Nos. 17-418 and 17-446

In the Supreme Court of the United States

STATE OF NEW YORK, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RIVERKEEPER, INC., ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Clean Water Act (Act), 33 U.S.C. 1251 *et seq.*, prohibits the "discharge of any pollutant" except in compliance with the Act, including certain permit requirements. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The term "navigable waters" is defined as "the waters of the United States." 33 U.S.C. 1362(7). The Environmental Protection Agency promulgated the Water Transfers Rule to codify its longstanding position that an "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," 40 C.F.R. 122.3(i), is not subject to the Act's permit requirements because it does not constitute the "addition" of a pollutant to "the waters of the United States." The question presented is as follows:

Whether the Water Transfers Rule reflects a permissible construction of the Act and is supported by a reasoned explanation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-113a)[1] is reported at 846 F.3d 492. The opinion of the district court (Pet. App. 114a-251a) is reported at 8 F. Supp. 3d 500.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 17-418.

JURISDICTION

The judgment of the court of appeals (17-446 Pet. App. 1a-2a) was entered on January 18, 2017. Petitions for rehearing were denied on April 18, 2017 (Pet. App. 1a-9a). On July 14, 2017, Justice Ginsburg extended the time within which to file petitions for writs of certiorari to and including September 15, 2017. The petition for a writ of certiorari in No. 17-446 was filed on September 14, 2017, and the petition for a writ of certiorari in No. 17-418 was filed on September 15, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA generally prohibits "the discharge of any pollutant by any person" except in compliance with the Act's requirements, which include various effluent-limitation restrictions and permitting programs administered by federal and state agencies. 33 U.S.C. 1311(a); see *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). "[N]avigable waters," in turn, means "the waters of the United States." 33 U.S.C. 1362(7). A "pollutant" includes "solid waste * * * , sewage, garbage * * * , rock, sand, cellar dirt and industrial, municipal, and agricultural waste," 33 U.S.C. 1362(6), and a "point source" is "any discernible, confined, and discrete conveyance, including * * * any pipe, ditch, channel, tunnel, [or] conduit * * * , from which pollutants are or may be discharged," 33 U.S.C. 1362(14).

Among other programs, the CWA established the National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. 1342, which "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee*, 541 U.S. at 102; see *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013). NPDES permits may be issued by the Environmental Protection Agency (EPA) or an authorized State entity, 33 U.S.C. 1342(a)(1) and (b). They contain both technology-based effluent limitations established by EPA, 33 U.S.C. 1311(b), 1314(b), and additional effluent limitations based on state water-quality standards established for specific water bodies, 33 U.S.C. 1311(b), 1313; see *Arkansas* v. *Oklahoma* , 503 U.S. 91, 101-102 (1992).

b. The CWA "anticipates a partnership between the States and the Federal Government" to pursue their "shared objective" of protecting the Nation's waters. *Arkansas*, 503 U.S. at 101. The Act declares "the policy of the Congress" to "protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use * * * of land and water resources," 33 U.S.C. 1251(b), and it protects the States' "distinct roles" in various ways, *PUD No. 1 of Jefferson Cnty.* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). For example, beyond authorizing States to establish their own NPDES-permit programs (with EPA approval), 33 U.S.C. 1342(b), the Act directs each State to develop its own water-quality standards for its waters, 33 U.S.C. 1313(a).

The Act also preserves state and local governments' authority to impose water-pollution controls beyond those established by the CWA. It recognizes the "right of any State or political subdivision thereof or interstate

agency" to "adopt or enforce * * * any standard or limitation respecting discharges of pollutants" from point sources, and "any requirement respecting control or abatement of pollution" from any source, so long as the State's requirement is not "less stringent" than the CWA's requirements. 33 U.S.C. 1370(1); see 33 U.S.C. 1362(7) and (12)(A). The CWA further contemplates that States will play a significant role in addressing "nonpoint sources of pollutants." 33 U.S.C. 1314(f). It directs EPA to assist the States' efforts by publishing "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollution" as well as "processes, procedures, and methods to control pollution resulting from" such sources—including pollution from "changes in the movement, flow, or circulation of any navigable waters * * * including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. 1314(f)(1) and (2)(F).[2]

The Act also safeguards the States' authority over the management and allocation of waters within their own borders. In enacting the CWA, Congress disclaimed any intent to "impair[] or in any manner affect[] any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. 1370(2). In a subsequent amendment, Congress confirmed "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" the Act. Clean Water

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[2] Section 1314(f) does not exclusively address nonpoint sources, and it "does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *Miccosukee*, 541 U.S. at 106.

Act of 1977, Pub. L. No. 95-217, § 5(a), 91 Stat. 1567 (33 U.S.C. 1251(g)).

2. a. This litigation concerns the applicability of the NPDES permit requirements to "water transfers"—activities that convey or connect waters of the United States without subjecting the waters to any intervening industrial, municipal, or commercial use. Pet. App. 14a. "Water transfers are an integral part of America's water-supply infrastructure." *Ibid.* Across the United States, thousands of water transfers of varying size and complexity are administered by federal, state, and local governments and other entities for a variety of purposes—including public water supply, irrigation, power generation, flood control, and environmental restoration. See *ibid.*; 73 Fed. Reg. 33,697, 33,698 (June 13, 2008).

Water transfers played a vital role in the settlement of the western United States and in the development of urban areas nationwide, and they remain an integral part of the Nation's infrastructure. 73 Fed. Reg. at 33,698-33,699. For example, the federal Bureau of Reclamation administers several major water projects in western States that utilize inter-basin water transfers to provide irrigation water to approximately 140,000 farmers. *Id.* at 33,698. The Army Corps of Engineers uses water transfers to prevent flooding on thousands of acres of urban and agricultural land that formerly was part of Florida's Everglades. *Ibid.* In addition, "[m]any large cities" such as New York and Los Angeles depend on inter-basin water transfers for drinking water and other uses. *Id.* at 33,698-33,699.

b. EPA's "longstanding position" is that Congress did not intend to subject water transfers to the CWA's NPDES permit requirement. 73 Fed. Reg. at 33,701.

Water conveyed in a water transfer often contains "pollutant[s]" under the CWA's broad definition, which encompasses materials like "rock" and "sand," 33 U.S.C. 1362(6). But EPA has long taken the view that a water transfer does not ordinarily constitute the "discharge of any pollutant," 33 U.S.C. 1311(a), because a water transfer does not involve the "addition of any pollutant * * * from any point source" to "the waters of the United States," 33 U.S.C. 1362(7) and (12); see 73 Fed. Reg. at 33,699, 33,701, 33,705, 33,707; C.A. App. 272-273.

Accordingly, since the enactment of the CWA in 1972, EPA has not "issued NPDES permits for mere water transfers" unless the transferring activity itself introduced pollutants (or in response to judicial decisions). C.A. App. 272 & n.4; see 73 Fed. Reg. at 33,699, 33,707. EPA also has never "stated in any general policy or general guidance that an NPDES permit is required for such transfers." C.A. App. 272. And in litigation the government has maintained that, "for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world." *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Until 2005, however, EPA's "position ha[d] not been fully articulated in an administrative document." C.A. App. 272. The States generally have not treated water transfers as subject to the NPDES permit requirements except in "isolated instances" in response to judicial decisions. 73 Fed. Reg. at 33,699.

c. The applicability of the NPDES permit requirement to water transfers has frequently been contested in litigation. Before EPA formally codified its position, several lower courts found the permit requirement to be applicable. See *Catskill Mountains Chapter of Trout*

Unlimited, Inc. v. *City of N.Y.*, 273 F.3d 481, 491-493 (2d Cir. 2001); *Dubois* v. *United States Dep't of Agric.*, 102 F.3d 1273, 1278-1279 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997); *Del-AWARE Unlimited, Inc.* v. *Pennsylvania Dep't of Envtl. Res.*, 508 A.2d 348, 381-382 (Pa. Commw. Ct.), appeal denied, 523 A.2d 1132 (Pa. 1986) (Tbl.). EPA was not a party in those cases.

The question whether NPDES permits are required for water transfers also arose in *Miccosukee Tribe of Indians* v. *South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), vacated and remanded, 541 U.S. 95 (2004). *Miccosukee* involved a canal and pump station used to drain and transfer water from a developed area, which historically had been part of the Everglades, into an undeveloped wetland. *Id.* at 1366. The Eleventh Circuit held that the transfer constituted the addition of a pollutant to a water of the United States because the transfer introduced pollutants from the canal into the wetland, which the court understood to be a distinct body of water. *Id.* at 1368-1369.

In this Court, the United States argued as an amicus, consistent with EPA's position, that the water transfer did not require a permit because the transfer did not cause the "addition" of pollutants to the waters of the United States collectively. *Miccosukee*, 541 U.S. at 105-106. The Court declined to address the argument because it had not been pressed by the parties or passed on by the lower courts, but noted that the argument "w[ould] be open to the parties on remand." *Id.* at 109; see *id.* at 105-109. The Court vacated the Eleventh Circuit's judgment on the ground that, even assuming the NPDES permit requirement applies to transfers between

distinct water bodies, "factual issues remain[ed] unresolved" bearing on whether the water bodies at issue were "distinct." *Id.* at 111; see *id.* at 109-112.

d. In August 2005, partly in response to these rulings, EPA's General Counsel issued a memorandum "confirm[ing] the Agency's longstanding practice and conclud[ing] that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under [33 U.S.C. 1342]." C.A. App. 273; see *id.* at 271-289. The General Counsel's memorandum also indicated that "the Agency intend[ed] to initiate a rulemaking process to address water transfers." *Id.* at 273. In June 2006, pursuant to its statutory authority to "prescribe such regulations as are necessary to carry out [its] functions under" the Act, 33 U.S.C. 1361(a), EPA commenced a notice-and-comment rulemaking and proposed a rule "codifying the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States." 71 Fed. Reg. 32,887, 32,893 (June 7, 2006).[3]

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[3] After the General Counsel's memorandum was issued, in a subsequent appeal in the *Catskill* litigation, the Second Circuit was asked to revisit its prior ruling in light of (*inter alia*) the memorandum. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of N.Y.*, 451 F.3d 77, 82 (2d Cir. 2006), cert. denied, 549 U.S. 1252 (2007). The Second Circuit adhered to its prior determination. The court explained that the deference applicable to formal agency interpretations under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was inapplicable to the General Counsel's internal memorandum, and that the court "disagree[d]" with the memorandum's reasoning. 451 F.3d at 82; see *id.* at 82-87.

In June 2008, after receiving public comments, EPA promulgated the final Water Transfers Rule, adopting (with minor changes for clarification) its proposed rule "clarif[ying] that NPDES permits are not required for transfers of waters of the United States from one water body to another." 73 Fed. Reg. at 33,700; see *id.* at 33,699. The Rule adds "[d]ischarges from a water transfer" to a list of "[e]xclusions" from the NPDES permit requirement. *Id.* at 33,708 (40 C.F.R. 122.3(i)). It defines "[w]ater transfer" to mean "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Ibid.* The Rule clarifies that the exclusion "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. 122.3(i).

"[T]aken as a whole," EPA explained, "the statutory language and structure of the [CWA] indicate that Congress generally did not intend to subject water transfers to the NPDES program." 73 Fed. Reg. at 33,701. EPA observed that the key textual question is whether a water transfer "constitutes an 'addition'" of pollutants to the waters of the United States. *Id.* at 33,700 (citation omitted). The agency explained that "'[a]ddition' is a general term, undefined by the statute," and that courts have "reached different conclusions" about its meaning in the CWA. *Id.* at 33,701. In EPA's view, that undefined term "should be interpreted by analyzing the statute as a whole" to ensure consistency "with Congress's overall policies and objectives" and "the balance Congress created between federal and State oversight of activities affecting the nation's waters." *Ibid.* Applying that "holistic approach to the text," EPA explained

that "an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source," *i.e.*, "when pollutants are introduced from outside the waters being transferred," which does not occur in situations covered by the Water Transfers Rule. *Ibid.* (citation omitted).[4]

EPA also explained that the CWA's legislative history supports this understanding. 73 Fed. Reg. at 33,703. That history shows that Congress "recognized that the new [NPDES] permitting program was not the only viable approach for addressing water quality issues associated with State water resource management," and it "makes clear that Congress generally did not intend a wholesale transfer of responsibility for water quality away from water resource agencies." *Ibid.* EPA inferred that "Congress was aware" of "State regimes for allocating water rights, many of which existed long before enactment of the [CWA]," and that Congress "did not want to impair the ability of these agencies to carry them out." *Ibid.*

EPA also clarified that excluding water transfers from the NPDES permit requirement does not mean that water transfers are exempt from water-related regulation. The agency observed that the CWA "establishes a variety of programs and regulatory initiatives in addition to the NPDES permitting program," and that "nothing in [the final] rule precludes a State, under State law, from regulating water transfers that are not subject to" the NPDES program. *Id.* at 33,702, 33,704;

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[4] EPA further explained that, although a point source must "introduce" the pollutant to constitute an "addition," a point source need not "generate" the pollutant, but rather "need only convey pollutants into navigable waters to be subject to the Act." 73 Fed. Reg. at 33,702 & n.7.

see *id.* at 33,699 ("The Act reserves the ability of States to regulate water transfers under State law and this proposed rulemaking was not intended to interfere with this State prerogative.").

3. a. EPA's Water Transfers Rule was challenged in multiple proceedings. In 2008, the petitioners in No. 17-418 (State Petitioners) and No. 17-446 (Private Petitioners) brought separate suits against EPA under the Administrative Procedure Act (APA), 5 U.S.C. 706, in the United States District Court for the Southern District of New York. Pet. App. 26a-27a. Those suits were later consolidated. Petitions for direct review of the Rule under 33 U.S.C. 1369(b)(1) were filed in multiple courts of appeals and were consolidated in the Eleventh Circuit. *Friends of the Everglades* v. *United States Envtl. Prot. Agency*, 699 F.3d 1280 (11th Cir. 2012) (*Friends II*), cert. denied, 134 S. Ct. 421, and 134 S. Ct. 422 (2013). The Eleventh Circuit stayed the consolidated petitions for review pending its resolution of another appeal in which the Water Transfers Rule was implicated, *Friends of the Everglades* v. *South Florida Management District*, No. 07-13829 (11th Cir.). See Pet. App. 27a. Meanwhile, the district court in these cases stayed the proceedings pending resolution of the various cases in the Eleventh Circuit. *Ibid.*

In 2009, the Eleventh Circuit held in *Friends of the Everglades* v. *South Florida Water Management District*, 570 F.3d 1210 (*Friends I*), cert. denied, 562 U.S. 1082 (2010), that the CWA's text is ambiguous and that EPA's Water Transfers Rule reflects a "reasonable" interpretation of the statute entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Friends I*, 570 F.3d at 1227-1228; see *id.* at 1222-1228. In 2012, the Eleventh

Circuit dismissed the consolidated petitions for direct review of the Water Transfers Rule, concluding that it lacked jurisdiction under 33 U.S.C. 1369(b)(1). *Friends II*, 699 F.3d at 1286, 1289.[5]

b. The district court in these cases subsequently lifted the stay, and various additional parties intervened as plaintiffs and defendants. Pet. App. 28a. The court ultimately granted summary judgment for petitioners. *Id.* at 114a-251a. It agreed with EPA, and with the Eleventh Circuit's holding in *Friends I*, that the CWA's text is ambiguous and subject to "two permissible interpretations." *Id.* at 147a-176a, 231a. The court declined, however, to defer to EPA's interpretation, concluding that EPA's "analysis" of the CWA was "arbitrary and capricious" and lacked a reasoned explanation. *Id.* at 199a; see *id.* at 190a-249a. The district court vacated the Water Transfers Rule "to the extent it is inconsistent with the statute," and the court remanded the matter to EPA to provide a further reasoned explanation. *Id.* at 250a.

c. The court of appeals reversed. Pet. App. 10a-84a.

i. Like the district court and the parties, the court of appeals analyzed the Water Transfers Rule under the *Chevron* framework. Pet. App. 29a-31a; cf. 17-418 Pet. C.A. Br. 20-22; 17-446 Pet. C.A. Br. 4-5. The court of appeals rejected petitioners' contention that its prior decisions in the *Catskill* cases foreclosed the Water Transfers Rule "at *Chevron* Step One." Pet. App. 32a.

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[5] The government filed a petition for a writ of certiorari in *Friends II*, seeking review of the Eleventh Circuit's holding that it lacked jurisdiction over the petitions for review. This Court denied certiorari. 134 S. Ct. 421. A related question is pending in *National Association of Manufacturers* v. *Department of Defense*, No. 16-299 (argued Oct. 11, 2017), but it is not implicated here.

It explained that those prior rulings—issued before the Water Transfers Rule was promulgated—had not determined that the CWA's text unambiguously precludes EPA's statutory interpretation. *Id.* at 32a-39a.

The court of appeals agreed with the district court that the CWA is "silent or ambiguous" on "the question of whether NPDES permits are required for water transfers." Pet. App. 55a-56a; see *id.* at 40a-56a. The court found that "nothing in the language or structure of the [CWA] indicates that Congress clearly spoke to th[at] precise question." *Id.* at 44a; see *id.* at 40a-44a. The court further explained that "the broader context of the Act" did not resolve the ambiguity because some provisions of the CWA refer to particular navigable waters, while others refer to navigable waters generally. *Id.* at 42a-43a. The court also determined that neither the CWA's purposes nor various canons of construction supplied a clear answer. *Id.* at 44a-55a.

Turning to "the second step of *Chevron* analysis," the court of appeals explained that this Court's precedents required it to uphold the Water Transfers Rule if the Rule "'is based on a permissible construction of the statute'"—*i.e.*, if it is "'reasonable,'" not "'arbitrary or capricious in substance, or manifestly contrary to the statute'"—and is "supported by a reasoned explanation." Pet. App. 56a-58a (citations omitted). The court of appeals disagreed with the district court's approach in "its *Chevron* Step Two analysis," which had "incorporated the standard for evaluating agency action under APA § 706(2)(A) set forth in [*Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983)]." *Id.* at 58a. The court of appeals explained that the *Chevron* and *State Farm* inquiries are "related

but distinct standards." *Id.* at 59a. The court agreed with the D.C. Circuit that the two standards often "'overlap'"—*e.g.*, both entail evaluating "whether an agency action is 'arbitrary' or 'capricious'" and often "take the same factors into consideration"—but "'are not identical.'" *Id.* at 61a (quoting *American Petroleum Inst.* v. *United States Envtl. Prot. Agency*, 216 F.3d 50, 57 (D.C. Cir. 2000) (per curiam)).

Applying these principles, the court of appeals upheld the Water Transfers Rule. Pet. App. 65a-84a. It concluded that EPA had "provided a reasoned explanation for its decision," and that the court "c[ould] see from the EPA's rationale how and why it arrived at [its] interpretation of the [CWA]." *Id.* at 65a. The court further held that EPA's resulting interpretation "is reasonable and neither arbitrary nor capricious." *Id.* at 56a; see *id.* at 67a-83a. The court noted that EPA's position comports with "longstanding practice" and that Congress had not acted to override the agency's interpretation. *Ibid.* The court also observed that extending the NPDES permit requirement to water transfers "is likely to be burdensome and costly," which could "disrupt existing water transfer systems," including various major state and local water projects. *Id.* at 75a-76a.

The court of appeals further observed that, apart from the NPDES regime, many other means of "regulat[ing] pollution in water transfers" exist at the federal, state, and international levels. Pet. App. 76a-79a. The court explained that "'states retain the primary role in planning the development and use of land and water resources, allocating quantities of water within their jurisdictions, and regulating water pollution,'" and that States have many "regulatory tools at their disposal" to "address particular pollution or threats of pollution."

Id. at 77a, 79a (citation omitted). The court rejected petitioners' arguments that EPA's position is inconsistent with *Miccosukee*, *supra*, the CWA's purposes, and EPA's position regarding another CWA provision, 33 U.S.C. 1344. Pet. App. 67a-71a, 80a-83a.

ii. Judge Chin dissented. Pet. App. 84a-113a. In his view, the CWA's text and structure, read in light of the precedents of this Court and the court of appeals, unambiguously foreclose EPA's position. *Id.* at 86a-111a. He would also have held that the Water Transfers Rule is "unreasonable" and therefore "fails at *Chevron* step two." *Id.* at 111a; see *id.* at 111a-113a.

ARGUMENT

The court of appeals correctly upheld EPA's Water Transfers Rule, which codifies EPA's longstanding view that the CWA generally does not subject water transfers to the NPDES permit requirement. Neither the court's ultimate conclusion, nor its application of general principles of administrative law, conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners contend (17-418 Pet. 19-27; 17-446 Pet. 13-17) that the Water Transfers Rule rests on an unreasonable interpretation of the CWA. The court of appeals correctly rejected that argument.

a. The court of appeals analyzed EPA's interpretation under the framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this Court, as in the court of appeals, see p. 12, *supra*, petitioners do not dispute that *Chevron* should apply, challenging only the court of appeals' specific application of it here. 17-418 Pet. 22-23, 27-30; 17-446 Pet. 1-2, 7-18. Under that framework, an agency's construction of a statute that it administers "governs if it is a reasonable

interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009). The court of appeals properly applied that framework in upholding EPA's interpretation of the CWA.

i. EPA's longstanding view that water transfers generally do not trigger the NPDES permit requirement reflects a permissible reading of the statutory text. The NPDES permit requirement applies to "the discharge of any pollutant," 33 U.S.C. 1311(a), which the CWA defines as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). Neither that language nor any other CWA provision defines the term "addition" or otherwise directly addresses whether the transfer of water within "navigable waters" (defined as "the waters of the United States," 33 U.S.C. 1362(7)) is covered.

In the absence of express statutory direction, EPA has long maintained that "an addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred." 73 Fed. Reg. at 33,701. Under that reading, a water transfer—*i.e.*, "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," and without the introduction of pollutants from "the water transfer activity itself," 40 C.F.R. 122.3(i)—does not entail the "addition" of pollutants to "the waters of the United States" because any pollutants were already present in those waters. See 73 Fed. Reg. at 33,700-33,702. EPA's position reflects at least a permissible construction of the term "discharge of any pollutant" and its statutory definition. See Pet. App. 41a.

ii. EPA also reasonably determined that the CWA's structure, history, and purpose support its reading. In enacting the CWA, Congress appreciated the significance of water transfers, which serve multiple important purposes, and state and local governments' roles in administering and regulating them. See 73 Fed. Reg. at 33,703 (discussing legislative history). For example, "Congress was aware" that water transfers "physically implement State regimes for allocating water rights, many of which existed long before" the CWA's enactment. *Ibid.*

Far from displacing state and local governments' authority in this area, Congress expressly confirmed it. Congress declared its "policy" in enacting the CWA "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b). In furtherance of that policy, the CWA preserves state and local governments' authority to adopt "any standard or limitation respecting discharges of pollutants" or "requirement respecting control or abatement of pollution" that is more stringent than the applicable federal standards. 33 U.S.C. 1370(1). The CWA also states that, "[e]xcept as expressly provided in" the Act, "nothing in [the Act] shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. 1370(2). Congress later confirmed "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" the Act. 33 U.S.C. 1251(g).

These provisions and the historical context confirm that "Congress generally did not intend a wholesale transfer of responsibility for water quality away from water resource agencies to the NPDES authority." 73 Fed. Reg. 33,703. Congress also "clearly expressed" its "policy not to unnecessarily interfere with water resource allocation," and EPA observed that "subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights." *Id.* at 33,701-33,702. EPA concluded that "Congress generally did not intend for water transfers to be regulated under" the NPDES program, and instead "intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities" under other programs. *Id.* at 33,703-33,704.

To be sure, "Congress was aware that there might be pollution associated with water management activities." 73 Fed. Reg. at 33,702. But the CWA's structure and history show that, instead of addressing that possibility through the NPDES regime governing point sources of pollution, Congress "chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution." *Ibid.* The Act directs EPA to provide guidance to States for addressing (*inter alia*) nonpoint sources of pollution, including from "'changes in the movement, flow, or circulation of any navigable waters.'" *Ibid.* (quoting 33 U.S.C. 1314(f)(2)(F)). That mandate "reflects an understanding by Congress that * * * such pollution would be managed by States under their nonpoint source program authorities." *Ibid.*

Excluding water transfers from the NPDES point-source regime is also consistent with Congress's overarching "inten[t] that pollutants be controlled at the source

whenever possible." 73 Fed. Reg. at 33,702. Because pollutants in transferred waters "often enter 'the waters of the United States' through point and nonpoint sources unassociated with" the water transfer, any "pollution from transferred waters is more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source." *Ibid.* EPA reasonably determined that, rather than subjecting water transfers to the NPDES regime, Congress had struck a "balance * * * between federal and State oversight" that accounts for water transfers' environmental effects and important state and local interests by allowing for holistic, comprehensive regulation of water transfers. *Id.* at 33,701-33,702.

b. Petitioners' challenges to the Water Transfers Rule lack merit.

i. Petitioners contend (17-418 Pet. 21-22; 17-446 Pet. 5) that the Rule is inconsistent with various decisions of this Court interpreting the CWA. That is incorrect. None of the decisions petitioners cite resolved the question whether water transfers trigger the NPDES permit requirements. And none of those decisions indicates that petitioners' contrary interpretation "follows from the unambiguous terms of the statute" so as to "leave[] no room for agency discretion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Petitioners argue that EPA's position is "in substantial tension" with *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and *Los Angeles County Flood Control District* v. *NRDC*, 568 U.S. 78 (2013), which petitioners describe as "reason[ing] that transfers of water between 'meaningfully

distinct water bodies' could effect an 'addition' of pollutants." 17-418 Pet. 21 (citation omitted); see 17-446 Pet. 5. Petitioners misread those decisions. In *Miccosukee*, it was undisputed that, if the water transfer at issue connected "two parts of the same water body" (rather than two distinct water bodies), no "addition" would occur, and no NPDES permit would be necessary. 541 U.S. at 109-110. Because "some factual issues" relevant to the distinctness inquiry "remain[ed] unresolved," the Court vacated the court of appeals' judgment and remanded for further proceedings. *Id.* at 111-112. The Court acknowledged the federal government's argument that no "addition" occurs even "when water from one navigable water body is discharged, unaltered, into another navigable water body." *Id.* at 106. But because neither the parties nor the lower courts had addressed that argument, the Court expressly declined to rule on it, while making clear that the "argument w[ould] be open to the parties on remand." *Id.* at 105, 109.

In *Los Angeles County*, the Court applied the same principle. 568 U.S. at 80-84. The Court explained that it had "held in *Miccosukee*," and that the parties in *Los Angeles County* did not dispute, "that the transfer of polluted water between 'two parts of the same water body' does not constitute a discharge of pollutants under the CWA." *Id.* at 82 (citation omitted). Because the court of appeals there had failed to apply that principle, the Court reversed. *Id.* at 82-84. As in *Miccosukee*, the Court did not address whether water transfers among different water bodies are subject to the NDPES permit requirement.

The State Petitioners' reliance (Pet. 21) on *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700 (1994), is also misplaced. The Court

in *PUD No. 1* upheld a state-imposed minimum-stream-flow requirement as consistent with 33 U.S.C. 1341. In upholding the State's authority to adopt that requirement, the Court rejected the contention that Sections 1251(g) and 1370(2)—which preserve States' authority over water use and allocation—"prevent[ed] the State from regulating stream flow." 511 U.S. at 720. In so holding, the Court observed that Sections 1251(g) and 1370(2) "do not limit the scope of water pollution controls * * * on [water] users who have obtained, pursuant to state law, a water allocation." *Ibid.*

Contrary to the State Petitioners' contention (Pet. 21), the Court's description of those provisions in *PUD No. 1* is not inconsistent with EPA's position in the Water Transfers Rule. Although EPA explained that Sections 1251(g) and 1370(2) support its interpretation, it did not suggest that they restrict the scope of otherwise-permissible water-pollution controls established by the CWA. 73 Fed. Reg. at 33,699, 33,702, 33,706. Indeed, EPA observed, citing *PUD No. 1*, that Section 1251(g) "does not prohibit EPA from taking actions under the CWA that it determines are needed to protect water quality." *Id.* at 33,702 & n.5. Rather, EPA explained that Sections 1251(g) and 1370(2) (and other provisions) aid in resolving the ambiguity in Section 1362 concerning which activities Congress intended to subject to specific requirements. *Id.* at 33,702. Specifically, those provisions "establish[] in the text of the Act Congress's general direction against unnecessary Federal interference with State allocations of water rights." *Ibid.* That understanding of the CWA framework is fully consistent with *PUD No. 1*.

ii. The Private Petitioners argue (Pet. 13-18) that the Water Transfers Rule is inconsistent with EPA's understanding of 33 U.S.C. 1344(a). That is incorrect.

Sections 1311 and 1342 generally require a permit for the "discharge of a pollutant," which Section 1362(12)(A) defines as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). Section 1344(a) governs a special program under which the Army Corps of Engineers issues permits for the "discharge * * * into the navigable waters at specified disposal sites" of "dredged * * * material." 33 U.S.C. 1344(a). Dredged material is material "excavated or dredged from waters of the United States," 40 C.F.R. 232.2, such as sediments and sands dredged from a riverbed, lakebed, or other water bottom.

As the Private Petitioners note (Pet. 14), EPA and the Corps treat the "redeposit" of dredged materials "other than incidental fallback" as constituting a discharge that requires a permit, even when sediments are redeposited into the same water body from which they have been dredged. 40 C.F.R. 232.2. The Private Petitioners suggest (Pet. 14-15) that, if that sort of redeposit constitutes the "discharge" (*i.e.*, "addition") of a pollutant under Section 1344, then transferring polluted water from one navigable-water body to another is likewise a "discharge" under Section 1342. That reasoning is mistaken.

The Water Transfers Rule addresses whether, in the context of Section 1342's permit program, the phrase "any addition of any pollutant to" waters of the United States, 33 U.S.C. 1362(12)(A), refers to an "addition" to a particular navigable water body, or instead to an "addition" to the waters of the United States collectively. 73 Fed. Reg. at 33,701. In that context, EPA has

reasonably determined that only an addition to the waters of the United States collectively triggers the requirements of Section 1342. See pp. 16-19, *supra*.

In the distinct context of dredged material, however, EPA reasonably construed the CWA to establish a different rule. Congress's creation of a permit program specifically for the discharge of dredged material indicates that such activities implicate the general prohibition on discharges of pollutants in 33 U.S.C. 1311(a). See 73 Fed. Reg. 33,703 ("Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in [Section 1311]."). Because dredged material "by its very nature comes from a water body," EPA understands the CWA to require a permit even when that type of pollutant comes from the waters of the United States. *Ibid.* EPA and the Corps thus view materials such as sediments that are dredged from the water bottom as being, or becoming by the process of dredging, separate and distinct from the navigable waters from which they are dredged. EPA's redeposit rule accordingly treats as a discharge the redeposit of dredged material back into the navigable water body from which it came. 40 C.F.R. 232.2. That understanding of the specific statutory provisions addressing dredged material is not inconsistent with EPA's construction of the term "discharge of any pollutant" in Sections 1342 and 1362(12).

The Private Petitioners' contrary position also proves too much. They construe Section 1344 and EPA's redeposit rule as establishing generally (Pet. 14) that "the discharge of pollutants taken from a waterbody and added back even to the very same waterbody constitutes a discharge (*i.e.*, an 'addition') of a pollutant to navigable waters that violates the [CWA] unless otherwise lawfully

permitted." This Court, however, has squarely rejected that understanding. The Court "held in *Miccosukee*," and reaffirmed in *Los Angeles County*, "that the transfer of polluted water between 'two parts of the same water body' does not constitute a discharge of pollutants under the CWA." *Los Angeles Cnty.*, 568 U.S. at 82 (quoting *Miccosukee*, 541 U.S. at 109). The Private Petitioners do not ask the Court to revisit those holdings or offer any justification for doing so.

iii. The State Petitioners argue (Pet. 20) that EPA's position generally excluding water transfers from the NPDES program makes "no sense in the context of a statute specifically designed to protect individual navigable waters from receiving contamination." As the court of appeals correctly observed, however, the CWA, like other laws, does not "pursue[] [that] purpose at all costs." Pet. App. 45a (quoting *Rapanos* v. *United States*, 547 U.S. 715, 752 (2006) (opinion of Scalia, J.)). "To the contrary," the CWA "is 'among the most complex' of federal statutes, and it 'balances a welter'" of various objectives. *Ibid.* (citation omitted). Although the Act endeavors to protect the "integrity of the Nation's waters," 33 U.S.C. 1251(a), it also declares a congressional policy to preserve States' regulatory authority over land and water resources generally and water allocation specifically. 33 U.S.C. 1251(b) and (g).

The CWA pursues those and its other aims by "establishing a complicated scheme of federal regulation employing both federal and state implementation and supplemental state regulation." Pet. App. 45a. It addresses different types of water-related environmental harms in different ways, administered by different regulatory authorities. For example, although pollutants emitted from nonpoint sources may affect the

water quality of individual water bodies, the CWA generally excludes nonpoint sources of pollution from the NPDES permit requirement and "leaves the regulation of nonpoint source pollution to the states." *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 219-220 (2d Cir. 2009).

c. The State Petitioners contend (Pet. 19-20) that a circuit conflict exists on the interpretive question presented here. That is incorrect. The decision below is "in complete agreement with [the] conclusion" of the only other appellate court that has addressed the validity of the Water Transfers Rule. Pet. App. 74a (citing *Friends of the Everglades* v. *South Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009), cert. denied, 562 U.S. 1082 (2010)).

Petitioners argue that the decision below is inconsistent with decisions of the First Circuit and a Pennsylvania intermediate appellate court. 17-418 Pet. 19-20 (citing *Dubois* v. *United States Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997), and *Del-AWARE Unlimited, Inc.* v. *Pennsylvania Dep't of Envtl. Res.*, 508 A.2d 348, 381-382 (Pa. Commw. Ct.), appeal denied, 523 A.2d 1132 (Pa. 1986) (Tbl.)). But neither *Dubois* nor *Del-AWARE* addressed EPA's regulation—which was promulgated many years after both decisions—or any other formal codification of EPA's position. Nor did either court conclude that its construction of the CWA "follow[ed] from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982; see *Dubois*, 102 F.3d at 1277-1279; *Del-AWARE,* 508 A.2d at 359.

Petitioners also argue (Pet. 19-20) that the decision below is inconsistent with the Second Circuit's prior rulings in *Catskill Mountains Chapter of Trout Unlimited,*

Inc. v. *City of New York*, 273 F.3d 481 (2001), and *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 451 F.3d 77 (2006), cert. denied, 549 U.S. 1252 (2007). The court below correctly rejected that argument, explaining that those decisions, like *Dubois* and *Del-AWARE*, did not hold that the CWA unambiguously precludes EPA's understanding. Pet. App. 32a-39a. In any event, any intracircuit inconsistency would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

2. Petitioners also contend (17-418 Pet. 27-31; 17-446 Pet. 7-12) that the court of appeals misapplied certain administrative-law principles in concluding that the Water Transfers Rule reflects a reasonable interpretation supported by a reasoned explanation. Those arguments lack merit and do not warrant review.

a. The Private Petitioners argue (Pet. 7-12) that the court of appeals misapplied the *Chevron* framework by failing to incorporate into its analysis the standard applicable to challenges to agency action as arbitrary and capricious under the APA, 5 U.S.C. 706(2)(A), and *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983). Relying on *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015), they contend that the court of appeals breached its obligation to apply that APA standard in evaluating EPA's position at *Chevron*'s second step.

In *State Farm*, this Court elucidated the "arbitrary and capricious" standard that governs challenges to agency action under the APA, 5 U.S.C. 706(2)(A). 463 U.S. at 43-44. The Court explained that, to avoid an

"arbitrary and capricious" finding, an agency must provide a "satisfactory explanation" and "reasoned analysis" for a rulemaking. *Id.* at 42-43. An agency cannot

> rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, [or] offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

The *State Farm* standard for APA challenges and *Chevron*'s reasonableness inquiry often "overlap," but they are not "identical." Pet. App. 61 (quoting *American Petroleum Inst.* v. *United States Envtl. Prot. Agency*, 216 F.3d 50, 57 (D.C. Cir. 2000) (per curiam)). This Court has regularly undertaken *Chevron* review without invoking *State Farm*. See, *e.g.*, *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 550 U.S. 81, 89-100 (2007); *Barnhart* v. *Thomas*, 540 U.S. 20, 26-29 (2003); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-432 (1999). Conversely, when a court concludes that agency action is invalid under *State Farm*, it need not engage in a *Chevron* analysis.

In *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117 (2016), for example, the Court held that an agency regulation that departed from the agency's prior statutory interpretation was arbitrary under *State Farm* because the agency had failed to provide a reasoned explanation for the change. *Id.* at 2126-2127. The Court explained that "[a]n arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference," *id.* at 2126, without deciding whether the

regulation reflected a substantively reasonable interpretation of the relevant statutory text. The Court thus treated the agency's failure to offer a reasoned explanation as a ground for declining to engage in *Chevron* analysis, not as a circumstance to be considered at *Chevron*'s second step. Similarly in *State Farm*, the Court addressed an agency's explanation for rescinding an existing rule, not the reasonableness of the agency's statutory interpretation. 463 U.S. at 43-44. Petitioners are therefore wrong in contending (17-446 Pet. 7-10) that the court of appeals here was required, in the course of evaluating EPA's regulation under *Chevron*, to apply *State Farm* as well.

In any event, although the court of appeals explained that a separate *State Farm* analysis was unnecessary here, Pet. App. 58a-65a, it recognized that an "arbitrary or capricious" agency interpretation would not merit deference. *Id.* at 57a. The court held that EPA's position was "neither arbitrary nor capricious," *id.* at 56a, and that EPA had provided a "reasoned explanation" for its position, *id.* at 58a, 65a-67a. In substance, the court of appeals thus determined that EPA's "explanation is clear enough that its 'path may reasonably be discerned,'" as *State Farm* requires. *Encino*, 136 S. Ct. at 2125 (citation omitted). Petitioners' disagreement with the labels the court of appeals applied and with the court's description of the relationship between the legal standards does not warrant this Court's review.

Contrary to petitioners' contention (17-446 Pet. 10-12) the decision below does not conflict with D.C. Circuit precedent. The court below relied on and adopted the D.C. Circuit's position that *State Farm* and *Chevron*'s second step, though often "overlap[ping]," are not "identical." Pet. App. 61a (quoting *American*

Petroleum Inst., 216 F.3d at 57). In any event, petitioners offer no reason to believe that the D.C. Circuit would have found the Water Transfers Rule to be invalid, where the Second Circuit concluded that EPA's analysis was "neither arbitrary nor capricious" and that EPA had "provided a reasoned explanation" for its position. *Id.* at 56a, 65a.

b. The State Petitioners contend (Pet. 27-30) that, because EPA did not conduct a formal empirical analysis, the court of appeals erred in upholding the Water Transfers Rule based in part on concerns about the potential burdens of a contrary approach. Petitioners misread EPA's and the court of appeals' reasoning.

EPA identified "congressional concerns that the statute not unnecessarily burden water quantity management activities" as one factor supporting its view that the Water Transfers Rule was consistent with Congress's intent. 73 Fed. Reg. at 33,700. EPA did not purport to engage in a freestanding comparison of the costs and benefits of requiring NPDES permits for water transfers in order to determine how to exercise its regulatory discretion. Instead, it simply attempted to ascertain the best reading of statutory provisions that Congress had enacted. See *id.* at 33,700-33,703. EPA recognized that Congress had "clearly expressed [a] policy not to unnecessarily interfere with water resource allocation," and it found that "subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations." *Id.* at 33,701-33,702. The validity of that reasoning did not depend on the precise extent of the practical burdens that a contrary approach would have entailed. EPA therefore was not required to perform any quantitative or empirical analysis in

order to identify this as one factor supporting its interpretation of the statute.

In upholding the Water Transfers Rule, the court of appeals simply recognized EPA's discussion of "congressional concerns" about potential unnecessary burdens and interference with state and local regulation as one of the grounds for the agency's interpretation of the statute. Pet. App. 65a. The court elsewhere noted submissions by other parties describing real-world examples of such burdens, illustrating that EPA's concerns were well-founded. *Id.* at 75a. But it did not defer to any EPA factual determination on that issue or sustain the Water Transfers Rule on that basis. Further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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