II

As the majority notes, our Court has twice interpreted these precise provisions of the Act as applied to these very facts. *See Catskill I*, 273 F.3d 484-85; *Catskill II*, 451 F.3d at 79-80. The decisions are not controlling, however, because EPA had not yet adopted the Water Transfers Rule and we conducted our review under a different deference standard. *See Catskill I*, 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference *might* be appropriate." (emphasis added)); *Catskill II*, 451 F.3d at 82 ("The City concedes that this EPA interpretation is not entitled to *Chevron* deference."). Nonetheless, the two decisions are particularly helpful to the

analysis at hand. Similarly, Supreme Court decisions have also suggested that EPA's unitary waters theory is inconsistent with the plain wording of the Act.

A. *Catskill I and II*

In *Catskill I* and *II*, we conducted our inquiry under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and *United States v. Mead Corp.*, 533 U.S. 218 (2001). *See Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 83 n.5.[6] Our application of the *Skidmore/Mead* framework does not imply that we found the Act to be ambiguous. Rather, to the contrary, we concluded in *Catskill I* and *II* that the meaning of the Act was plain and unambiguous.

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[6] While we discussed *Mead* and *Skidmore* in *Catskill I* and *II*, we rejected EPA's position as unpersuasive. In *Catskill I* we held:

> [C]ourts do not face a choice between *Chevron* deference and no deference at all. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference: the agency position should be followed to the extent persuasive. *See Mead*, 121 S. Ct. at 2175-76 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). For the reasons that follow, however, we do not find the EPA's position to be persuasive.

273 F.3d at 491. In *Catskill II*, we observed that because EPA's position was not the product of a formal rulemaking, the most EPA could hope for was to persuade the court of the reasonableness of its position under *Skidmore,* a position we did not accept. *Catskill II*, 451 F.3d at 83 n.5 ("[W]e do not find the ['holistic'] argument persuasive and therefore decline to defer to the EPA.").

1. *Skidmore*

Under *Skidmore*, the court applies a lower level of deference to certain agency interpretations and considers "the agency's expertise, the care it took in reaching its conclusions, the formality with which it promulgates its interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments." *Community Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002); *accord In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 83 (2d Cir. 2004); *see Skidmore*, 323 U.S. at 140. The appropriate level of deference afforded an agency's interpretation of a statute depends on its "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Unlike *Chevron*, however, *Skidmore* does not require a court to make a threshold finding that the statute is ambiguous before considering the persuasiveness of the agency's interpretation. Instead, *Skidmore* merely supplies the appropriate framework for reviewing agency interpretations that "lack the force of law." *Id.*

As the majority notes, the Supreme Court has never explicitly held that courts must find ambiguity before applying the *Skidmore* framework. While there is some scholarly authority for the proposition that "'the *Skidmore* standard implicitly replicates *Chevron*'s first step,'" Op. at 34 (quoting Kristin E. Hickman

& Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1247 (2007)), the Supreme Court has decided numerous cases under *Skidmore* without finding that a statute's language was ambiguous, *see, e.g.*, *EEOC v. Arabian American Oil*, 499 U.S. 244, 257 (1991) (applying *Skidmore* without finding ambiguity in statute and noting that agency's interpretation "lacks support in the plain language of the statute"); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980) (applying *Skidmore* without finding ambiguity in statute and holding that regulation was permissible after considering statute's "language, structure and legislative history"); *see generally* Richard J. Pierce, Jr., I *Admin. L. Treatise* § 6.4 (5th ed. 2010).

Of course, the Supreme Court did not hold, in either *Skidmore* or *Mead*, that ambiguity was a threshold requirement to applying the framework. *See Mead*, 533 U.S. at 235 (An agency ruling is entitled to "respect proportional to its 'power to persuade,' . . . . Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, and any other sources of weight." (citations omitted)); *Skidmore*, 323 U.S. at 164 ("The weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

pronouncements, and all those factors which give it power to persuade, if lacking power to control."). Rather, the *Skidmore/Mead* framework adopts a less rigid, more flexible approach, *see U.S. Freightways Corp. v. Comm'r*, 270 F.3d 1137, 1142 (7th Cir. 2001) (referring to "the flexible approach *Mead* described, relying on . . . *Skidmore*"), as it presents "a more nuanced, context-sensitive rubric" for determining the level of deference a court will give to an agency interpretation, Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 836 (2001); *see also* Pierce, *supra*, § 6.4, at 444 ("The Court has referred to a variety of factors that can give an agency statement 'power to persuade.' . . . [N]o single factor is dispositive . . . .").

Ambiguity in a statute, of course, can be a factor, and in the sliding-scale analysis of the *Skidmore/Mead* framework, the "power to persuade" of an agency determination can be affected by the clarity -- or lack thereof -- of the statute it is interpreting. Indeed, upon applying the *Skidmore/Mead* framework, a court may uphold -- or reject -- an agency interpretation because the interpretation is consistent with -- or contradicts -- a statute whose meaning is clear. *See* Pierce, *supra*, § 6.4, at 443. Here, we did not defer to the agency's

interpretation of the Act in *Catskill I* and *II,* precisely because the Water Transfers Rule contravened the plain meaning of the Act.

2. *The Plain Meaning of the Act*

The majority dismisses the notion that we ruled on the plain meaning of the Act in *Catskill I* and *II*, asserting that there were only a "few references to 'plain meaning'" in our decisions. Op. at 36. To the contrary, through both our words and our reasoning, we made clear repeatedly in *Catskill I* and *II* that the agency's unitary waters theory was inconsistent with the unambiguous plain meaning of the Act.

In *Catskill I*, we held that defendants' interpretation was "inconsistent with the *ordinary meaning* of the word 'addition.'" 273 F.3d at 493 (emphasis added). Specifically, we held that there is an "addition" of a pollutant into navigable water from the "outside world" -- thus triggering the permitting requirement -- any time such an "addition" is from "*any place* outside the particular water body to which pollutants are introduced." *Id.* at 491 (emphasis added). We reasoned that:

> Given the *ordinary meaning* of the [Act]'s text and our holding in *Dague*, we cannot accept the *Gorsuch* and *Consumers Power* courts' understanding of "addition," at least insofar as it implies acceptance of what the *Dubois*

> court called a "singular entity" theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States. . . . We properly rejected that approach in *Dague*. *Such 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."

Id. at 493 (emphases added).[7] As a result, we held that "the 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." *Id.* at 491 (emphasis added). Accordingly, we clearly were relying on the plain meaning of the Act in reaching our conclusion.

We also noted that "[e]ven if we were to conclude that the proper application of the statutory text to the present facts was sufficiently ambiguous to justify reliance on the legislative history of the statute, . . . that source of

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[7] In *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), the City of Burlington argued that "pollutants would be 'added' only when they are introduced into navigable waters for the first time," *id.* at 1354, an argument mirroring those raised by defendants here. We rejected the contention, in light of "the intended broad reach of § 1311(a)," noting "that the definition of 'discharge of a pollutant' refers to 'any point source' without limitation." *Id.* at 1355 (quoting 33 U.S.C. § 1362(12)). We rejected the assertion that water flowing from a pond to a marsh was not an "addition." *See Catskill I*, 273 F.3d at 492.

legislative intent would not help the City." 273 F.3d at 493. That language certainly makes clear we concluded the statutory text was *not* ambiguous.

Finally, in the penultimate paragraph of *Catskill I*, we made absolutely clear that our holding was based on the plain meaning of the statutory text. We held:

> 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 § 1331(a) and the definition of "discharge of a pollutant" in § 1362(12) are met here.

Id. at 494 (emphases added).[8]

Our analysis in *Catskill II* was similar, as we dismissed defendants' arguments as merely "warmed-up" versions of those rejected in *Catskill I*, made no more compelling by EPA's new "holistic" interpretation of the statute. 451

[8] At least one commentator has agreed that we found in *Catskill I* that "the statute's plain meaning was clear." Jeffrey G. Miller, *Plain Meaning, Precedent and Metaphysics, Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Envtl. L. Rep. News & Analysis 10770, 10792 (2014) ("Although the Second Circuit did not explicitly employ the two-step *Chevron* deference test to EPA's water transfer rule, it left no doubt as to how it would have decided the case under *Chevron*. With regard to the first step, whether the statute is ambiguous, the court in *Catskill I* held that the statute's plain meaning was clear.").

F.3d at 82. We rejected New York City's "'holistic arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute," because, we concluded, they "simply overlook its *plain language*." *Id.* at 84. (emphasis added). We noted our dismissal of the unitary waters theory in *Catskill I* based on the ordinary meaning of the word "addition":

> We also rejected the City's "unitary water" theory of navigable waters, which posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an addition. We pointed out that this theory would lead to the *absurd result* that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an "addition" of pollutants and would not be subject to the [Act]'s NPDES permit requirements. *Catskills I* rejected the "unitary water" theory as inconsistent with the *ordinary meaning* of the word "addition."

Id. at 81 (emphasis added) (internal citations omitted). Again, we considered the very interpretation of "navigable waters" proffered in the current appeal and rejected it based on "the plain meaning" of the Act's text. *Id.* at 82.[9]

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[9] The majority suggests that we ruled on the meaning of "addition" based on the plain meaning of the statute without reaching the meaning of "addition . . . *to navigable waters*." Op. at 36-37 (emphasis added) ("We do not . . . think that by referring to the 'plain meaning' of 'addition' in *Catskill I* we were holding that the broader statutory

I do not suggest that we are bound by our prior decisions. But in both decisions, we carefully considered the statutory language, and in both decisions, based on the plain wording of the text, we rejected an interpretation of §§ 1311 and 1362 that construes "navigable waters" and "the waters of the United States" to mean a single water body. Hence, we have twice rejected the theory based on the plain language of the Act. That plain language has not changed, and neither should our conclusion as to its meaning.

B. ***The Supreme Court Precedents***

Finally, although the Supreme Court has not explicitly ruled on the validity of EPA's "unitary waters" theory, it has expressed serious reservations. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 1537 (2004), the Court strongly suggested that the theory is not reasonable. First, the Court remanded for fact-finding on whether the two water bodies at issue

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phrase 'addition . . . to navigable waters' unambiguously referred to a collection of individual 'navigable waters.'" (internal citations and quotations omitted)). It is not possible, however, to define "addition" without defining the object to which the addition is made, as the concepts are inexorably linked. It is clear from our reasoning in *Catskill I* and *II*, that we considered the *entire phrase* in reaching our conclusion. Thus, when we stated "that the discharge of water containing pollutants from one distinct water body to another is an 'addition of [a] pollutant' under the CWA," we could only have meant that the discharge of water containing pollutants constitutes "an 'addition' of [a] pollutant" *to navigable waters*. *Catskill II*, 451 F.3d at 80.

were "meaningfully distinct water bodies." 541 U.S. at 112. That disposition follows from Judge Walker's soup ladle analogy in *Catskill I*: "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 (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle)." 273 F.3d at 492. In *Catskill II*, we noted that such a transfer would be an intrabasin transfer, from one water body back into the same water body, and we then applied the analogy to the facts of this case: "The Tunnel's discharge . . . was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer." 451 F.3d at 81. In *Miccosukee*, the Supreme Court cited the "soup ladle" analogy with approval, and remanded the case to the district court to determine whether the water bodies in question were "two pots of soup, not one." 541 U.S. at 109-10; *see also id.* at 112. If the "unitary waters" theory were valid, however, there would have been no need to resolve this factual question. If all the navigable waters of the United States were deemed one collective national body, there would be no need to consider whether individual water bodies were distinct -- there would be no need to determine whether there were two pots of soup or one.

Second, as previously discussed, the Court observed that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id.* at 107. The Court noted that under the Act, states "may set individualized ambient water quality standards by taking into consideration 'the designated uses of the navigable waters involved," thereby affecting local NPDES permits. *Id.* (quoting 33 U.S.C. § 1313(c)(2)(A)). "This approach," the Court wrote, "suggests that the Act protects individual water bodies as well as the 'waters of the United States' as a whole." *Id.*[10]

Subsequent Supreme Court decisions support this reading of *Miccosukee*. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court held that a water transfer between one portion of a river through a concrete channel to a lower portion of the same river did not trigger a NPDES permit requirement. 133 S. Ct. 710 (2013). The Court observed that "[w]e held [in *Miccosukee*] that th[e] water transfer would count as a discharge of pollutants under the CWA *only if* the canal and the reservoir were 'meaningfully distinct water bodies.'" *Id.* at 713 (emphasis added) (citations omitted). In holding that "the flow of water from an improved portion of a

[10] In *Catskill II*, we concluded that "[o]ur rejection of [the unitary waters] theory in *Catskill I* . . . is supported by *Miccosuke*e, not undermined by it." 451 F.3d at 83.

navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA," *id.*, the Court again suggested that it *would* be a discharge of pollutants if the transfer were between two *different* water bodies.

In *Miccosukee*, the Supreme Court acknowledged the concerns that have been raised about the burdens of permitting, but also observed that "it may be that such permitting authority is *necessary to protect water quality*, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs." 541 U.S. at 108 (emphasis added). Indeed, recognizing the importance of safeguarding drinking water, Congress created an extensive system to protect this precious resource, a system that would be undermined by exempting interbasin water transfers.

Hence, the Supreme Court's decisions in *Miccosukee* and *Los Angeles County* support the conclusion that water transfers between two distinct water bodies are not exempt from the Act.

III

In my view, then, Congress has "unambiguously expressed" its intent to subject interbasin water transfers to the requirements of §§ 1311 and

1362 of the Act. Accordingly, I would affirm the judgment of the district court based on step one of *Chevron*. Even assuming, however, that the statutory text is ambiguous, I agree with the district court that the Water Transfers Rule also fails at *Chevron* step two because it is an unreasonable and manifestly contrary interpretation of the Act, largely for the reasons set forth in the district court's thorough and carefully-reasoned decision. I add the following:

First, *Chevron* deference has its limits. "Deference does not mean acquiescence," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992), and "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking," *Judulang v. Holder*, 132 S. Ct. 476, 484-85 (2011).

Second, an agency's interpretation of an ambiguous statute is not entitled to deference where the interpretation is "at odds" with the statute's "manifest purpose," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001), or the agency's actions "'deviate from or ignore the ascertainable legislative intent,'" *Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 867 (D.C. Cir. 2000) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983)). *See* Katzmann, *Judging Statutes* 31 ("The task of the judge is to make sense of

legislation in a way that is faithful to Congress's purposes. When the text is ambiguous, a court is to provide the meaning that the legislature intended. In that circumstance, the judge gleans the purpose and policy underlying the legislation and deduces the outcome most consistent with those purposes."). As discussed above, in my view the Water Transfers Rule is manifestly at odds with Congress's clear intent in passing the Act.

Third, the Water Transfers Rule is not entitled to deference because it will lead to absurd results. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("No regulation is 'appropriate' if it does significantly more harm than good.'"); *see also* Scalia & Garner, *Reading Law* 234 ("A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve."). Indeed, this Court has already held -- twice -- that the "unitary waters" theory would lead to absurd results. In *Catskill* I, we concluded that "[n]o one can *reasonably* argue that the water in the Reservoir and the Esopus are in any sense the 'same,' such that 'addition' of one to the other is a logical impossibility." 273 F.3d at 492 (emphasis added). In *Catskill II*, we rejected the "unitary water" theory for a second time, observing that it "would lead to the

absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants." 451 F.3d at 81 (emphasis added). It would be an absurd result indeed for the Act to be read to allow the unlimited transfer of polluted water to clean water. Clean drinking water is a precious resource, and Congress painstakingly created an elaborate permitting system to protect it. Deference has its limits; I would not defer to an agency interpretation that threatens to undermine that entire system.

* * *

I would affirm the judgment of the district court, and, accordingly, I dissent.