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COMMENTS OF

NEW YORK ATTORNEY GENERAL ELIOT SPITZER
CONNECTICUT ATTORNEY GENERAL RICHARD BLUMENTHAL
DELWARE ATTORNEY GENERAL CARL C. DANBERG
ILLINOIS ATTORNEY GENERAL LISA MADIGAN
IOWA ATTORNEY GENERAL THOMAS J. MILLER
KENTUCKY ATTORNEY GENERAL GREGORY D. STUMBO
MAINE ATTORNEY GENERAL G. STEVEN ROWE
MASSACHUSETTS ATTORNEY GENERAL THOMAS F. REILLY
MINNESOTA ATTORNEY GENERAL MIKE HATCH
MISSOURI ATTORNEY GENERAL JEREMIAH W. (JAY) NIXON
RHODE ISLAND ATTORNEY GENERAL PATRICK C. LYNCH
VERMONT ATTORNEY GENERAL WILLIAM H. SORRELL
WISCONSIN ATTORNEY GENERAL PEGGY A. LAUTENSCHLAGER
MANITOBA MINISTER OF WATER STEWARDSHIP STEVE ASHTON

on the

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
PROPOSED RULE CONCERNING THE APPLICABILITY OF NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS TO
INTER-BASIN TRANSFERS OF WATER CONTAINING POLLUTANTS.


I. Summary.

The Attorneys General of New York, Connecticut, Delaware, Illinois, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Rhode Island, Vermont, Wisconsin and the Minister of Water Stewardship of the Province of Manitoba respectfully submit these comments opposing the United States Environmental Protection Agency’s (“EPA”) proposal to amend regulations promulgated pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq. (“Act”), so that National Pollutant Discharge Elimination System (“NPDES”) permits are not required for the transfer of water containing pollutants from one distinct body of water (“donor water”) into another distinct body of water (“receiving water”), even though the receiving water would not be burdened with the additional pollutants except for the transfer. 71 Fed. Reg. 32887, 32895 (June 7, 2006). The proposed rule is presented as a categorical exclusion to the Act’s general requirement that a NPDES permit be obtained in connection with “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. §§ 1311(a), 1342(a), 1362(12). EPA, therefore, proposes that no NPDES permit be required for the transfer of pollutants from any donor water (no matter how polluted) into any receiving water (no matter how pristine).

We recommend that EPA permanently withdraw this proposed rule. It is in direct conflict with the plain text and fundamental objective of the Act. In fact, the United States Court of Appeals for the Second Circuit has just recently reviewed and rejected the reasoning contained in EPA’s August 5, 2005 interpretive memorandum, upon which the proposed rule is premised, because it is not in keeping with the “plain language” of the Act. See Catskill Mts. Chapter of Trout Unlimited v. City of New York (“Catskill II”), 451 F.3d 77, 83, 83 n.5, 85 (2d Cir 2006).

EPA’s supposedly “holistic approach” to interpreting the Act, see 71 Fed. Reg. at 32889, lacks any basis in law or fact. EPA asserts that there is not “any addition” of pollutants to a receiving water even when pollutants, that would never otherwise reach the receiving water, are placed into that water. In so doing, EPA has improperly ignored the “ordinary or natural meaning” of the phrase “any addition” and is therefore proposing a statutory construction directly contrary to the method of statutory interpretation required by the Supreme Court when reviewing the meaning of words that are “neither defined in the statute nor a term of art.” See S.D. Warren Co. v. Maine Bd. of Environmental Protection (“S.D. Warren”), 126 S.Ct. 1843, 1847 (2006) (interpreting “discharge” in the Clean Water Act according to its “ordinary or natural meaning”).

Remarkably, EPA makes no effort to review the adverse impacts associated with certain inter-basin transfers of water containing pollutants. Salt water could be transferred into fresh

1 Memorandum from Ann R. Klee, EPA General Counsel et al., to Regional Administrators, regarding “Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers” (August 5, 2005) (hereafter, “Agency Interpretation”)(available at EPA Docket No. EPA-HQ-OZW-0141), attached as Exhibit A. EPA based its proposed rule on the Agency Interpretation. See 71 Fed. Reg. at 32889 (“This proposed rule is based on the legal analysis contained in the interpretive memorandum.”)
water, sediment-laden water could be sent into clear drinking water reservoirs, warm waters could be pumped into cold water habitats, chemical laden waters could be dumped into waters employed in farm and ranch irrigation, and invasive species could be transferred into waters not yet infested. EPA does not explain how leaving such transfers unregulated by NPDES permits would be consistent with the fundamental “objective” of the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). EPA’s failure to evaluate the actual and potential adverse impacts of inter-basin transfers of pollutants in this proposed rule-making is arbitrary, capricious, and an abuse of discretion.

To require NPDES permits for inter-basin point source transfers of pollutants does not unduly tax the resources of regulators. Permitting authorities already issue tens of thousands of permits as a matter of course. To the extent that regulated parties complain that the permitting process is time-consuming and costly, NPDES permits are readily available where the transferred water is of a quality that will not degrade the quality of the receiving water, which is the case in the vast majority of transfers. Administratively efficient “general permits” would likely be available to handle such non-problematic water transfers. For more complex water transfers, delegated States have the ability to expedite action on individual NPDES permits. And, where technological or cost limitations make it necessary, the NPDES program provides for “schedules of compliance” to allow for long-term implementation of corrective measures necessary to achieve compliance, while allowing important but problematic water diversions to continue in the interim. Finally, as detailed in Catskill II, 451 F.3d at 85-87, there is sufficient flexibility and variance authority built into the NPDES process to assure that important inter-basin water transfers may be authorized pursuant to a NPDES permit.

The States have a strong interest in ensuring a strong “national floor” of water quality controls through the Act’s permitting requirement. These requirements, approved by EPA, prevent States from relaxing their own standards and enforcement efforts in order to gain a perceived market advantage in the siting of industrial or commercial facilities at the economic or environmental expense of other States. Moreover, because watersheds do not respect political boundaries, downstream States have a substantial interest in protecting their water bodies through the uniform processes and remedies provided by the Act against the transfer of pollutants originating in upstream States.

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2 The Province of Manitoba has joined in these comments as well.

3 Courts have recognized that creating a uniform national floor of protective measures against water pollution is one of the Act’s purposes. See Arkansas v. Oklahoma (“Arkansas”), 503 U.S. 91, 110 (1992) (citing the “Act’s purpose of authorizing EPA to create and manage a uniform system of interstate water pollution regulation”); Natural Res. Def. Council v. Costle (“Costle”), 568 F.2d 1369, 1378 (D.C. Cir 1977) (“[T]he primary purpose of the effluent limitations and guidelines was to provide uniformity among federal and state jurisdictions enforcing the NPDES program and prevent the ‘Tragedy of the Commons’ that might result if
II. Background: Inter-Basin Water Transfers Have the Potential to Cause Significant Injury.

Water transfers are proposed for a variety of purposes, such as to provide drinking water (Lund & Israel 1995), irrigation, power generation, and flood control (Growsns 2003). While many inter-basin water transfers may simply move clean water from one place to another, causing no injury, such transfers may, in fact, cause large amounts of physical, chemical or biological pollution and thereby harm cleaner waters. The NPDES permit process would help avoid or limit potential injury from such pollutant additions.

A large amount of data demonstrates that water transfers may have significant impacts on the environment, including: (i) the introduction of invasive species, toxic blue-green algae, chemical pollutants, and excess nutrients; (ii) increased turbidity; and (iii) alteration of habitat (e.g., warm water into cold water, or salt water into fresh water). Among the most significant environmental concerns related to water transfers is the introduction of species not normally found in receiving waters, including exotic or “invasive” species, pests, and diseases.

Water transfers can induce physical impacts by changing the geomorphology of the receiving catchment, thereby inducing stream bed and bank erosion. (Growsns 2003; Khalequzzaman 2004; Matete 2004; and Snaddon, et al. 1997). Stream bed and bank erosion releases sediment and increases turbidity in the downstream receiving waters (Bunn & Arlington 2002). Other examples of physical impacts include altered thermal characteristics (Davies, et al. 2000), aquatic habitat destruction such as the inundation of riffles, micro pools, wetlands, and flood plains (Bunn & Arlington 2002; Growsns 2003; and Matete 2004). Water transfers can induce chemical impacts, included the introduction of pollutants (Snaddon, et al. 1997), excess nutrients (USEPA 2006), excess sulfate (National Wildlife Federation 2006), and salinity (USEPA 2006) to receiving waters.

Inter-basin transfers have generated a wide variety of adverse biological impacts. Water transfers create new pathways that allow passage of exotic or “invasive” species, such as “toxic” algae (Applied Biochemists & Arizona Game and Fish Dept. 2005; CA Water Resource Control

jurisdictions can compete for industry and development by providing more liberal limitations than neighboring states.”) They have also recognized the important venue for inter-state dispute resolution that is provided for by the Act. See, e.g., City of Milwaukee v. Illinois, 451 U.S. 304, 325-26 (1981)(“It is also significant that Congress addressed in the [Act] one of the major concerns underlying [our] recognition of federal common law. . . . In the 1972 Amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State’s permit-granting agency to seek redress.”)

4 All of the abbreviated citations are summarized and more fully cited in the Technical Appendix to these comments. Each referenced document is also attached in Adobe Acrobat electronic format.
and Vanderploeg 2006) and disease-causing microbes (Muller 2001; and Shao et al. 2003) into watersheds that have not previously been infested. (Davies, et al. 2000; Linder, et al. 2005; Mills, et al. 1993; Northeast-Midwest Institute 2003; USEPA 2006; U.S. Office of Technology Assessment 1993; and Strayer, et al. 1999). If populations of these non-native species become established, they can severely alter the ecology of a watershed by preying upon native species or by out-competing them for food and habitat. For example, a pair of electric barriers have been erected on the Chicago Sanitary and Ship Canal to prevent Asian carp from swimming into the Great Lakes (Burrows, et al. 2004; and USEPA 2002). The problem is exacerbated when exotic species arrive without their natural predators, since this may allow their populations to expand unchecked, as has occurred with zebra mussels in the Great Lakes (Strayer, et al. 1999).  

Case Study: Devils Lake North Dakota

One inter-basin transfer of polluted water that provides a comprehensive example of our concern with EPA’s proposed rule is the creation of an outlet from the land-locked Devils Lake in northeastern North Dakota. This lake is within the Hudson Bay basin but does not have a natural outfall or other hydrologic connection to another surface water. As a result of the isolated character of the lake, the water quality of Devils Lake is much different than in downstream waters. Devils Lake has significantly higher concentrations of a number of chemical constituents, including total dissolved solids ("TDS"), sulfates and phosphorus. The water is of such poor quality that it has not been used for local drinking water. Devils Lake is about fifteen miles from the Sheyenne River, which flows to the Red River (the boundary between North Dakota and Minnesota), on into Manitoba’s Lake Winnipeg, the 10th largest freshwater lake in the world, and then onto Hudson Bay. See People to Save the Sheyenne River, Inc. v. North Dakota Dept’ of Health ("Sheyenne"), 697 N.W.2d 319, 323 (N.D. 2005). Parties hoping to

Due to its de-regulation of actions that will likely spread invasive species, EPA’s proposed water transfer rule is in direct violation of Presidential Executive Order 13112 of February 3, 1999: entitled “Invasive Species.” See 64 Fed. Reg. 6183 (February 9, 1999). Section 2 of the Executive Order, among other things, directs each federal agency to “prevent the introduction of invasive species” as well as to “detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner.” Furthermore, each federal agency is directed to: “not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United State or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.” Id. at 6184. EPA’s rationale accompanying its proposed rule does not even mention the risk posed by the spread of invasive species between distinct water bodies. See 71 Fed. Reg. 32887-95. Any responsiveness summary prepared by EPA must fully account for purported agency compliance with Executive Order 13112.
reduce flooding associated with rising lake levels in the 1990s proposed to construct a drainage system to transfer Devils Lake water to the Sheyenne River. The construction of such an outlet was extensively reviewed by the Army Corps of Engineers, which included the preparation of an environmental impact statement.  

In two letters and extensive technical comments on the environmental impact statement, EPA raised numerous concerns. In a May 2002 letter from EPA Region 8 Administrator Robert E. Roberts to Colonel Robert L. Ball, District Engineer of the St. Paul District, EPA stated that the outlet plan was “environmentally unsatisfactory. . . . the basis of our rating is the significant, long-term, adverse environmental impacts from the construction of the proposed outlet and its subsequent operations.” (Attached as Exhibit B.) This letter cited concerns with respect to: “long-term and significant exceedances of North Dakota and Minnesota water quality standards for total dissolved solids (TDS) and sulfate”; invasive species transfer and consistency with Executive Order 13112; wetland and riparian habitat degradation; and adverse impacts to Canadian waters. Exhibit B at 2.

In technical comments that accompanied the May 2002 letter, EPA expounded upon these concerns. Levels of total dissolved solids and sulfates (in excess of water quality standards) would be such as to “impair both water supply and agricultural uses in the Red and Sheyenne Rivers.” Exhibit C at 1. EPA also cited “increased erosion/sedimentation” as well as “the effects of increased flows in the Sheyenne River on channel shape, bank stability, sediment transport, and riparian vegetation.” Id. at 1-3. EPA identified potential adverse impacts to 2,100 acres of wetlands. Id. at 5. International issues with respect to the requirements of the Boundary Waters Treaty of 1909 between the U.S. and Canada were also raised by EPA, especially the “no-harm” provisions of the Treaty. Id. at 11. Perhaps most striking were the detailed concerns raised by EPA with respect to the inter-basin transfer of non-native biota from Devils Lake to the entire Hudson Bay basin, including the potential transmission of “[s]ignificant parasites and pathogens.” Id. at 12-14. Indeed, EPA expressly questioned whether the Army Corps’ proposal for an outlet was “consistent with Executive Order 13112 for Invasive Species.” Id. at 12. These concerns were summarized and re-emphasized in a follow-up letter by the EPA Region 8 Administrator to the Army Corps’ Chief of Planning. 7 Given these concerns, EPA “strongly encourage[d] the Corps to initiate early discussions with the appropriate government agency regarding potential permitting requirements under Section 402” [of the Act]. Exhibit C at 3.

While the Army Corps of Engineers has not pursued the proposed project, North

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7 June 18, 2003 letter of EPA Region 8 Administrator Robert E. Roberts to William Dawson, Chief of the Planning Division, U.S. Army Corps of Engineers, attached as Exhibit D.
Dakota’s Legislature authorized its own, smaller scale, outlet construction project from Devils Lake. *Sheyenne*, 697 N.W.2d at 323. The North Dakota Department of Health conducted an administrative process in 2003 and ultimately issued an NPDES permit for the operation of an outlet from Devils Lake into the Sheyenne River – a permit that the Supreme Court of the North Dakota held was required to comply with the various permit provisions of the Act. *Id.* at 323-25. The State of Minnesota, the Province of Manitoba, and a number of environmental and citizen organizations participated in the administrative process in opposition to the permit. Minnesota (as an *amicus*), Manitoba and citizen organizations opposed issuance of the permit in subsequent litigation on the grounds that its was not sufficient to control nutrient phosphorus, invasive species and other biota transfers, and that the Department of Health had failed to conduct an adequate anti-degradation review. *Id.* at 324, 329-33. The court, however, upheld the permit under a “deferential” standard of review. *Id.* at 333.

The appropriateness of the limitations contained in the NPDES permit issued for the Devils Lake outlet is the subject of a significant continuing dispute. Nonetheless, the conditions imposed through the NPDES permitting process are certainly preferable to what would otherwise be an unregulated discharge that would put the downstream environment at greater risk. This case study shows that the NPDES permit process can be: (i) a forum for the presentation of environmental concerns associated with inter-basin transfers to decision-makers; (ii) a comprehensive protocol to develop methods to reduce and avoid adverse impacts associated with pollutant transfers; and (iii) a dispute resolution forum that is available to resolve local, interstate and even international disputes. The Devils Lake outlet shows that inter-basin transfers can be far more in the nature of a water “disposal” than a water “allocation.” Indeed, the sole purpose of the outlet is to lower the water levels of a lake that is burdened with poor water quality. Importantly, the Devils Lake outlet demonstrates in EPA’s own words the significant adverse impacts to the chemical, physical and biological integrity of a water body that can potentially result from the inter-basin transfer of pollutants.

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8 A copy of the August 8, 2003 North Dakota Department of Health’s permit is attached as Exhibit E.

9 The NPDES permit for the Devils Lake outlet is again at issue. In May 2006, the North Dakota Water Commission requested a modification of its permit that would allow discharges when sulfate levels in downstream receiving waters are higher than the limit imposed in 2003. The Commission has also requested an extension of the period during which operations are allowed and the elimination of restrictions on the discharge on total suspended solids. Minnesota, Manitoba and citizen groups have once more participated in the administrative process. Manitoba, in particular, has contended that the effect of the modifications, if approved, would be to increase exceedences of bilaterally-agreed TDS objectives at the U.S./Canadian boarder and increase the probability that invasive species will be transferred to the downstream environment.
III. The Plain Text of the Clean Water Act Requires a NPDES Permit for the Inter-Basin Transfer of Water Containing Pollutants.

EPA states that the “proposed rule is based on the legal analysis contained in its [Agency Interpretation],” 71 Fed. Reg. at 32889. “The precise legal question addressed in the [Agency Interpretation] was whether the movement of pollutants from one water of the U.S. to another by a water transfer is the ‘addition’ of a pollutant potentially subjecting the activity to the permitting requirement under section 402 [33 U.S.C. § 1342] of the Act.” Id.; see Agency Interpretation at 18 (declaring that “[i]t does not address any . . . terms under the [Act] other than ‘addition’”). Both the Agency Interpretation and the proposed EPA rule-making are premised on EPA’s assertion that “[s]tatutory construction principles instruct that the Clean Water Act should be interpreted by analyzing the statute as a whole” id. (citing United States v. Boisdore’s Heirs, 49 U.S. 113, 122 (1850)), as opposed to parsing the specific provisions of the Act. EPA’s near exclusive use of a “statute as a whole” analysis is contrary to well-settled cannons of construction that direct EPA’s attention to the specific provisions and meaning of the statute itself. A review of the plain text of the Act demonstrates that EPA’s proposed rule lacks any basis in law. Furthermore, as shown in Point III below, EPA’s interpretation also ignores the Act’s purpose and structure, and thus is inconsistent with the “statute as a whole.”

A. The Clean Water Act Requires a NPDES Permit for “Any Addition” of a Pollutant, Which by its Plain Meaning Includes Water Transfers.

Congress adopted the Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), “the ‘national goal’ being to achieve ‘water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.’” S.D. Warren, 126 S.Ct. at 1852 (quoting 33 U.S.C. § 1251(a)(2)). As part of the comprehensive program to implement the Act’s objectives, Congress declared that “the discharge of any pollutant by any person” from a point source into navigable waters “shall be unlawful,” 33 U.S.C. § 1311(a), unless it is in accord with an NPDES permit (or state analog), 33 U.S.C. §§ 1342(a), (b). The Act’s permit program is the “primary means” for protecting and improving water quality within the “comprehensive regulatory regime” established by Congress. Arkansas v. Oklahoma, 503 U.S. 91, 99, 101 (1992). Whether issued by EPA or a delegated State, an NPDES permit sets forth the conditions for the discharge of pollutants consistent with various other applicable provisions of the Act, to assure that each

10 It is black letter law that an agency cannot overrule the statutory directive of Congress through rule-making or administrative interpretation, and that courts do not give any deference to agency legal interpretations when the congressional intent is unambiguous. When the statute is clear from the Court’s use of “traditional tools of statutory construction,” the inquiry ends and the intent of Congress is to be given effect. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., (“Chevron”) 467 U.S. 837, 842-43, 843 n. 9 (1984). This is the well known “Chevron Step One” analysis that serves as a judicial bar to agency efforts to avoid congressional directives or effectively re-write statutes.
receiving water body will achieve or continue to achieve applicable “water quality standards.” 33 U.S.C. §§ 1311(b)(1)(C), 1312(a), 1313(a)-(c); 40 C.F.R. § 122.44(d)(1).

The Act requires a permit for the “discharge of a pollutant” from a “point source” into “navigable waters.” See 33 U.S.C. §§ 1311(a); 1342(a), (b); 1362(6), (7), (12), (14); see also 40 C.F.R. § 122.1(b). The Act employs broad definitions of these key terms. “[D]ischarge of a pollutant” is defined in pertinent part as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). “Point source,” in turn, is expansively defined 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.” 33 U.S.C. § 1362(14). The definitions of “pollutant,” 33 U.S.C. § 1362(6), and “navigable waters,” 33 U.S.C. § 1362(7), are similarly broad. The word “addition” is not defined in the Act or treated anywhere within the Act as a term of art, or as a word with a technical or scientific meaning. Moreover, “[t]he legislative history [of the Clean Water Act] is silent on the meaning of ‘addition.’” Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York (“Catskill I”), 273 F.3d 481, 493 (2d Cir. 2001).

Consistent with Supreme Court guidance, therefore, the term “addition,” as employed in the Act, must be accorded its plain or ordinary meaning. The recent Supreme Court decision in S.D. Warren provides an explicit directive on the appropriate method of statutory construction EPA is to employ. In S.D. Warren, the dispute “turn[ed] on the meaning of the word ‘discharge’” in section 401, 33 U.S.C. § 1341, of the Act. 126 S.Ct. at 1847. The Supreme Court found that since “discharge” “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.’” Id. (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)). The unanimous opinion reviewed such sources as dictionary definitions, past case law usage, and prior agency usage to “confirm[] our understanding of the everyday sense of the term.” Id. at 1847-49. After reviewing the “common,” “ordinary,” and “every day,” meaning of the word “discharge,” the Court found that water flowing from a hydroelectric dam was being “discharged” from the dam, thereby affirming the applicability of section 401’s certification requirement to federally licensed hydroelectric facilities. Id. at 1849, 1853.

Here, because “addition” is not defined in the Act or a term of art, it must be construed “in accordance with its ordinary or natural meaning,” id. at 1847, as this constitutes the proper

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11 The Supreme Court recently rejected a restrictive reading of the term “point source.” Relying on the statutory definition, the Court held that it was “plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” South Florida Water Management District v. Miccosukee Tribe of Indians, (“Miccosukee”) 541 U.S. 95, 105 (2004) (emphasis added). The inter-basin transfer of polluted water that EPA is proposing to exempt from the permit requirement similarly involves the point source conveyance of pollutants to navigable waters.
use of “traditional tools of statutory construction.”  *Chevron*, 467 U.S. at 843 n.9; see also *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 (1994) (plain text of the Resource Conservation and Recovery Act compelled conclusion that certain municipal waste combustion ash was not exempt from regulation as hazardous waste, and rejecting EPA Administrator memorandum to all EPA Regional Administrators asserting that ash was exempt: “It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text. Here that requires us to reject the Solicitor General’s plea for deference to the EPA’s interpretation.”) The word “addition” commonly means “[a]ct, process, or instance of adding; also anything added; increase.”  *Webster’s New International Dictionary, Unabridged* 30 (2d ed. 1950). The word “add,” in turn, commonly means “[t]o join or unite, as one thing to another or as several particulars, so as to increase the number, augment the quantity, enlarge the magnitude.”  *Id.* at 29; see *Webster’s Third New International Dictionary, Unabridged* 24 (1981)(“addition” as “[t]he result of adding: anything added: increase . . . the act or process of adding: the joining or uniting of one thing to another”); 1 *The Oxford English Dictionary* 143 (2d ed. 1989)(“addition” defined as “[t]he action or process of adding; the putting or joining of one thing to another so as to increase it, or the joining together of several things into one amount”); *Id.* at 141 (defining “add” as: “To join or unite [a thing to another] so as to increase the number, quantity, or importance.”) (brackets and emphasis in text). Under this usage, water transfers that add pollutants to waters are clearly “additions.”

Significantly, EPA strains to avoid using the words “addition” or “add” when describing the activity it is proposing to categorically exempt from the NPDES permit requirement, instead employing words such as “convey,” “route,” “pump,” “direct,” “move,” and “transfer” when referring to the addition of pollutants into a receiving water from a distinct donor water.  71 Fed. Reg. 32887-89 (“trans-basin transfers of water . . . can also move pollutants from one water body (donor water) to another (receiving water).”) Pollutants cannot be “moved” into a receiving water, however, without there being an “addition” of pollutants to the receiving water. The movement of pollutants described by EPA clearly constitutes “[t]he action or process of adding; the putting or joining of one thing to another so as to increase it, or the joining together of several things into one amount.” 1 *The Oxford English Dictionary* 143 (2d ed. 1989). Indeed, EPA’s use of synonyms in its regulatory rationale reads like a thesaurus entry for “addition.”

EPA’s departure from the text of the Act becomes even more evident when one considers that the statutory term EPA interprets is not simply “addition” but the more expansive “any addition.”  *See 33 U.S.C. § 1362(12).* It is well-settled that the plain meaning of “any” indicates an expansive Congressional intent, that is “one or something indiscriminately of whatever kind.”  *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004)(“The plain language of the Himalaya

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12  *See also Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006) (striking down EPA rule allowing for “annual” or “seasonal” limits where the Clean Water Act’s plain text called for “daily” limits); *New York v. EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005)(vacating the “Clean Unit” provision of a regulation because EPA “lacks authority” for the regulation under “the plain language of the [Clean Air Act].”)
Clause indicates an intent to extend the liability limitation broadly — to ‘any’ servant, agent or
other person (including any independent contractor)’ whose services contribute to performing the
contract. ‘Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some
indiscriminately of whatever kind.’ There is no reason to contravene the clause’s obvious
meaning.’)(citations omitted); Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131
(2002) (“As we have explained, ‘the word ‘any’ has an expansive meaning, that is, ‘one or some
indiscriminately of whatever kind.’”); United States v. Gonzales, 520 U.S. 1, 5 (1997) (“The
question we face is whether the phrase any other term of imprisonment means what it says, or
whether it should be limited to some subset of prison sentences – namely, only federal sentences.
Read naturally, the word any has an expansive meaning, that is, one or some indiscriminately of
whatever kind. Congress did not add any language limiting the breadth of that word, and so we
must read § 924(c) as referring to all terms of imprisonment, including those imposed by state
courts.”) (internal citations and quotations omitted); Harrison v. PPG Indus., Inc., 446 U.S. 578,
588-89 (1980) (same, interpreting the Clean Air Act).

Congress’s use of the word “any” to modify “addition” in the Clean Water Act, therefore,
serves as a further bar to EPA creating a discretionary categorical exception to the NPDES
permit requirement. EPA is not authorized to pick and choose among various supposed types,
sources or definitions of pollutant “additions” when “any” addition of pollutants via point
sources to receiving waters requires an NPDES permit. Indeed, the D.C. Circuit recently struck
down EPA regulations that provided ways for stationary air pollution sources to avoid triggering
new source review air pollution permitting requirements, based on EPA’s mis-interpretation of
the plain scope and meaning of the word “any.” New York v. EPA, 443 F.3d 880, 883, 890
(D.C. Cir. 2006). Applying Chevron, the court found that while the term “physical change” is
subject to a variety of meanings, “when Congress places the word ‘any’ before a phrase [i.e.,
“physical change”] with several common meanings, the statutory phrase encompasses each of
those meanings; the agency may not pick and choose among them.” Id. at 888; see id. at 884-90
(“[T]here is no reason the usual rules of statutory construction should not apply and hence no
reason why “any” should not mean “any.”) Thus, EPA’s proposed water transfer exception to the
NPDES permitting requirement is directly contrary to the plain, natural and ordinary meaning of
the text of the Act.

B. EPA’s Rule Contravenes Plain Text Judicial Precedent.

1. Inter-Basin Transfers Between Distinct Water Bodies.

All four appellate courts that have addressed this issue have determined that the Act
requires an NPDES permit for the point-source discharge of water containing pollutants from
outside of the receiving water. EPA is without authority, by rule-making or otherwise, to over-
rule the effect of “plain language” appellate court decisions. See Lechmere Inc. v. NLRB, 502
U.S. 527, 536-37 (1992)(“Once we have determined a statute’s clear meaning, we adhere to the
determination under the doctrine of stare decisis, and we judge an agency’s later interpretation of
the statute against our prior determination.”); Maislin Indus., U.S. v. Primary Steel, Inc., 497

In Catskill I, the Second Circuit 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.” 273 F.3d at 491. Thus, “[w]hen the water and the suspended sediment therein passes from the [Shandaken] Tunnel into the [Esopus] 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.” Id. at 492. The Second Circuit found that this conclusion was compelled by the express terms of the Act:

the transfer of water containing pollutants . . . is plainly an addition and thus a ‘discharge’(273 F.3d at 491) . . . ;

[s]uch an interpretation is inconsistent with the ordinary meaning of the word ‘addition’ (id.) . . . ;

none of the [Act’s] broad purposes sways us from what we find to be the plain meaning of its text (id. at 494) . . . ;

[w]here 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 (id.) . . . ; and

[w]e find that the textual requirements of the discharge prohibition in § 1311(a) and the definition of ‘discharge of a pollutant’ in § 1362(12) are met here (id.).

(Emphasis supplied).

On appeal after remand, the Second Circuit in Catskill II again expressly held that a permit is required for the inter-basin transfer of polluted water under the plain text of the Act:

In the end, while the City contends that nothing in the text of the [Act] supports a permit requirement for interbasin transfers of pollutants, these “holistic” arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are

13 See also Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services (“Brand X”), 125 S.Ct. 2688, 2700 (2005) (reviewing interaction of stare decisis with the Chevron deference doctrine, and holding that where Chevron deference applies “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”)
required for “the discharge of any pollutant,” 33 U.S.C. § 1311(a), which is defined as “any addition of any pollutant to navigable waters from any point source, id. § 1362(12). It is the meaning of the word “addition” upon which the outcome of [Catskill I] turned and which has not changed, despite the City’s attempts to shift attention away from the text of the [Act] to its context. In [Catskill I], we pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. 273 F.3d at 494. The [Act] seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation’s waters. The City and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.


In Dubois, a New Hampshire ski area sought to pump water from the East Branch of the Pemigewasset River up into Loon Pond, a water body within the White Mountain National Forest. 102 F.3d at 1277-78. Loon Pond is a high-altitude water body considered to be “unusual for its relatively pristine nature”; it serves as a drinking water supply for the Town of Lincoln. Id. at 1277. In fact, New Hampshire classified Loon Pond “as a Class A waterbody, protected by demanding water quality standards under a variety of criteria.” Id. The East Branch, by contrast, “is a relatively unprotected Class B waterway under New Hampshire law.” Id. at 1279. Indeed, the court took judicial notice that for years the East Branch was “one of the most polluted rivers in New England, the repository of raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel paint off buildings located on its banks.” Id. at 1297. Because East Branch water, which otherwise would not have flowed into Loon Pond but for its routing by the ski operation, id. at 1297, contained “bacteria, other aquatic organisms such as Giardia lambia, phosphorus, turbidity and heat,” id. at 1278, the First Circuit held that an NPDES permit was required for the transfer, which added pollutants from a point source to a navigable water, id. at 1296-1299. The court concluded that it “cannot allow such a watering down of Congress’ clear statutory protections . . . . The proposed transfer of water from one [water] to the other constitutes an “addition.” Id. at 1299 (emphasis supplied).

In Northern Plains, a company extracted methane gas from deep underground coal seams in Montana and in the process, drew large quantities of deep ground water to the surface. 325 F.3d at 1158. The company did not add any chemicals to the water before dumping it into the Tongue River. Id. In its “natural state,” however, the water contained suspended solids, calcium,
magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, fluoride, aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium. *Id.* Further, the ground water was “salty,” raising concerns by those using the Tongue River for agricultural irrigation that the salt would break down the soil structure on farms and ranches. *Id.* The Ninth Circuit held that an NPDES permit was required under the “plain language” of the Act. *Id.* at 1160 (emphasis supplied). “Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a ‘pollutant,’ even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly undermine the integrity of [the Act’s] prohibitions.” *Id.* at 1162 (internal quotations omitted). In fact, the Ninth Circuit found that to not require a permit would pave the way for someone to pipe “the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the [Act.]” *Id.* at 1163.

In Miccosukee Tribe, 280 F.3d at 1368-69, 1369 n.8, the Eleventh Circuit held that a canal that drained a large developed area was “distinct” from a portion of the Everglades — a factual determination subsequently vacated by the Supreme Court and remanded for further fact finding. *Miccosukee*, 541 U.S. at 112. The legal issue in dispute before the Eleventh Circuit was “whether the pumping of the already polluted water constitutes an addition of pollutants to navigable waters from a point source.” *Miccosukee Tribe*, 280 F.3d at 1367. On this legal issue the Eleventh Circuit held that the transfer of polluted water from one distinct water body into another would constitute an addition that triggers the Act’s permit requirement:

> When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water but for the change in flow caused by the point source, an addition of pollutants from a point source occurs.

*Miccosukee Tribe*, 280 F.3d at 1366, 1368-69 (footnote omitted); see also *id.* at 1368 n.5.

Each of these appellate decisions held that the Act requires a NPDES permit for the transfer of water containing pollutants into a distinct receiving water. Because these courts found that “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43.

2. The “Dams Cases” are not Relevant.

EPA places a great deal of reliance on the “Dams cases.” See Agency Interpretation at 10-12. *National Wildlife Fed’n v. Gorsuch* ("Gorsuch"), 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Fed’n v. Consumers Power Co.* ("Consumers Power"), 862 F.2d 580 (6th Cir. 1988), held that discharges of water containing pollutants from dams which re-circulated the
same water into the same water body through a pump storage facility or sent water down stream within the same watershed did not require a NPDES permit. A key premise of the Gorsuch and Consumers Power decisions was the “sameness” of the water and water body – a premise that may not reasonably be stretched to encompass polluted water transfers between completely distinct water bodies. See Catskill I, 273 F.3d at 492 (“The present case, however, strains past the breaking point the assumption of ‘sameness’ made by the Gorsuch and Consumers Power courts. 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.”)

While the Supreme Court in Miccosukee did not discuss or cite the Dams cases, it did rely on the Catskill I decision with respect to the analogy the Second Circuit employed to describe the type of *intra*-basin water movement that would not trigger the NPDES permit requirement. See Miccosukee, 541 U.S. at 109-10 (“The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an ‘addition’ of pollutants. As the Second Circuit put it 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.’ 273 F.3d, at 492.”). Further, in the section of Catskill I cited favorably in Miccosukee, the Second Circuit had, in fact, raised numerous questions about the validity of much of the reasoning of the Gorsuch and Consumers Power decisions. Catskill I, 273 F.3d at 490-92, 492 n. 3.

In Catskill II, the Second Circuit expounded on the important distinction between the *intra*-basin transfers in the Dams cases and the *inter*-basin transfers at issue in EPA proposed rulemaking:

[Gorsuch] and [Consumers Power] held that water taken from a water source and then released back into that same source was not an “addition” to navigable waters under the [Act], despite the fact that the water so released contained “pollutants.” . . . This case differed from the dams cases . . . because the Tunnel discharges water into the creek from a source that is a different, distinct body of water. . . . [W]e analogized the dams cases to a soup ladle scooping soup out of a pot and returning it to that pot, a type of water transfer known as an intrabasin transfer. The Tunnel’s discharge, in contrast, was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer. Interbasin transfers . . . constitute “additions,” rendering . . . reliance on the dams cases misplaced.

Catskill II, 451 F.3d at 81 (citations omitted). And further:

[Catskill I] concluded that, despite the presence of pollutants in both interbasin and intrabasin transfers, interbasin transfers are properly distinguished [from those in Gorsuch and Consumers Power] because they “add” pollutants to the navigable
waters. [citation omitted] This has not changed.

Nor does the Supreme Court’s decision in Miccosukee render inter- and intra-basin transfers indistinguishable. Miccosukee cited with approval our “soup ladle” analogy and the distinction between inter- and intra-basin transfers. 541 U.S. at 109-10. The Court remanded the case to the district court to determine whether the water bodies in question were “two pots of soup, not one.” Id.; cf. S.D. Warren Co., 126 S.Ct. at 1850 n.6. This remand would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers.

Id. at 83. The important distinctions between inter- and intra-basin transfers were forcefully recognized by both the Miccosukee and Catskill II courts, thereby completely undercutting EPA’s reliance on Gorsuch and Consumers Power.

C. The Clean Water Act does not Allow EPA to Categorically Exclude Polluted Water Transfers from the NPDES Permit Requirement.

In the proposed rule, EPA would categorically exclude inter-basin transfers by simply listing inter-basin transfers of pollutants via a point source as one of a number of “discharges [that] do not require a NPDES permit.” 40 CFR § 122.3 (“Exclusions”); 71 Fed. Reg. at 32895. It has long been settled, however, that EPA does not have the statutory authority under the Act to exempt an entire category of discharges from the NPDES permit program. See Costle, 568 F.2d at 1377 (“The wording of the statute, legislative history, and precedents are clear: the EPA administrator does not have authority to exempt categories of point sources from the permit requirement of § 402 [33 U.S.C. 1342]. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.”) In Costle, the court vacated EPA regulations that would have excepted from the NPDES requirement a number of discharge sources such as “all silvicultural point sources.” Id. at 1372. See also League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 (9th Cir. 2002)(following Costle and rejecting claimed exception to the NPDES permit requirement for aerial spraying of pesticides over waters: “EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by ‘defining’ it as a non-point source.”)

Courts have rejected EPA’s authority to create new exceptions to the Act in part because the Act makes clear that when Congress decided to create an exception, it knew how to do so. See, e.g., 33 U.S.C. § 1362(6)(excluding from the definition of “pollutant” “a discharge incidental to the normal operation of a vessel of the Armed Forces”); 33 U.S.C. § 1362(14) (excluding from the definition of “point source” “agricultural stormwater discharges and return flows from irrigated agriculture” though it includes concentrated animal feeding operations.) Where Congress has carved out an express statutory exemption for one form of otherwise regulated activity but not another, EPA is not free to create additional exceptions. See, e.g., United States v. Smith, 499 U.S. 160, 167 (1991) (“Where Congress explicitly enumerates
certain exceptions to a general prohibition, additional exceptions are not to be implied.”); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 188 (1978) (under the maxim *expressio unius est exclusio alterius*, Court will find that Congress limited exceptions from the Endangered Species Act to those expressly listed in the statute.) Indeed, it is broadly accepted that exceptions to the Act should be read narrowly. See United States v. Brace, 41 F.3d 117, 124 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995); United States v. Akers, 785 F.2d 814, 819 (9th Cir.) cert. denied, 479 U.S. 828 (1986); United States v. Huebner, 752 F.2d 1235, 1240-41 (7th Cir.) cert. denied, 474 U.S. 817 (1985); Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897, 925 n.44 (5th Cir. 1983).

A telling example of EPA overstepping its authority to create a categorical exclusion to the NPDES permit requirement was presented in Northwest Environmental Advocates v. EPA, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005). There, the court addressed whether EPA’s regulatory exception to the NPDES permit requirement for “any other discharge incidental to the normal operation of a vessel,” 40 CFR § 122.3(a), was contrary to the Act. Id. at *4. The challenge to the regulation was triggered by problems associated with ballast water discharges, where ships transport water from one waterbody to another (along with significant numbers of nuisance invasive species) in amounts estimated by the government to exceed 21 billion gallons each year. Id. at *5. Applying Chevron, the court found that EPA’s categorical exclusion of vessel ballast water discharges from the NPDES permit requirement was contrary to the “clear language” of the Act. Id. at *15, *26-29, *38-40. Based on this finding, the court ordered EPA to repeal the regulatory exception, which had been on the books for about 30 years. Id. at *29, *39-40. The same reasoning dictates that EPA’s newly proposed NPDES exclusion for polluted water transfers is likewise an illegal categorical exclusion. The proposed rule, therefore, should not be finalized.14

IV. Neither Other Sections of the Act, its Legislative History, EPA Past Practice, Nor the Act’s Structure Support the Proposed Rule.

EPA’s rationale for the proposed water transfer rule side-steps the plain language of the Act by employing a supposed “holistic” approach, 71 Fed. Reg. at 32887, concluding that “the specific statutory provisions addressing the management of water resources – coupled with the overall statutory structure – support the conclusion that Congress did not intend for water transfers to be regulated under section 402.” Id. at 32890. EPA focuses on two theories. First, it claims that state water allocation authority under the act indicates that Congress would not want

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14 Based on similar reasoning, the answer to EPA’s question, as to whether State’s should be given the ability under EPA regulation to selectively designate water bodies as being subject to the NPDES permit requirement while excluding others (see 71 Fed. Reg. at 32892-93 ), would appear to be “no” – as authority to exclude particular water bodies from the NPDES permit requirement is not consistent with the Act’s prohibition on the establishment of categorical exclusions. While as a policy matter, it would be better for States to have this authority than not, as a legal matter any such categorical exclusion is illegal.
NPDES permits to apply to inter-basin water transfers — citing sections 101(g) and 510(2) of the Act, 33 U.S.C. §§ 1251(g) and 1370. Id. at 32890. Second, EPA asserts that any problems associated with inter-basin transfers are better addressed through the Act’s non-permit, “nonpoint” source programs. Id. at 32890-91, citing section 304(f) of the Act, 33 U.S.C. § 1314(f). The Second Circuit already has rejected these arguments, Catskill II, 451 F.3d at 83 n.5, and EPA should drop them. EPA’s assertions with respect to legislative history, past agency practice and the Act’s structure are also without merit.

A. Water Allocations.

States are vested with authority to “allocate quantities of water” pursuant to section 101(g), 33 U.S.C. § 1251(g):

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Neither that provision, nor section 510(2), 33 U.S.C. § 1370(2) — which provides that nothing in the Act should impair any right of the “States with respect to the waters . . . of such States” — explicitly or implicitly dispenses with the need to obtain an NPDES permit for inter-basin transfers of water that involve the discharge of pollutants from a point source.

In fact, the Supreme Court has directly held that “[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.” PUD No. 1 v. Washington Dep’t of Ecology, 511 U.S. 700, 720 (1994) (emphasis supplied). Thus, there is no limitation or exemption to the NPDES permit requirement contained in these provisions of the Act. See also Catskill II, 451 F.3d at 84 (interpreting sections 101(g) and 510(2) and finding that “[t]he power of the states to allocate quantities of water within their borders is not inconsistent with federal regulation of water quality”)(emphasis in original). The primary “water pollution control” contemplated by the Act is, of course, the NPDES permitting process itself. See Riverside Irrigation Dist. v. Andrews (“Riverside Irrigation”), 758 F.2d 508, 513 (10th Cir. 1985) (“[W]here both the state’s interest in allocating water and the federal government’s interest in protecting the environment are implicated, Congress intended an accommodation” to be “best reached” through “the individual permit process.”) Indeed, section 510 of the Act merely provides for the preservation of the prior rights of the States with respect to waters, so long as they are “not in conflict with other requirements of the [Act].” Catskill II, 451 F.3d at 84; see 510(2) providing for State authority “[e]xcept as expressly provided in this chapter.”) The Act, of course, expressly requires NPDES permits for
pollutant additions.

EPA does not provide anything more than a vague and generalized statement as to why NPDES permitting would constitute an undue burden on state water allocation authority: “[b]ecause subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocation of water rights, this section [101(g)] provides additional support for the Agency’s interpretation that absent a clear congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers.” 71 Fed. Reg. at 32890 (emphasis added). This argument is meritless because, first, there is clear congressional intent – the plain text of the Act – that pollutant transfers require a permit, and second, a vague, undefined, potential “interference” cannot serve as the basis for the creation of categorical exemptions.

EPA’s claim that state water allocation authority displaces all other statutory requirements is boundless and clearly cannot be correct. Would EPA negate clean air permits with respect to enormous diesel powered pump stations that are associated with some water transfers? Would the creation of massive trenched conduits, to allow for inter-basin transfers, be able to be constructed without a wetland permit or the environmental impact statement process provided by the National Environmental Policy Act? If a NPDES permit is an undue burden on water allocations, then why wouldn’t controls imposed pursuant to the Safe Drinking Water Act be a similar undue burden? Moreover, EPA makes no mention of polluted water transfers that are not allocations at all, but rather, a disposal of unwanted water, such as polluted runoff collected in a canal (that is itself a navigable water) that is then transferred into another distinct water body. EPA’s position with respect to water allocation is unsupported and unsubsupportable.

In Catskill I, the Second Circuit has spoken to the need to balance the various goals of the Act and not elevate one policy above all others. In holding that section 101(g), 33 U.S.C. § 1251(g), does not abrogate the NPDES permit requirement, the Second Circuit observed:

Yet like many complex statutes . . . the [Act] balances a welter of consistent and inconsistent goals. In contrast with the policies cited by the City, the [Act] also expressly includes a broad and uncompromising policy of “restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Artificially transferring water and pollutants between watersheds as the City has done here might well interfere with that integrity. . . .

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.

273 F.3d at 494. That “balance,” as provided by the plain text of the Act, is best struck through
the NPDES permit process.\textsuperscript{15}

**B. Non-Point Source Controls.**

Relying on section 304(f) of the Act, 33 U.S.C. § 1314(f), EPA asserts that the inter-basin discharge of pollutants should not be regulated through the Act’s permit requirement for point source transfers, but by its provisions governing nonpoint source pollution. 71 Fed. Reg. at 32890.\textsuperscript{16} Although § 1314(f) requires EPA to provide guidance for addressing nonpoint sources of pollution resulting from activities such as agriculture, mining, construction, or “water flow diversion facilities,” id. § 1314(f)(2)(A)-(C), (F), nowhere does it dispense with the permit requirement for point source discharges from those activities. Indeed, as the Supreme Court noted in Miccosukee, “§ 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the ‘point source’ definition” of the Act. Miccosukee, 541 U.S. at 106 (emphasis in original). Because an activity can have both point and nonpoint attributes, this dual approach is necessary to achieve the Act’s overall goals, and is consonant with the Act’s policy of addressing both point and nonpoint pollution. See 33 U.S.C. § 1251(a)(7).

In fact, the Second Circuit has held that EPA has incorrectly asserted that § 1314(f) somehow removes the need for a NPDES permit for inter-basin transfers of pollutants. Catskill II, 451 F.3d at 84 (citing Miccosukee).\textsuperscript{17} Similarly, in United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979), the Tenth Circuit held that section 304(f) does not create nonpoint source exemptions from the Act’s NPDES requirement: “Mining and other categories listed in § 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation.”

EPA’s reading of 33 U.S.C. § 1314(f) would exclude, for instance, all agricultural

\textsuperscript{15} As discussed below in Point IV, in the unlikely event that a conflict arises between the State’s authority to allocate water and the State’s authority to control water pollution pursuant to the Act, the States will be able to resolve that conflict within the NPDES permitting process.

\textsuperscript{16} EPA admits that “[m]ere mention of an activity in section 304(f) does not mean it is exclusively nonpoint source in nature.” Id. at 32890 (citing Miccosukee 541 U.S. at 106). EPA then goes on to make the directly contrary and patently incorrect statement that “[i]n light of Congress’ . . . inclusion of changes in the movement, flow, or circulation of any water of the U.S. in a section of the Act [304(f)] addressing sources of pollutants that would not be subject to regulation under section 402 it is not [un]reasonable to interpret ‘addition’ as not generally including the mere transfer of waters.” Id. at 32891 (emphasis added).

\textsuperscript{17} The Second Circuit similarly rejected claims that yet other programs somehow displaced the need for NPDES permits in the context of inter-basin transfers of pollutants. See Catskill II, 451 F.3d at 85.
activities – typical non-point sources of pollution – from the NPDES permit process, even though the Act itself defines “pollutant” to include “agricultural wastes,” 33 U.S.C. § 1362(6), and “point source” to encompass a “concentrated animal feeding operation,” 33 U.S.C. § 1362(14). Furthermore, EPA regulations expressly require an NPDES permit for point source discharges from many of the activities listed in 33 U.S.C. § 1314(f)(2), including those involving concentrated animal feeding operations, see 40 C.F.R. § 122.23; mining activities, see 40 C.F.R. § 122.26(a)(ii), (b)(14)(iii); and construction activities, see 40 C.F.R. §§ 122.26(a)(9)(I), (b)(14)(x), (b)(15)(I), 122.34(b)(4)(l), even though they too also often are non-point sources as well.

EPA contends that nonpoint source programs should be employed to the exclusion of point source NPDES permits as it is “essential that discharge of pollutants be controlled at the source.” 71 Fed. Reg. at 32891. While programs to address nonpoint pollution are important, the point source is an essential place for controlling the discharge of pollutants because the point source controls how, where, and when pollutants from lower-quality waters are added to higher-quality waters. Given that it is all but impossible to control through nonpoint programs some pollutants found in transferred water (such as heat, natural salt content, or invasive species), any effort to place point source discharges beyond the Act’s NPDES permit program must be rejected.

Finally, EPA wildly speculates that Congress did not think the NPDES program was an appropriate part of the “comprehensive program” needed to “address[] pollution that may be associated with water transfers,” going so far as to assert that in 1972 Congress “chose to defer to comprehensive solutions developed by state and local agencies.” Id. at 32890. EPA cites no support for this speculation nor any “comprehensive programs” that have been effectuated. Indeed, Congress, when enacting the Act in 1972, expressed dissatisfaction with State-led efforts to protect water quality. See EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 202-05 (1976) (quoting legislative history to the effect that “the Federal water pollution control program [which largely deferred to the States] . . . has been inadequate in every vital respect”); see S. Rep. No. 92-414, 1-10 (1971). There is absolutely no basis for the unlikely proposition that this dissatisfaction led Congress to further rely on state and local government non-point source programs to the exclusion of the NPDES program. Indeed, at least 17 States have adopted rules that essentially prohibit the adoption of any water quality rules that go beyond the minimum level of protection provided under federal law and regulation – further evidencing the need for a strong national floor of water quality controls. See Note: Obstacles to the Devolution of Environmental Protection: States’ Self-Imposed Limitations on Rulemaking, 15 Duke Env. L. & Policy 105, 116 and n. 43 (2004).

Nonpoint source programs have not sufficiently protected our waters or addressed the deleterious discharges at issue here. See supra Point II. Moreover, as EPA’s recent surveys have found, nearly half of the nation’s waters remain impaired, typically from sources not controlled
by NPDES permits. Transferring such impaired waters without any controls is likely to cause further harm. To require point source discharges of pollutants involved in water transfers to be addressed solely through nonpoint source programs, therefore, would frustrate the Act’s goals of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

C. Legislative History and Agency Practice.

EPA cites a few spare phrases of the legislative history concerning sections 101(g) and 304(f) of the Act that say nothing concerning the creation of an exception to the general NPDES permit requirement. 71 Fed. Reg. at 32891. Despite this silence, EPA then proceeds to simply pronounce that the Act’s legislative history supports the proposed rule. Id.

To the extent it is even relevant here, there is nothing in the legislative history that contradicts the Act’s plain language requirement of an NPDES permit for inter-basin transfer of pollutants. As discussed, the basis for EPA’s proposed rule is its interpretation of the meaning of the word “addition” within the Act. 71 Fed. Reg. at 32889; Agency Interpretation at 18. However, “[t]he legislative history [of the Act] is silent on the meaning of ‘addition.’” Catskill I, 273 F.3d at 493; National Wildlife Federation v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982) (same). Rather, as fully explained by the D.C. Circuit in Castle, the legislative history with respect to the adoption of the NPDES permit program evidences Congress’ intention to establish a “tough law that relied on explicit mandates to a degree uncommon in legislation of this type,” and demonstrates that “the basic premise” of the Act is that any discharge of pollutants without a permit is unlawful. 568 F.2d 1373-77 (providing extensive discussion of legislative history). Indeed, what little legislative history EPA does cite stands for the opposite proposition for which it is cited. 71 Fed. Reg. at 32891. The cited report states that “the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise primary responsibility in both of these areas and thus provide a balanced management control system.” H.R. Rep. No. 92-911, at 96 (1972)(emphasis supplied). This statement directly contradicts EPA’s assertion that NPDES and other programs are mutually exclusive.

The absence of legislative history support for EPA’s position is accompanied by the lack of any long-standing EPA position on this issue. In Miccosukee, the Supreme Court, despite the federal government’s claim of “a longstanding EPA view that the process of ‘transporting, impounding, and releasing navigable waters’ cannot constitute an ‘addition’ of pollutants to ‘waters of the United States,’” found that “the Government does not identify any administrative documents in which EPA has espoused that position.” 541 U.S. at 107. In fact, the Miccosukee Court identified an EPA regulation (40 CFR § 122.45(g)(4)) and General Counsel opinion (In re

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Riverside Irrigation Dist., Op. No. 21, Ofc. Gen. Coun., 1975 WL 23864, June 27, 1975) that indicate a contrary view to the position EPA now advances. Id. 541 U.S. at 107-08. EPA appears to admit as much. See Agency Interpretation at 2 n.5. EPA itself issued an NPDES permit for at least one inter-basin transfer of water in response to the First Circuit’s holding in Dubois, 102 F.3d 1273. See Agency Interpretation at 2 n.4. And, EPA has approved at least one state program, that of Pennsylvania, that has regularly required permits for all inter-basin transfers of water containing pollutants. See Miccosukee, 541 U.S. at 109; 33 U.S.C. § 1342(b) (required EPA approval of state NPDES permit programs).19

D. The Act’s Structure.

Although EPA asserts that the “overall statutory structure” of the Act supports the proposed rule, 71 Fed. Reg. at 32890, the opposite is true. In reality, the Act establishes numerous water quality protection programs that operate in conjunction with the Act’s NPDES permit requirement to improve or maintain water quality by protecting individual water bodies. These measures, which demonstrate that Congress intended for the Act to distinguish between discrete water bodies throughout the Nation, would be significantly undermined if the Act’s fundamental permitting requirement were read to exclude the point source transfer of pollutants from one distinct water body to another.

The Act and EPA’s regulations contemplate that delegated States will make individualized determinations in classifying and designating the uses of each water body within their borders; in establishing water quality criteria applicable to each body of water; and in issuing NPDES permits to regulate and control, on a case-by-case basis, the discharge of pollutants into each such body. The Act and EPA regulations require each State to issue “water quality standards” that consist of two major elements: (i) “the designated uses of the navigable waters involved”; and (ii) “the water quality criteria for such waters based upon such uses.” 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11.

To establish the designated use (or “classification”) of each body of water, States “must take into consideration the use and value” of each water body “for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.” 40 C.F.R. § 131.10(a). Classifications vary depending on the attributes and purposes served by the water body. In addition to designating the uses of their bodies of water, the Act also requires States to establish “water quality criteria.” 33 U.S.C. § 1313(c)(2)(A). “Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally

protect the designated use.” 40 C.F.R. § 131.3(b). Importantly, depending on a water body’s particular designated use, the stringency of applicable water quality criteria may vary substantially.

After a State has designated the use and water quality criteria applicable to a particular body of water, it may issue, on a case-by-case basis, an NPDES permit that regulates the discharge of pollutants into that water body. For each discharge of a pollutant, the permit imposes limitations intended to prevent excursions above water quality standards applicable to the specific receiving water body affected by the discharge. 33 U.S.C. §§ 1342(a)(1), (2); 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(i). Thus, the terms of an NPDES permit allowing a discharge are predicated on the particular water body’s condition and current uses.

The Act establishes a number of additional regulatory mechanisms that further operate to ensure compliance with the different water quality standards applicable to every individual water body. First, the Act requires States to assess their waters and identify each water body that has not achieved compliance with water quality standards, despite implementation of effluent limitations and thermal controls contained in all existing NPDES permits that sanction pollutant discharges into the non-compliant waters. 33 U.S.C. §§ 1313(d)(1)(A), (B); 1315. For each non-compliant body, States must develop water pollution budgets and remedial pollutant loading allocations, known as “total maximum daily loads” (“TMDLs”), to identify both piped (“point”) and diffuse (“nonpoint”) sources of excessive pollutants in an effort to promote compliance with applicable water quality standards. 33 U.S.C. §§ 1313(d)(1)(C), (D); 40 C.F.R. §§ 130.7. Once established, the loads assigned to point sources in the TMDL process are incorporated as limitations within the relevant NPDES permits. 40 C.F.R. § 122.44(d)(1)(vii).

Second, the Act provides that prior to undertaking any project that requires a federal license or permit and “which may result in any discharge into the navigable waters,” 33 U.S.C. § 1341(a)(1), a permit applicant first must obtain a certification from the State that the project will not violate applicable state water quality standards, 40 C.F.R. § 121.2(a)(3). Like an NPDES permit (or state analog), the state certification may impose conditions or limitations to ensure compliance with water quality standards for the affected water body. 33 U.S.C. § 1341(d).

Third, the Act and EPA regulations contain an “antidegradation policy,” 33 U.S.C. § 1313(d)(4)(B), that requires States to maintain and protect the quality of those water bodies that “exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water,” 40 C.F.R. § 131.12(a)(2). Under this policy, waters that are cleaner than the criteria for the particular designated use specified must be protected at the actual higher quality, unless water degradation is necessary to support pressing economic or social needs. Id.; see also PUD No. 1, 511 U.S. at 718-19.

Together, these various programs work to prevent the introduction of pollutants that may adversely affect the water quality of each individual water body, and further demonstrate the Act’s structural water body-by-water body approach to assuring water quality. Abrogating the
permit requirement for inter-basin transfers, therefore, would be manifestly inconsistent with the basic structure and operation of the Act. EPA’s proposed rule that transfers of water containing pollutants from one body to another are not subject to the technological controls, operational methodologies, or pollutant management practices encompassed by the NPDES permit process and related measures, would deprive delegated States of an important tool to maintain and achieve water quality consistent with the designated uses and water quality criteria mandated by the Act.

V. Application of the Act’s Permit Requirement to Inter-Basin Point Source Transfers of Water Containing Pollutants is Not Unduly Burdensome.

EPA states that an NPDES permit “could unnecessarily interfere with State decisions on allocations of water rights.” 71 Fed. Reg. at 32890. Again, EPA offers no evidence for this assertion. Assuming that EPA is referring to the administrative requirements associated with the issuance of NPDES permits, the history of one NPDES program, that of Pennsylvania, demonstrates that permits for inter-basin transfers of water that involve an addition of a pollutant from a point source will not unduly tax the resources or capabilities of regulators.

EPA and delegated States already issue many thousands of permits to address discharges of pollutants in numerous circumstances. NPDES “general permits” cover tens of thousands of pollutant discharges from such varied activities as urbanized storm water runoff, 40 C.F.R. §§ 122.26, 122.30-122.37; sediment discharges from construction sites more than one acre in size, 40 C.F.R. §§ 122.26(a)(9)(I), (b)(14)(x), (b)(15)(I), 122.34(b)(4)(I); and concentrated animal feeding operations, 40 C.F.R. §§ 122.23. EPA and delegated States also issue tens of thousands of NPDES permits for industrial and sewage treatment facilities.\(^2\) And apart from general permits and NPDES permits that cover specific situations, States routinely issue permit-like “certifications” with respect to federal projects involving discharges into navigable waters. See 33 U.S.C. § 1341(a), (d); PUD No. 1, 511 U.S. at 707-08. Issuing the number of additional inter-basin permits that might be realistically projected is eminently feasible, particularly since the permitting authority may be able to issue a general permit that considerably streamlines the permitting process, especially in instances where the transfer of water does not adversely affect the quality of the receiving water body. See 40 C.F.R. §§ 122.28 and 123.25.

Further, delegated States have the ability and authority to marshal resources and expedite permit review. Because these States are familiar with their own water quality criteria and the designated uses of the affected bodies of water, they are well-positioned to act on permit applications. Indeed, in most instances, delegated States may issue an NPDES permit based on state-developed water quality standards and – inasmuch as there are no national effluent limitations for water diversions – in keeping with state-established technical, operational, and management protocols.

\(^2\) See http://www.epa.gov/compliance/planning/data.
It is wholly unrealistic to suggest that requiring an NPDES permit for transfers of polluted water will effectively prevent or dramatically diminish such transfers altogether. In most instances, NPDES permits would be readily available where the water being transferred is of a quality that would not impair the quality of the receiving water. Indeed, receiving waters frequently can accommodate or assimilate pollutants without violating water quality standards.

Even where there is a likelihood that a proposed water transfer will materially impair the quality of the receiving water body, the NPDES program provides EPA and delegated States with the ability to require the implementation of pollutant removal technologies, management practices, and operational modifications. See 33 U.S.C. §§ 1314(c), (e). Moreover, the Act and its underlying regulations provide for “schedules of compliance” to allow long-term implementation of corrective measures necessary to achieve compliance with applicable water quality standards, while allowing important, though problematic, water diversions to continue in the short-term. 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47. Variances to water quality based effluent limitations are available where one engaged in a polluted water transfer demonstrates that achieving the effluent limitation is not feasible. 40 CFR § 131.13. See Catskill II, 451 F.3d at 86-88 (reviewing the NPDES permit development process and concluding: “We think the flexibility built into the [Act] and the NPDES permit scheme . . . will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either.”); cf Whitman v. American Trucking Ass’ns, Inc., 531 U.S. 457, 495 (2001) (Breyer, J., concurring) (noting numerous inherent flexibilities in the Clean Air Act “sufficient to avoid the extreme results that some of the industry parties fear”).

Nor is there any basis for creating any exception to the Act’s permit requirement on the ground of necessity. See Costle 568 F.2d at 1377-82 (reviewing and rejecting extensive claims by EPA that numerous categorical exceptions to the NPDES permit require were necessitated by administrative infeasibility). In fact, the Eleventh Circuit’s decision to affirm that a permit is required under the circumstances in the Miccosukee Tribe case but to vacate the injunction prohibiting the operation of the pump station at issue, 280 F.3d at 1369-1371, demonstrates that the Act strikes a reasonable and appropriate balance where competing considerations are at stake. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982) (courts may exercise equitable discretion to allow vital discharges that otherwise violate Federal Water Pollution Control Act to continue pending application for permit).
VI. Conclusion.

EPA’s proposed rule is contrary to law and is arbitrary, capricious, and an abuse of discretion. It contravenes the Act’s plain text and prime objective, and therefore, should not be finalized. If the States can be of any assistance as EPA further examines these issues, please contact Peter Lehner, Chief of the Environmental Protection Bureau, New York State Attorney General’s Office, at (212) 416-8450 or James Tierney an Assistant Attorney General in that bureau, at (518) 474-4843.

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Respectfully submitted,

ELIOT SPITZER  
Attorney General of the State of New York

RICHARD BLUMENTHAL  
Attorney General of the State of Connecticut

CARL C. DANBERG  
Attorney General of the State of Delaware

LISA MADIGAN  
Attorney General of the State of Illinois

THOMAS J. MILLER  
Attorney General of the State of Iowa

GREGORY D. STUMBO  
Attorney General of the State of Kentucky

G. STEVEN ROWE  
Attorney General of the State of Maine

THOMAS F. REILLY  
Attorney General of the Commonwealth of Massachusetts

MIKE HATCH  
Attorney General of the State of Minnesota

JEREMIAH W. (JAY) NIXON  
Attorney General of the State of Missouri

PATRICK C. LYNCH  
Attorney General of the State of Rhode Island

WILLIAM H. SORRELL  
Attorney General of the State of Vermont

PEGGY A. LAUTENSCHLAGER  
Attorney General of the State of Wisconsin

STEVE ASHTON  
Minister of Water Stewardship Province of Manitoba