No. 17-418

IN THE

Supreme Court of the United States

STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, WASHINGTON, AND THE PROVINCE OF MANITOBA, CANADA,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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INTRODUCTION

As the Environmental Protection Agency concedes, "[w]ater conveyed in a water transfer often contains 'pollutant[s]' under the [Clean Water Act's] broad definition." U.S. Br. 6. When a water transfer adds such pollutants to a "navigable" water body subject to the Act's protections, both common sense and ordinary English compel the conclusion that there has been an "addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12). EPA's assertion to the contrary in the Water Transfers Rule defies both the plain language of the statute and multiple federal- and state-court decisions rejecting EPA's interpretation. Certiorari is warranted to review the court of appeals' incorrect decision upholding the Rule, and to resolve a dispute of great importance over whether the States can rely on the Clean Water Act's flagship permit program to protect themselves from polluting water transfers.

Respondents' strained attempts to reconcile EPA's interpretation with the actual text of the Clean Water Act have already been rejected by this Court and the courts of appeals. And their policy argument that this Court should let the decision below stand because it reaches a good outcome is both incorrect and irrelevant. Respondents' rosy view of the States' environmental future without the permitting program mandated by the Act simply ignores the many ways in which, absent such oversight, water transfers can move contaminants from one water body to another—by conveying saltwater into freshwater, water infected with fecal coliform into a pristine stream, or invasive species into a previously unsullied lake. These injuries

are far from abstract. Rather, they are concrete, serious, and ongoing, and the various substitute protections that respondents propose in place of the Act's permit program have proven inadequate to resolve them. This Court should accordingly grant certiorari to resolve an important legal dispute that has divided the courts and to prevent EPA from upending Congress's judgment about the scope of the Clean Water Act's protections.

ARGUMENT

I. Certiorari Is Warranted to Resolve a Question of Grave Importance About Whether the Clean Water Act's Nationwide Permit Protections Apply to Polluting Water Transfers.

This case presents long-standing issues of critical importance to the States and their residents about whether the environmental protections of the Clean Water Act's permitting program apply to polluting water transfers. The court of appeals resolved these issues by accepting EPA's untenable interpretation of the Act's discharge prohibition, which requires a permit for any "addition" of pollutants to "navigable waters" via a point source. (Pet. App. 286a.) EPA's reading of the discharge prohibition has already been rejected by other courts as contrary to the provision's ordinary meaning, structure, and purpose. Respondents assert several reasons for denying certiorari despite this conflict concerning an issue of nationwide importance. But none of these assertions justifies declining review.

1. First, several respondents attempt to minimize the importance of this case by asserting that the Rule merely exempts water transfers from the Act's

National Pollutant Discharge Elimination System (NPDES), while leaving States free to invoke other provisions of the Clean Water Act or other federal and state programs. *See* Western Br. 25-31; NYC Br. 1, 12-15. But this argument severely downplays the central importance of NPDES permitting, which Congress selected as the "primary means" for protecting the nation's waters from harmful pollutants. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992). Indeed, the NPDES program is the specific mechanism that Congress chose for controlling the type of pollution at issue here—namely, pollution conveyed into navigable waters via point sources.

The significant harms that certain water transfers have already inflicted on water users, local businesses, and the environment (Pet. 16-17) demonstrate that the other water-protection programs cited by respondents are not effective substitutes for the NPDES regime selected by Congress. The possibility of interstate compacts (Western Br. 30) is cold comfort when such compacts require the cooperation of the polluting State. States' authority to impose pollution controls above the Act's minimum standards does not protect them from upstream States, which will have little incentive to impose more stringent protections than federal law requires when the harms of polluting transfers are felt elsewhere. And other statutes such as the Safe Drinking Water Act, *see* 42 U.S.C. § 300f *et seq.*, serve distinct and narrow purposes and are not designed to achieve the Clean Water Act's goal of comprehensively protecting the water quality of all navigable waters.

Respondents' other attempts to minimize the impact of the Rule are also without merit. Respondents are simply incorrect to suggest that any harms under

the Rule will be rare because water transfers do not often have interstate effects (Western Br. 29): as respondents themselves acknowledge (*id.* at 5-6), many significant water transfers that the Rule exempts from the Act's permit protections convey water across state boundaries or into navigable waters used by residents of multiple States. (*See* Pet. App. 305a.) Respondents further contend that water transfers convey only "natural" pollutants—such as sand or suspended solids—into receiving water bodies. Western Br. at 1, 23-24. But the water transfers that led the States to challenge the Rule include transfers that dumped cancer-causing chemicals or toxic algae into navigable waters. Pet. 16. And respondents' characterization of certain pollutants as "natural"—and thus harmless—improperly ignores the severe harms that may be caused by transferring pollutants that are "natural" to one water body (such as heat, sediment, or marine species) but are highly destructive in another water body.

Respondents' attempts to minimize the nationwide importance of this case are further belied by the sheer number and diversity of parties involved here—including eleven States, dozens of cities and municipalities, and a Canadian province that intervened in this lawsuit. These respondents confirm that water transfers are "critically important" (Western Br. 1), and many of them previously urged the Court to address the vital issue of whether water transfers are subject to NPDES permitting. *See* Br. of Amici Curiae States in Support of Resp. 4, *Friends of the Everglades v. South Fl. Water Mgmt. Dist.*, 562 U.S. 1082 (2010) (Nos. 10-196, 10-252), 2010 WL 4232627 (supporting respondent's request for certiorari). Indeed, the grave importance of the question presented explains why the

answer has sharply divided the States for over a decade. The Court should grant certiorari now that this critical water-quality issue has finally reached the Court in a posture appropriate for review.

2. Second, respondents assert that the decision below does not conflict with decisions of other federal and state courts that required NPDES permits for water transfers because those decisions predated the Water Transfers Rule and did not "'follow[] from the unambiguous terms of the statute.'" U.S. Br. 19 (quoting *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)). But the decisions concluding that the discharge prohibition applies to water transfers all made clear that the result was dictated by the discharge prohibition's plain meaning. Pet. 19-20. And respondents do not dispute that these courts rejected *every* interpretive argument accepted by the decision below, on the ground that those arguments contradicted the Clean Water Act's plain language, structure, and purpose. Pet. 20-22.

Because the decisions requiring permits for water transfers thus followed from the "unambiguous plain meaning" of the discharge prohibition (Pet. App. 104a), they cannot be reconciled with the contrary conclusion of the court below and the Eleventh Circuit that the same words in the same discharge prohibition are ambiguous. *See Friends of the Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1223-27 (11th Cir. 2009). And EPA's promulgation of the Rule also cannot override this judicial conflict because EPA receives no deference for an interpretation that conflicts with the Act's unambiguous meaning. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

3. Third, respondents defend the decision below as appropriately upholding EPA's "longstanding view" (U.S. Br. 15) that water transfers should be exempt from the NPDES program because of the burdens that the permitting process would impose on water transfers that "remain an integral part of the Nation's infrastructure" (*id.* 5). *See also* Western Br 1-2, 10-12. But the vintage of an agency's incorrect statutory interpretation cannot override Congress's clear contrary judgment—particularly when, as here, the courts repeatedly rejected EPA's position. See Pet. 6-7. And respondents' concerns about the burdens of NPDES permits are overstated. Congress has already provided multiple flexibilities in the NPDES program to ensure that permits will not impose undue constraints on essential water transfers. As this Court has explained, permitting authorities may "control regulatory costs by issuing general permits to point sources associated with water distribution programs." *South Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004); *see id.* at 108 n.* (general permits "greatly reduce" burdens by allowing entities to discharge pollutants without "further action" except adhering to permit). And in issuing general or individual permits, permitting authorities may also consider costs in setting effluent limitations, 40 C.F.R. § 125.3, and grant variances from specific effluent limitations, *see id.* § 131.13.

Congress further ensured that States may retain control over any permits issued for their water-movement systems by allowing States to run the NPDES process within their own jurisdictions, so long as they meet minimal federal pollution-control standards. 33 U.S.C. §§ 1313, 1342(b). For example, Colorado issues NPDES permits within its borders

and thus remains free to use the NPDES program's built-in flexibilities to alleviate burdens that might result from requiring permits for water transfers. *See* EPA, *NPDES State Program Information*. New York City has applied for variances for the Shandanken Tunnel and has continued to transfer massive amounts of water while its application is pending. NYC Br. 9-10. And Pennsylvania has routinely issued NPDES permits for water transfers without experiencing the ill effects predicted by respondents. *See* Br. for Pennsylvania Dep't of Environmental Protection 11-18, *Miccosukee*, 541 U.S. 95 (No. 02-626), 2003 WL 22793537.

If requiring permits for water transfers would actually be too burdensome, Congress remains free to amend the Act to exempt water transfers from the discharge prohibition. Indeed, Congress has exempted specific categories of point-source discharges from NPDES permitting, often in response to concerns, similar to the ones raised here, that such discharges present distinct problems warranting a different regulatory scheme. (Pet. App. 276a-278a, 280a-284a.) But absent such an express legislative exemption for water transfers, EPA and the courts "are required to give effect to Congress' express inclusions and exclusions, not disregard them" by creating an unauthorized permit exemption from whole cloth. *See National Ass'n of Mfrs. v. Department of Def.* ("*NAM*"), No. 16-299, slip op. at 14 (U.S. Jan. 22, 2018).

4. Finally, respondents argue that certiorari is not warranted because EPA reasonably interpreted the Clean Water Act. Respondents are incorrect.

a. Both ordinary English usage and common sense compel the conclusion that transferring polluted water

from one navigable water body into a separate, unpolluted navigable water body constitutes an "addition" of pollutants to "navigable waters," which requires a permit. Respondents attempt to infuse this unambiguous language with uncertainty by asserting that pollutants are "added" to "navigable waters" only when the "pollutants are introduced from outside the waters being transferred"—for example, from "the transfer activity itself." U.S. Br. 16. But it makes no difference to the receiving water body how pollutants got into the "waters being transferred": whatever their origin, the pollutants are unambiguously added *to the receiving water body* by the transfer.

The commonsense interpretation of "addition" is reinforced by the fact that, as several respondents acknowledge, NPDES permits are designed to protect the *individualized* quality of navigable water bodies that differ markedly from one another. *See* Western Br. 2-3. Given the Act's overwhelming focus on the water quality of individual water bodies, EPA's unitary-waters theory, which treats all navigable waters as an indistinguishable whole (*see* U.S. Br. 16), makes no sense: the Act's animating purpose is not to protect some ill-defined conglomerate "waters of the United States," but rather the specific water bodies where people drink, fish, and swim. The court of appeals improperly disregarded this critical statutory context in upholding the Rule. *See NAM*, slip op. at 10 (relying on "text and structure" for statutory interpretation); *Artis v. District of Columbia*, No. 16-460, dissenting slip op. at 5 (U.S. Jan. 22, 2018) (Gorsuch, J.) (relying on "textual and contextual clues" for statutory interpretation).

b. Respondents also assert that EPA properly relied on various provisions of the Act that purportedly

demonstrate Congress's intent to exempt water transfers from the Act's permit program. But this "holistic approach" to interpreting the Act (Pet. App. 319a) conflicts with this Court's precedents and is "completely unmoored" from the Act's plain language and purpose. *See NAM*, slip op. at 17 (rejecting EPA's "functional interpretative approach").

Respondents argue that two provisions of the Act—concerning the States' authority over water allocations—support exempting water transfers from the permit program. U.S. Br. 17-18; Western Br. 8-9. But this argument directly conflicts with the Court's holding in *PUD No. 1* that exactly the *same* water-allocation provisions do not "limit the scope" of the Act's water-quality protections. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 720 (1994). EPA attempts to avoid this square conflict by asserting that the Rule does not exempt *all* of the Act's water-quality protections—only the protections of the NPDES program. *See* U.S. Br. 20-21. But this argument improperly disregards the NPDES program's central role in achieving the Act's water-quality goals.

EPA's reliance on these water-allocation provisions also ignores the fact that the same provisions preserve rather than displace the Act's focus on protecting water quality. One of the allocation provisions, 33 U.S.C. § 1370, expressly provides that States must abide by the Act's minimum pollution-control measures (Pet. App. 286a-287a)—sweeping language that necessarily includes the NPDES permit program. And the legislative history of the other allocation provision, 33 U.S.C. § 1251(g), makes clear that Congress never intended this provision to exempt States from the Act's water-quality controls—even if those controls might "incidentally affect individual water rights."

123 Cong. Rec. 39,212 (1977) (Sen. Malcolm Wallop, Wyoming). As EPA explained shortly after § 1251(g)'s enactment, this provision did not disturb Congress's mandate that "without exception … point source discharges be controlled" through NPDES permitting "to meet water quality standards." Mem. from EPA Div. of Water & Waste Mgmt. to Reg'l Admin'rs, State Authority to Allocate Water Quantities—Section 101(g) of the Clean Water Act 3 (Nov. 7, 1978).

The Clean Water Act's provisions addressing nonpoint source pollutants also do not support the Rule (*see* U.S. Br. 18-19) because water transfers, by definition, convey pollutants through point sources—which Congress chose to regulate through the NPDES permit program. EPA had no authority to disregard Congress's choice based on EPA's own policy view that point-source discharges from water transfers can be dealt with effectively through nonpoint-source regulations.

Respondents are also incorrect to assert that the Rule properly excused water transfers from NPDES permitting because such transfers do not themselves generate the pollutants they add to water bodies. *See* U.S. Br. 18-19; Western Br. 23-25. Congress has expressly made point-source operators responsible for obtaining NPDES permits for *all* of their discharges of pollutants—regardless of where the pollutants originated. As this Court has explained, "a point source need not be the original source of the pollutant" to be subject to permitting; rather, the point source "need only convey the pollutant to 'navigable waters'" to fall under the NPDES program. *Miccosukee*, 541 U.S. at 105. Water transfers are plainly subject to the NPDES permit program under this interpretation.

II. The Court of Appeals' Deference to an Agency's Reliance on a Factual Analysis It Never Conducted Also Merits Certiorari.

Review is also warranted for the separate reason that the decision below allows EPA and other agencies to justify regulations based on an asserted factual analysis that the agency never conducted. This determination squarely conflicts with decisions of other circuit courts that have rejected precisely the same type of unreasonable decision-making under the principles governing deference to agency decision-making set forth in *Chevron*, 467 U.S. 837. See Pet. 27-29.

Respondents contend (U.S. Br. 29) that EPA was not required to conduct an empirical analysis of the costs and benefits of NPDES permitting because it was merely discerning *Congress's* cost-benefit analysis. But this reasoning improperly collapses the two distinct steps of the *Chevron* doctrine, which require courts to consider first whether any statutory ambiguity exists and then, if so, whether the agency reasonably resolved such ambiguity. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439 (2014). By relying on exactly the same purported congressional intent both to find statutory ambiguity and then to resolve such ambiguity, EPA simply failed to exercise any reasoned judgment at step two.

More fundamentally, EPA's assertion that Congress has already made a dispositive cost-benefit analysis contradicts its position that the Act is *ambiguous* about whether water transfers are subject to the NPDES permit program at all. EPA's ambiguity argument necessarily implies that Congress left a policy gap for EPA to resolve. As a result, Congress's

concerns about "water quantity management activities" and "water resource allocation" (U.S. Br. 29) do not reflect a conclusive empirical judgment about the costs and benefits of requiring permits for water transfers, but rather, at most, identify areas that Congress intended EPA to address through reasonable exercise of its expertise. *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707-08 (2015) (interpreting Clean Air Act provision as requiring EPA to consider economic costs). EPA simply failed to do so here, instead assuming that permits would unnecessarily burden water transfers, without conducting *any* evaluation—let alone a detailed or empirical evaluation—of whether any such burdens existed, whether general permitting or variances would alleviate any such burdens, or whether the water-protection benefits of permitting would outweigh any residual costs. EPA's justification of the Rule based on a factual evaluation that it never conducted reflects quintessentially unreasonable and arbitrary decision making that does not warrant deference.

CONCLUSION

The petition should be granted.

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