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Consolidated Cases: 14-1909, 14-1991, 14-1997, 14-2003

United States Court of Appeals
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants-Appellants-Cross Appellees,

(For the Complete Caption See Reverse Side of Cover)

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

**BRIEF OF NATIONAL HYDROPOWER ASSOCIATION, NORTHWEST
HYDROELECTRIC ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION,
SABINE RIVER AUTHORITY OF TEXAS, SABINE RIVER AUTHORITY STATE OF
LOUISIANA, AND OGLETHORPE POWER CORPORATION AS *AMICI CURIAE* IN
SUPPORT OF DEFENDANT–APPELLANT–CROSS APPELLEE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

Michael A. Swiger
Charles R. Sensiba
Sharon L. White
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, DC 20007
Telephone: (202) 298-1800

September 18, 2014

Counsel for Amici Curiae

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., WATERKEEPER ALLIANCE, INC., TROUT UNLIMITED, INC., NATIONAL WILDLIFE FEDERATION, ENVIRONMENT AMERICA, ENVIRONMENT NEW HAMPSHIRE, ENVIRONMENT RHODE ISLAND, ENVIRONMENT FLORIDA, STATE OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON,

Plaintiffs-Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

Consolidated Plaintiff-Appellee,

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

Intervenor Plaintiffs-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants-Cross Appellees,

STATE OF COLORADO, STATE OF NEW MEXICO, STATE OF ALASKA, ARIZONA DEPARTMENT OF WATER RESOURCES, STATE OF IDAHO, STATE OF NEBRASKA, STATE OF NORTH DAKOTA, STATE OF NEVADA, STATE OF TEXAS, STATE OF UTAH, STATE OF WYOMING, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL UTAH WATER CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER, BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION, CITY OF BOULDER [COLORADO], CITY OF AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT, IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, KANE COUNTY [UTAH] WATER CONSERVANCY DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION, SALT LAKE & SANDY [UTAH] METROPOLITAN WATER DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER AUTHORITY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS, ACTING BY AND THROUGH ITS ENTERPRISE COLORADO SPRINGS UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS, CITY OF NEW YORK,

Intervenor Defendants-Appellants-Cross Appellees,

NORTHERN COLORADO WATER CONSERVANCY DISTRICT,

Intervenor Defendant,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Intervenor Defendant-Appellant-Cross Appellant.

CORPORATE DISCLOSURE STATEMENT

National Hydropower Association (“NHA”) is a non-profit trade association that represents and advocates on behalf of the hydropower industry. NHA has 195 members from all segments of the industry. NHA has no parent company or stockholders.

Northwest Hydroelectric Association (“NWhA”) is a non-profit trade association that represents and advocates on behalf of the Northwest hydropower industry. NWhA has over 80 members from all segments of the industry. NWhA has no parent company or stockholders.

American Public Power Association (“APPA”) is a national organization representing the interests of more than 2,000 non-profit, community-owned electric utilities throughout the United States. Hydroelectric projects comprise over 17 percent of public power’s total generation. APPA has no parent company or stockholders.

Sabine River Authority of Texas and Sabine River Authority, State of Louisiana (together, “SRAs”) are state entities charged under their respective authorizing statutes to operate the Toledo Bend Project. The SRAs have no parent company or stockholders.

Oglethorpe Power Corporation is a non-profit electric cooperative owned by the 38 electric membership corporations that it serves. It has no parent company or stockholders.

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STATEMENT OF INTEREST

National Hydropower Association (“NHA”), Northwest Hydroelectric Association (“NWhA”), American Public Power Association (“APPA”), Sabine River Authority of Texas and Sabine River Authority, State of Louisiana (“SRAs”), and Oglethorpe Power Corporation (“OPC”) (together, “Hydropower *Amici*”) represent electric utilities and hydropower project owners and operators from across the nation, as well as others who rely on such projects that may be affected by the district court’s decision in this case.¹ In particular:

NHA is a non-profit national association dedicated exclusively to advancing the interests of the United States hydropower industry, including conventional, pumped storage, and new hydrokinetic technologies. NHA seeks to secure hydropower’s place as a clean, renewable, and reliable energy source that serves national environmental and energy policy objectives. NHA’s membership consists of 195 organizations including public power utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NWhA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWhA has over 80 members from

¹ Pursuant to Local Rule 29.1, Hydroelectric *Amici* state that no counsel for any party to this case authored this brief in whole or in part, and no person other than *amici* and their members made monetary contributions to the preparation and submission of this brief. The parties have consented to the filing of this brief.

all segments of the industry. NWhA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

APPA is a national organization representing the interests of more than 2,000 non-profit, community-owned electric utilities throughout the United States that deliver electric energy to approximately 47 million citizens, or 15 percent of the population. Hydroelectric projects comprise over 17 percent of public power's total generation.

The SRAs are state entities (created by the States of Texas and Louisiana) that are charged, under their respective authorizing statutes, to control and regulate the flow of the Sabine River, and to finance, construct, and operate the Toledo Bend Project, located along the Sabine River on the Texas-Louisiana border. The Toledo Bend Project is the only hydropower facility in the United States that is co-licensed to two states through governmental units of those states.

OPC is one of the nation's largest power supply cooperatives with assets serving 38 Electric Membership Corporations which, collectively, provide electricity to more than 4.1 million Georgia citizens. OPC is the majority owner and operator of the Rocky Mountain Pumped-Storage hydroelectric plant, located in Floyd County, Georgia.

The Court’s decision in this case could have far-reaching and serious impacts on the nation’s hydropower industry and supply of electric energy. Hydropower projects are an important source of electric power, accounting for approximately seven percent of national electric production each year and over half of the country’s renewable energy.² Hydroelectric dams impound water in a reservoir or divert water out of the stream for release through turbines for the production of electricity. In addition to electricity production, the nation’s hydropower projects provide numerous other benefits to the communities where they are located, such as municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat.

Almost all non-federally owned hydropower projects are subject to the Federal Power Act’s (“FPA”) comprehensive regulatory regime. 16 U.S.C. §§ 791-825r (2012). Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) “to secure a comprehensive development of national resources.” *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n*, 328 U.S. 152, 180-81 (1946). Under the FPA, the Federal Energy Regulatory Commission (“FERC”) has exclusive authority to issue licenses authorizing the

² U.S. Energy Information Administration, Frequently Asked Questions, Electricity Generation by Source, <http://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3> (last visited September 11, 2014); U.S. Geological Survey, Hydroelectric Power Water Use, <http://water.usgs.gov/edu/wuhy.html> (last visited September 11, 2014).

construction, operation, and maintenance of new and existing hydroelectric projects.³ *See* 16 U.S.C. §§ 797(e), 808, and 817. In carrying out its statutory responsibilities, FERC is required to consider all of the factors affecting the public interest in the comprehensive development of a waterway, including appropriate conditions to protect the environment. *See* 16 U.S.C. §§ 797(e), 803(a)(1).

To encourage and attract the enormous amount of capital required to develop hydropower, Congress included safeguards in the FPA to help ensure security and stability in investments. For example, section 6 authorizes FERC to issue licenses for long, fixed terms of up to 50 years. 16 U.S.C. § 799. Section 6 also prohibits FERC from amending licenses, once they are accepted, without the consent of the licensee. *Id.*; *Pac. Gas & Elec. Co. v. F.E.R.C.*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). At the end of the license term, section 15 directs that a new license be issued on reasonable terms, and for a term of 30 to 50 years. 16 U.S.C. § 808(a)(1), (e). FPA section 28 restricts the authority to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. *Id.* § 822. In addition to the FPA, hydropower projects are subject to the requirements of a variety of environmental statutes, such as the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Endangered

³ Federally operated projects, such as those operated by the Tennessee Valley Authority, U.S. Army Corps of Engineers, and the Bureau of Reclamation are not licensed by FERC.

Species Act, the Coastal Zone Management Act, the Federal Land Policy and Management Act, and the National Historic Preservation Act.

FERC-licensed hydropower projects are also subject to section 401 of the Clean Water Act (“CWA”), 33 U.S.C. § 1341 (2012). This provision requires an applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters to obtain a water quality certification from the state in which the discharge will occur. *See id.* § 1341(a). This certification is intended to ensure that the discharge will comply with a state’s water quality standards. If this certification is granted, FERC may issue the license, and is statutorily required to include any terms and conditions contained in the certification in the license. *See PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 722 (1994); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110 (2d Cir. 1997). Licensees must obtain a new section 401 certification each time that the hydropower project is relicensed. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 374-75 (2006); 33 U.S.C. § 1341(a)(1).

By contrast, hydropower dam operations have been held as a general matter not to be subject to the CWA’s section 402 National Pollution Discharge Elimination System (“NPDES”) program, which requires that any person who discharges pollutants from a point source to waters of the United States obtain an NPDES permit. 33 U.S.C. § 1342; *see Nat’l Wildlife Fed’n v. Consumers Power*

Co., 862 F.2d 580 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

In this case, multiple plaintiffs filed complaints under the CWA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 500-596 (2012), challenging the Environmental Protection Agency’s (“EPA”) promulgation of the National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule. 73 Fed. Reg. 33,697 (June 13, 2008) (“Water Transfers Rule”) (SPA 123-34). The Rule, adopted in 2008, codified EPA’s longstanding interpretation that the CWA exempts water transfers from regulation under the NPDES permitting program. On multiple motions and cross-motions for summary judgment, the United States District Court for the Southern District of New York concluded, under the two-step framework established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that EPA’s interpretation of the CWA to exclude water transfers from the permitting requirements of the NPDES program was not a permissible construction of the statute. The court also found EPA’s interpretation to be arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A). Additionally, the court found that the Water Transfers Rule at least partially contravened the United States Supreme Court’s plurality decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The court vacated the rule to the extent it was inconsistent with the CWA and, in particular, the phrase “navigable waters” as

interpreted in *Rapanos*, and remanded the rule to EPA to provide a reasoned explanation for its interpretation.

Hydropower *Amici* believe that the district court's decision is incorrect and warrants reversal. Water transfers are subject to regulation by the states under other provisions of the CWA, and such transfers should not be subject to the NPDES permitting program, which was intended by Congress to control end-of-pipe discharges of pollutants. The district court appropriately distinguished between water transfers, and recirculation of waters in-river through a dam or pumped-storage hydropower project. (SPA 22-25). However, many hydropower projects involve transfers of water between water bodies that do not add pollutants to the water. Some of these projects divert water from one river basin to another. Others move water among tributaries within the same river basin. Particularly in the western United States, project configurations among multiple water bodies can be quite complex and involve numerous diversions and discharges, reflecting the multi-purpose nature of many of these projects which serve important water supply functions as well as power production. Without the Water Transfers Rule in place, all such projects could become subject to NPDES permitting, with enormous regulatory and operational implications.

Requiring hydropower dam projects that convey water with pre-existing pollutants now to obtain NPDES permits, 50 years after enactment of the CWA,

would create a regulatory trainwreck neither authorized nor contemplated by Congress when it passed the CWA. NPDES permits, which must be obtained every five years, could interfere with FERC-issued long-term licenses that reflect the comprehensive balancing of public interest factors, and that already contain compliance requirements designed to protect the full panoply of environmental interests, including water quality (*e.g.*, the section 401 water quality certification and terms and conditions), recreation, and fish and wildlife habitat. Adding new and potentially conflicting environmental requirements on a hydropower dam every five years when the dam is not itself adding any pollutants to the stream would further complicate an already very complex regulatory scheme for FERC-licensed hydropower projects, and threaten licensees' certainty of investment.

Hydropower *Amici*, therefore, request that the Court reverse the district court's decision, afford EPA deference in its interpretation of the CWA to exclude water transfers under the NPDES program, and uphold the Water Transfers Rule.

STATEMENT OF THE ISSUE PRESENTED

Whether the transfer of water containing pollutants between water bodies without introducing new pollutants to the transferred water constitutes an "addition" of pollutants to "navigable waters" under the CWA, or whether such a transfer is excluded from NPDES permitting as interpreted by EPA under the Water Transfers Rule.

SUMMARY OF ARGUMENT

The ruling below improperly expands the scope of CWA section 402 by failing to recognize that Congress, in enacting the CWA, did not intend for the NPDES permitting program to apply to all activities that contribute to pollution. The section 402 program, and its technology and water quality-based requirements, were intended to address only “end-of-pipe” introductions of waste into navigable waters. Activities that change flows of surface waters were recognized as potential contributors to pollution, but were not intended to be subject to NPDES permits. Imposing such a requirement on point sources that merely convey already polluted water without adding pollutants from the outside world would inappropriately expand the scope of the NPDES program. Moreover, such activities are not conducive to regulation under the NPDES permitting regime; the presence and quantity of such pollutants, which may be man-made or naturally occurring, cannot be readily ascertained or abated in an NPDES permit.

Under longstanding precedent, releases at hydroelectric dams are not subject to NPDES permits. Under the district court’s decision, passage of water through a hydropower project involving a water transfer could now be subject to NPDES permitting, even if the water transfer adds no pollutants from the outside world. This would have significant regulatory and operational implications to hydroelectric projects across the country.

ARGUMENT

I. EPA’s Interpretation of the CWA in the Water Transfers Rule Was Reasonable and Entitled to Deference Under *Chevron* Step Two.

The CWA is designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Section 301(a) of the CWA prohibits “the discharge of any pollutant” without a permit under the Act, such as an NPDES permit under section 402.⁴ *Id.* §§ 1311(a), 1342. “Discharge” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12). “Navigable waters” is further defined as “the waters of the United States.” *Id.* § 1362(7). “Addition” is undefined by the CWA. NPDES permits must be obtained from either the EPA or the appropriate state permitting agency operating under an EPA-approved program.⁵ Permits under section 402 require that the discharger adhere to certain technology and water quality based requirements, and permits are issued for a term of five years. *Id.* § 1342(b)(1)(B). Under EPA’s Water Transfers Rule, “water transfers are not subject to regulation under the [NPDES] permitting program.” (SPA 123). The Rule defines a water transfer as “an activity that conveys or connects waters of the

⁴ EPA regulations require any person who discharges or “proposes to discharge pollutants” to apply for an NPDES permit. 40 C.F.R. § 122.21(a) (2014).

⁵ Pursuant to section 402(b) of the CWA, EPA may grant a state section 402 permitting authority. 33 U.S.C. § 1342(b).

United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.”⁶ (SPA 123).

In issuing the Water Transfers Rule, EPA interpreted the term “addition of pollutants” in the CWA to conclude that the transfer of water and any existing pollutants therein is not an “addition” of those pollutants “to navigable waters.” The issue before this court is whether EPA’s interpretation of the CWA under the Water Transfers Rule is reasonable. The court below concluded that it was not, holding that EPA failed under *Chevron* Step Two to give a “reasoned explanation” of its interpretation of the CWA that water transfers are exempt from CWA section 402.

a. EPA’s Interpretation of the CWA Was Reasonable Under *Chevron* Step Two, as the Eleventh Circuit Held in *Friends of the Everglades*.

EPA determined that the CWA is ambiguous as to whether pollutants are “added” to navigable waters during a water transfer.⁷ EPA’s interpretation of the CWA in the Water Transfers Rule is entitled to deference under *Chevron* Step Two if it is a reasonable construction of an ambiguous statute. *Chevron*, 467 U.S. at 843-44. “When ‘Congress has not directly addressed the precise [interpretative]

⁶ The Rule clarifies that the passage of water through a hydropower dam does not constitute an “intervening industrial, municipal, or commercial use.” (SPA 130).

⁷ Intervenor-Appellant South Florida Water Management District (“SFWMD”) argues that the CWA is unambiguous in that water transfers are not an addition of a pollutant to navigable waters under the unitary waters theory. Hydropower *Amici*’s arguments set forth herein are consistent with SFWMD’s position.

question at issue,’ . . . a reviewing court cannot ‘simply impose its own construction o[f] the statute.’” *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) (citing *Chevron*, 467 U.S. at 843). Rather, the court must defer to an agency if it offers a “reasonable” way of filling the “gap left open by Congress.” *Id.* at 1607 (citing *Chevron*, 467 U.S. at 866).

EPA’s Water Transfers Rule offers a reasonable, and therefore permissible, construction of the CWA. In reviewing the language, structure, and purpose of the CWA, EPA properly recognized that Congress did not intend for all activities that contribute to pollution be addressed with the issuance of technology-based permits under the NPDES program. (SPA 127). Thus, EPA concluded that Congress’ use of the phrase “discharge of a pollutant” contemplates an effort to address the manner in which “pollutants” are introduced into the receiving waters, and that it is not synonymous with the term “pollution,” which is a much broader term.⁸ (SPA 128). Nonpoint source pollution generally refers to “pollution that does not result from the ‘discharge’ or ‘addition’ of pollutants from a point source.” *Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987); *see also Or. Natural Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998). EPA recognized that activities that may cause or contribute to pollution may well be

⁸ “Pollution” is more broadly defined than “pollutant” and includes “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” 33 U.S.C. § 1362(19).

issues that are appropriate for states to address,⁹ but that those activities are not subject to section 402.¹⁰ (SPA 128). Man-altering changes in the normal flow of surface water are a classic example of one area where Congress understood that “pollution” might occur, yet understood that they would not be treated as the addition of a pollutant from a point source.¹¹ Congress, in section 304(f), expressly provided that EPA would issue guidance on controlling nonpoint source pollution, such as “changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.” 33 U.S.C. § 1314(f)(2)(F).¹² However, EPA would not have a regulatory role over them. (SPA 128).

⁹ Congress generally left the control of nonpoint source pollution with the states under section 319 of the CWA. 33 U.S.C. § 1329. Indeed, Congress initially contemplated through section 208 of the CWA that states would develop area-wide plans to address pollution. *Id.* § 1288. *See generally* Raymond A. Sales, *Implementing Section 208: What Does it Take – A Report on Growth Management and Water Quality Planning*, 11 Urb. Law. 604 (1979); *see also* 33 U.S.C. §§ 1251(b), (g) (discussing “pollution” and the role of the states).

¹⁰ Senate Comm. On Environmental Public Works, Clean Water Act of 1977, S. Rep. No. 95-370, at 8-9 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334-35, *and in* 4 Legislative History of the Clean Water Act of 1977, a Continuation of the Legislative History of the Federal Water Pollution Control Act, at 642-43 (1978).

¹¹ House Comm. On Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 92-911, at 109 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3718-19, *and in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 796 (1973).

¹² *See also* Environmental Protection Agency, National Water Quality Inventory: 1977 Report to Congress at 15-19 (Oct. 1978) (EPA Doc. No. 440/4-78-001) (describing pollution from dams as nonpoint source pollution).

EPA further reasoned that in contrast to section 304(f), the section 402 program was designed to ensure the use of “end-of-pipe” effluent limitations¹³ for the introduction of “wastes” from point sources, such as water treatment plants, industrial facilities, and concentrated animal feeding operations, into waters of the United States. (SPA 128-29); *e.g.*, *United States v. Robison*, 505 F.3d 1208, 1212 (11th Cir. 2007) (discharge from pipe manufacturing machines).¹⁴ The United States Court of Appeals for the Tenth Circuit aptly noted that “[t]he touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); *see also United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (the definition of point source “evoke[s] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways”). The United States Court of Appeals for the Ninth Circuit, in commenting upon the general term “pollutants,” similarly observed that the term suggests “waste material of a human or industrial process.” *Ass’n to Protect*

¹³ The CWA defines “effluent limitation” as “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters” 33 U.S.C. § 1362(11).

¹⁴ The precursor to section 402 is section 13 of the Rivers and Harbors Appropriations Act, which sought to control the introduction of wastes into navigable waters. 33 U.S.C. § 407; *see also id.* § 1342(a)(4) (coordinating the Refuse Act with the new section 402 program).

Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1016 (9th Cir. 2002).

EPA's interpretation also recognizes the practical differences between regulating end-of-pipe discharges and treatment of pollutants already present in navigable waters. Pollutants that are added by the point source are amenable to end-of-pipe technology-based effluent limitations and water quality-based requirements. The presence and quantity of such pollutants are readily ascertainable, because it is the point source itself that is creating or causing the pollutants to be introduced. Treatment or reduction in pollutant sources can be applied to meet limitations and requirements. This is not true when the point source is simply passing along already polluted water. The presence or quantity of such "pollutants" can and does vary depending upon the actions of third parties, the climate, atmospheric deposition, land use practices, and even soils. Developing and implementing specific technology-based effluent limitations and acceptable treatment levels would be untenable for activities that do not themselves create the waste or otherwise add pollutants from the outside world. These activities can neither control nor anticipate what pollutants might pass through their systems and at what levels. Moreover, installation of treatment facilities at each point of transfer would be technically impractical and cost prohibitive. *See* Brief of Intervenor Defs.-Appellants-Cross Appellees Western Water Providers at 16-23.

For these reasons, EPA’s interpretation of the CWA in the Water Transfers Rule is abundantly reasonable. It addresses the precise issue that the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 105-109 (2004), intentionally left open for later resolution, and it does so in a manner that gives full effect to, and reduces redundant application of, the various requirements of the CWA. By interpreting “addition of any pollutant to navigable waters” as an activity that occurs only when a pollutant is initially introduced to the waters of the United States as a collective whole, the Water Transfers Rule fully accomplishes the purpose of section 402—to regulate and control pollutants at the point where they enter “waters of the United States” from the outside world. It also gives full effect to Congress’ intent under section 304 for state regulation of nonpoint source pollution, including “changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.” 33 U.S.C. § 1314(f)(2)(F).

Unfortunately, the district court—although producing a lengthy and detailed analysis of the CWA—overstepped its narrow duty under *Chevron* Step Two simply to ascertain the reasonableness of EPA’s interpretation, as explained in EPA’s brief. Brief of Def.-Appellant-Cross Appellee EPA at 37-39, 42-50. It simply is not within the purview of *Chevron* Step Two for a reviewing court to

decide whether the agency’s interpretation is “the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts,” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009), or to “substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron*, 467 U.S. at 844. Yet, this is precisely what the district court did below.

The district court should have afforded “generous leeway” to EPA in interpreting the CWA—a statute that Congress entrusted it to administer. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Chevron*, 467 U.S. at 842-45). As the United States Court of Appeals for the Eleventh Circuit held when upholding the Water Transfers Rule under *Chevron* Step Two, “[b]ecause the EPA’s construction is one of the two readings we have found is reasonable, we cannot say that it is ‘arbitrary, capricious, or manifestly contrary to the statute.’” *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009).

Hydropower *Amici* recognize that this Court in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) (“*Catskill I*”), decided years prior to EPA’s formal promulgation of the Water Transfers Rule, did not afford *Chevron* deference to EPA’s informal opinion that no NPDES permit was required for a water transfer. In this ruling, however, the

Court did not “foreclose the possibility that its decision might be different if *Chevron* deference applied.” *Id.* at 490 (stating that “substantial deference” would be appropriate “[i]f the EPA’s position had been adopted in a rulemaking or other formal proceeding . . .”). Moreover, in *Gorsuch*, decided prior to *Chevron*, the United States Court of Appeals for the D.C. Circuit deferred to EPA’s interpretation of the CWA. *Gorsuch*, 693 F.2d at 166-70. The court found that because Congress gave EPA reasonable discretion to define two other necessary components of the section 402 permit program (“point source” and “pollutant”), it is likely that Congress would have given EPA similar discretion to define “addition.” *Id.*

Now that EPA has formally adopted its interpretation of the CWA in promulgating the Water Transfers Rule, the district court should have followed *Catskill I* by affording substantial deference to EPA under *Chevron* Step Two. Because it did not, its decision must be reversed.

b. The District Court Erroneously Imbedded an Arbitrary and Capricious Review at *Chevron* Step Two.

The district court also erred in reviewing EPA’s legal interpretation of the CWA under the auspices of the APA’s “arbitrary and capricious” standard, 5 U.S.C. § 706(2)(A). (SPA 79-103). Hydropower *Amici* certainly recognize that in certain circumstances, a court’s review of agency action can include both statutory interpretation under *Chevron*, as well as review of an agency’s reasoned decision-

making under traditional APA principles, such as actions involving an agency’s factual findings or a change in its interpretation of a statute it administers. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991). However, this case concerns only EPA’s legal interpretation of the CWA—which did not require any factual or policy decision by EPA. Thus, the district court’s review should have been confined to *Chevron*, as explained by the D.C. Circuit:

a reviewing court’s inquiry under *Chevron* is rooted in statutory analysis and is focused on discerning the boundaries of Congress’ delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference.

Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995) (citing *Chevron*, 467 U.S. at 843-45).

EPA based the Water Transfers Rule on its legal interpretation of the CWA. (SPA 126). EPA was not obligated to engage in a factual or scientific analysis of the environmental impacts of water transfers in promulgating its rule. (SPA 62-63). Plaintiffs, however, argued that the court must engage in a detailed review of the factual allegations in the administrative record under *Motor Vehicle Manufacturers Ass’n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), as part of its arbitrary and capricious review under the APA. Agreeing with Plaintiffs, the district court found that EPA was obligated to “undertake *some* kind of analysis—scientific, technical, or otherwise—and it is the

Court's job, at [*Chevron*] [S]tep [T]wo, to determine whether that analysis was sufficient." (SPA 62-63).

Hydropower *Amici* respectfully disagree with the district court's conclusion that an agency's interpretation of a statute it administers must be accompanied by a factual analysis regarding the effects of its interpretation, such as evaluating any environmental impacts of varying interpretations of the statute. Such an approach would invite agencies to second-guess policy decisions rendered through the legislative process, and to evade Congressional intent through findings of fact that are unresponsive to a statute's plain language.

Thus, the district court should have confined its review to the issue of whether EPA's interpretation of the CWA is a permissible construction of the statute under *Chevron* Step Two, which is a legal analysis involving review of the language, structure and purpose of the CWA. *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 417 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole."). As the Eleventh Circuit in *Friends of the Everglades* held following its detailed legal analysis of the CWA under *Chevron*, the Water Transfers Rule is a "reasonable, and therefore [a] permissible [] construction of the [statute]." *Friends of the Everglades*, 570 F.3d at

1228. The district court should have conducted the same analysis and arrived at the same conclusion.

II. The District Court’s Decision, if Upheld on Appeal, Could Disrupt Longstanding Precedent that Hydropower Dams Are Generally Not Subject to Regulation Under Section 402 of the CWA.

The Water Transfers Rule, together with the *Gorsuch* and *Consumers Power* cases, are critical precedents for the hydropower industry. They provide certainty to dam owners and operators that they will not be subject to NPDES permits that may conflict with their FERC licenses or state water quality permits. If the Rule is vacated and remanded to EPA for reconsideration, these precedents could be reversed for a substantial class of hydropower projects involving movement of water between water bodies, creating a significant regulatory overlap and economic strain on dam owners, as well as interference with the water supply functions of many hydroelectric dams.

a. The Water Transfers Rule Specifically Exempts Hydroelectric Projects Involving Water Transfers from Section 402.

The District Court’s opinion, if upheld, could expand the scope of section 402 to other types of facilities, including certain hydropower dams that involve water transfers, that Congress did not intend to be regulated by section 402.

In *Gorsuch* and *Consumers Power*, the courts have established that the passage of water from one side of a hydroelectric dam to the other does not constitute a “discharge” into “waters of the United States” for purposes of section

402 of the CWA. *Gorsuch*, 693 F.2d at 175; *Consumers Power*, 862 F.2d at 586.

As the Eleventh Circuit notes in *Friends of the Everglades*, “*Gorsuch* and *Consumers Power* involved water that wound up where it would have gone anyway.” *Friends of the Everglades*, 570 F.3d at 1221. However, not all hydropower dams simply convey water from upstream to downstream within a river. Many hydropower projects move water between or among water bodies by means of dams, diversions, storage reservoirs, collectors, and tunnels for purposes of hydropower generation and water supply.

In its Water Transfers Rule, EPA directly addressed hydropower projects that contain one or more water transfers. EPA stated that:

[u]tilities often take advantage of the change in elevation over the course of a water transfer by installing hydroelectric facilities. . . . [The Water Transfers Rule] does not affect the longstanding position of EPA and the Courts that hydroelectric dams do not generally require NPDES permits . . . unless . . . the hydroelectric facility itself introduces a pollutant such as grease into the water passing through the dam.

(SPA 131).

The district court’s decision, if upheld, could potentially subject hydropower projects involving one or more water transfers to NPDES permitting. Like hydropower projects that only pass water downstream, hydropower projects involving one or more water transfers do not add pollutants from the outside world. Instead, they pass water that may already contain pollutants through a system of

tunnels and reservoirs for purposes of hydropower generation. The presence and quantity of pre-existing pollutants in the water at these projects is unascertainable, because neither the dam nor the tunnels or reservoirs are the point sources that are creating or causing the pollutant to be introduced. Moreover, the presence or quantity of pre-existing pollutants in water passing through these projects can and does vary depending upon the actions of third parties, the climate, atmospheric deposition, land use practices, or, sometimes, the soil. Developing and implementing specific technology-based effluent limitations under an NPDES permit to achieve acceptable treatment levels would be untenable for hydropower projects that do not themselves create the waste or otherwise add pollutants from the outside world. These activities can neither control nor anticipate what pollutants might pass through their systems and at what levels.

Accordingly, it is critically important to the hydropower industry that the Water Transfers Rule is upheld and the district court's opinion be reversed.

b. Water Transfers that Do Not Add Pollutants from the Outside World Should Not Become Subject to Section 402.

The district court acknowledged the *Gorsuch* and *Consumers Power* cases, both of which recognized that Congress did not intend to regulate hydropower dams as “point sources” and held that dams are not subject to NPDES permits, unless they physically “add” pollutants from the outside world, such as the discharge of grease or oil from a pipe. (SPA 22-23) (citing *Consumers Power*, 862

F.2d at 586; *Gorsuch*, 693 F.2d at 175). Both of these cases involved the transfer of water through dams within a single water body. The court in *Consumers Power* observed that EPA's interpretation that the pollutant must be introduced from the "outside world" is a permissible construction of the CWA. 862 F.2d at 584. See also *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976); *Gorsuch*, 693 F.2d at 174-175; *Missouri ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (dam induced pollution); *United States ex rel. Tenn. Valley Auth. v. Tenn. Water Quality Control Bd.*, 717 F.2d 992, 999 (6th Cir. 1983) (same); see *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (regulated point source can be found when the point source did not merely pass pollution from one body of navigable water into another).

The Supreme Court has twice addressed the transfer of polluted water within a single water body. In *Miccossukee*, the Court held that the transfer of polluted water between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA. 541 U.S. at 109-112. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court reaffirmed this precedent by holding that

the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a "discharge of pollutants" under the CWA.

133 S. Ct. 710, 711 (2013).

The district court's decision in this case does not appear to disturb the holdings of these cases, that the transfer of water within a single water body is not subject to section 402. However, the Court in *Miccosukee* left open the question whether transfer of polluted water between "meaningfully distinct" water bodies would be subject to section 402, without defining "meaningfully distinct." Offstream storage reservoirs, tributary streams, and other water bodies within a river basin could be held to be "meaningfully distinct" even if water diverted from such water bodies to a hydropower dam located on the main stem of the river ultimately ends up "where it would have gone anyway." Water bodies in different river basins connected by man-made diversions and conveyances could be held to be "meaningfully distinct." If the district court's decision is upheld, the movement of water within these hydropower projects, though they do not entail the addition of a pollutant from the outside world, could become subject to section 402, despite the *Gorsuch* and *Consumers Power* precedent that generally exclude hydropower dams from this section.

Sound reasons support Congress' decision to deliberately exempt hydropower dams from the section 402 NPDES permit program. Dams do not add pollutants "from the outside world" and the imposition of specific technology-based effluent limitations on dams through NPDES permits would be untenable

because they themselves do not create the waste or otherwise add pollutants to the water. Nonpoint source pollution is regulated by the states under other provisions of the CWA, including section 304(f). 33 U.S.C. § 1314(f)(2)(F).

In addition, most non-federal hydropower dams are subject to the jurisdiction of FERC. These facilities are issued new licenses by FERC every 30 to 50 years, and once they are accepted, FERC is prohibited from amending licenses without the consent of the licensee. 16 U.S.C. § 799; *Pacific Gas & Electric*, 720 F.2d at 83-84. In addition, hydropower facilities are usually subject to one or more state water quality certifications under section 401 of the CWA, 33 U.S.C. § 1341; those certifications typically mandate conditions for the protection of water quality. The FERC license, which by law incorporates any section 401 conditions, dictates the environmental requirements for operation of the hydropower facility for the duration of the 30 to 50 year license. Licensees must obtain a new section 401 certification each time the hydropower project is relicensed (*see S.D. Warren*, 547 U.S. at 374-75; 33 U.S.C. § 1341(a)(1)), and when seeking certain amendments. *See Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 292 (D.C. Cir. 2003).

Sections 401 and 402 of the CWA are fundamentally different in scope. Section 401 requires a certification if the activity “may result in any discharge into the navigable water[s]” of the United States. 33 U.S.C. § 1341(a)(1). In *S.D.*

Warren, the Supreme Court observed that section 401’s “terms have a broad reach, requiring state approval any time a federally licensed activity ‘may’ result in a discharge. . . .” 547 U.S. at 380. The Court noted that for purposes of section 401, a “discharge” encompasses any “flowing or issuing out” of water. *Id.* at 376. Section 402, conversely, requires an NPDES permit for the “discharge of any pollutant” into the navigable waters of the United States. 33 U.S.C. § 1342(a). Noting the differences between the sections in *S.D. Warren*, the Court explained that

[t]he triggering statutory term [in section 402] is not the word “discharge” alone, but “discharge of a pollutant,” a phrase made narrower by its specific definition requiring an “addition” of a pollutant to the water.

547 U.S. at 380-81.

The scope of section 401 allows for regulation of all aspects of water quality. *See PUD No. 1 of Jefferson County*, 511 U.S. at 712. Neither the CWA’s language nor purpose warrants subjecting hydropower dams to additional regulation under section 402. Further, conditions attached to an NPDES permit may well duplicate or conflict with those attached to the section 401 water quality certification that is incorporated into the FERC license, or with the FERC license conditions themselves, which are carefully crafted to balance environmental protection and other public interest considerations. *See* 16 U.S.C. § 803(a).

Moreover, because NPDES permits expire every five years, EPA or the state permitting authority could reevaluate and revise the water quality conditions at regular intervals, requiring dam owners to control pollutants that are released by upstream dischargers. *See* 33 U.S.C. §§ 1342(a)(3), (b)(1)(B); 40 C.F.R. §§ 122.46(a), (b). This “moving target” of environmental responsibility affects a dam owner’s certainty of investment, and sometimes leads to lengthy, regular litigation. *See, e.g., Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013). Requiring an NPDES permit proceeding every five years when a dam is not itself adding any pollutant from the outside world would complicate an already complex regulatory scheme for FERC-licensed hydropower projects and would present substantial inchoate liability for licensees over the term of the license. *See Consumers Power*, 862 F.2d at 590 (“EPA regulation would not add anything superior to existing FERC regulation. . . .”).

More importantly, if the district court’s decision is upheld and EPA reverses its policy on water transfers, the CWA will be transformed. First, it will expand—and in effect eviscerate—the concept of “addition of a pollutant” under section 402. The courts have found that “addition of a pollutant” requires the physical addition of a pollutant from the outside world. *Gorsuch*, 693 F.2d at 165 n.22. However, without the Water Transfers Rule, the meaning of “addition” under

section 402 would expand to include any conveyance of already-polluted water between water bodies without the physical addition of anything into the water. This could include the conveyance of water through hydropower projects that involve transfers between water bodies. Second, while the CWA does not purport to directly regulate nonpoint source pollution, it will in effect do so by regulating the non-responsible parties that merely convey the water downstream. Congress did not intend for all activities that contribute to pollution to be addressed with the issuance of permits under the NPDES program. Nonpoint source activities that may cause or contribute to pollution may well be issues that are appropriate for states to address, but those activities are not subject to section 402. Vacating the Water Transfers Rule would expand the scope of section 402 to regulate nonpoint source pollution through the regulation of facilities that merely convey the pollution downstream, contrary to Congress' intention in enacting the CWA.

CONCLUSION

For the reasons set forth above, Hydropower *Amici* respectfully request that the Court reverse the district court's decision and uphold the Water Transfers Rule and EPA's interpretation of the CWA to exclude water transfers from the permitting requirements of the NPDES program.

Respectfully submitted,

/s/ Michael A. Swiger

MICHAEL A. SWIGER
Counsel of Record
CHARLES R. SENSIBA
SHARON L. WHITE
VAN NESS FELDMAN, LLP
1050 THOMAS JEFFERSON STREET, N.W.
SEVENTH FLOOR
WASHINGTON, DC 20007
(202) 298-1800

Counsel for Amici Curiae

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,960 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type.

/s/ Sharon L. White
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Sharon White, hereby certify that on September 18, 2014, I electronically filed the foregoing Brief of Hydropower *Amici Curiae* in support of Defendant-Appellant-Cross Appellee U.S. Environmental Protection Agency with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent six paper copies to the Clerk of the Court.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated at Washington, D.C., this 18th day of September, 2014.

/s/ Sharon L. White
Sharon L. White
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, DC 20007
Telephone: (202) 298-1800