No. 17-446

IN THE

Supreme Court of the United States

RIVERKEEPER, INC., THEODORE GORDON FLYFISHERS, INC., and WATERKEEPER ALLIANCE, INC.,

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 IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY

Riverkeeper, Inc., Theodore Gordon Flyfishers, Inc., and Waterkeeper, Inc. ("Environmental Petitioners") hereby submit this Reply in response to the opposition briefs filed by the Federal Respondents ("Fed. Opp'n") and the Western States and Western Water Providers ("Western States Opp'n"):

1. In response to Environmental Petitioners' argument that the Water Transfer Rule embodies an interpretation of the term "addition" in section 502(12), 33 U.S.C. § 1362(12) (2012), that is inconsistently applied to two separate permitting provisions, the Federal Respondents misstate the basic structure of the Act. They suggest that section 404 "dredge and fill" permits under 33 U.S.C. § 1344 are a "special program" somehow distinct and independent from the prohibitions and permit provisions of sections 301 and 402, 33 U.S.C. §§ 1311, 1342. Fed. Opp'n at 22–23. As this Court recognized just last week, the Act does *not* distinguish what constitutes an "addition" based on the type of permit required. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299, 2018 WL 491526, at *4 (U.S. Jan. 22, 2018). Instead, the Act, in a single section (33 U.S.C. § 1311(a)), prohibits the discharge of any pollutants into navigable waters without a permit:

> One of the Act's principal tools in achieving [its] objective is §1311(a), which prohibits "the discharge of any

> pollutant by any person," except in express circumstances. A "discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," such as a pipe, ditch, or other "discernible, confined and discrete conveyance." §§1362(12), (14). . . .
>
> Section 1311(a) contains important exceptions to the prohibition on discharge of pollutants. Among them are two permitting schemes that authorize certain entities to discharge pollutants into navigable waters. The first is the National Pollutant Discharge Elimination System (NPDES) program, which is administered by the EPA under §1342. . . .
>
> The second permitting program, administered by the Corps under §1344, authorizes discharges of "dredged or fill material" . . . .

Nat'l Ass'n of Mfrs., 2018 WL 491526, at *4 (citations and internal quotations omitted). The illegal discharges prohibited by section 301 are defined in only one place, section 502(12), where they are defined as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Thus, the

term "addition" that the Federal Respondents seek to define differently for purposes of section 404 and 402 permits occurs only once in the Act, and, as a result, EPA is adopting two different interpretations of the very same word occurring in one place in the statute. If redeposit of dredged materials into the same body of water constitutes a discharge under section 301, then so does transfer of pollutants from one navigable water into another navigable water. The argument that section 404 is a "special program" that invokes a different use of the terms "discharge" or "addition" ignores the actual text and structure of the Act.

2. Federal Respondents and Western State Respondents incorrectly assert that EPA's interpretation of the term "addition" initially and consistently excluded water transfers from the Act's permitting requirements. Federal Respondents state that EPA has not "issued NPDES permits for mere water transfers" unless the transferring activity itself introduced pollutants (or in response to judicial decisions). Fed. Opp'n at 6. Western State Respondents claim that "EPA has never required a National Pollution Discharge Elimination System permitting program . . . permit for a water transfer," and that EPA has never "stated in any general policy or general guidance that an NPDES permit is required for such [water] transfers." Western States Opp'n at 8. In fact, EPA initially interpreted the permitting requirement specifically to apply to the reintroduction of

pollutants to waters of the United States in irrigation ditches. On June 27, 1979, the EPA General Counsel issued formal opinion No. 21, which stated that that "even if any [given] irrigation ditch [were determined to be] a navigable water, it would still be permittable as a point source where it discharges into another navigable water body." Pet. App. at 123a-124a. Thus, EPA in 1979 interpreted the Act to require a permit even where water from navigable water was directly discharged without alteration into another navigable water. Hence the Water Transfer Rule does not represent EPA's initial, or even consistent, interpretation of the term "addition" in the Act.

3. In response to Environmental Petitioners' argument that the Court below erroneously refused to apply the analysis set forth in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983) to *Chevron* step two, the Federal Respondents first assert that *State Farm* analysis applies only to Administrative Procedure Act ("APA") challenges and is unnecessary when reviewing an administrative interpretation under *Chevron*. Fed. Opp'n at 26–28. This argument ignores both that this case *is* an APA challenge, Pet. App. at 19a, and that this Court expressly applied *State Farm* analysis as *part of* its *Chevron* Step Two analysis in *Michigan v. EPA*, 135 S. Ct. 2699, 2706–08 (2015) (holding that agencies are

required to engage in "reasoned decisionmaking [which means] the process by which [an agency] reaches its result must be logical and rational" and that decision "must rest on a consideration of the relevant factors") (*quoting Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) and *State Farm*, 463 U.S. at 43). Contrary to the Federal Respondents' contentions, application of *State Farm*, including an analysis of the factors considered or ignored by the agency, is not an optional analysis to be considered at the whim of individual courts or judges. In any event, the court below did not "choose" to ignore *State Farm*, it erroneously held that *State Farm* was *inapplicable* to *Chevron* analysis and that the district court erred in considering it. Pet. App. at 53a. This was error, inconsistent with holdings of the D.C. Circuit and contrary to this Court's analysis in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

4. The Federal Respondents also suggest that the court below did conduct *State Farm* review and, regardless, such review would not have altered the decision. Fed. Opp'n at 28-29. This contention is simply untrue as a factual matter—the court below expressly refused to conduct *State Farm* review and, as a result, did not review EPA's failure to consider environmental impacts of water transfers. This decision necessarily impacted the outcome of the case. Indeed, the court below recognized that *State Farm* analysis is a "much stricter and more exacting review of the agency's rationale than the *Chevron* Step Two standard" it

applied, further finding that "[w]hile we have great respect for the district court's careful and searching analysis of the EPA's rationale for the Water Transfers Rule, we conclude that it erred by incorporating the *State Farm* standard into its *Chevron* Step Two analysis and thereby applying too strict a standard of review." Pet. App. at 52a. The district court opinion invalidating the Water Transfers Rule was based in large part on consideration under *State Farm* of the environmental impacts that EPA ignored in adopting the Water Transfers Rule. Pet. App. 178a–179a. The court below reached its holding by ignoring those same factors. Thus, the application of *State Farm* review is outcome determinative.

5. Both the Western States Respondents and the Federal Respondents rely heavily on the burdens they claim would result from requiring permits for water transfers. *See* Western States Opp'n at 4 (arguing that "crippling burdens" and "severe practical consequences" would result "if EPA were forced" to set aside the Water Transfers Rule); *see also* Fed. Opp'n at 18, 21 (citing inferences from the Water Transfer Rule, and arguing that a more "holistic, comprehensive" regulatory scheme is achieved by *excluding* water transfers from the "NPDES regime"). Yet, at the same time, both claim that the environmental impacts from allowing unpermitted water transfers would be minimal. *See* Western States Opp'n at 24 (contending that Colorado has never encountered an impaired water body resulting from polluting

water transfers and "[i]n many projects, transferred waters are of equal or better quality than are receiving waters"). *See also* Fed. Opp'n at 19 (calling it burdensome to require a water transferor to take responsibility for point source and non-point source pollution which may be "unassociated" with the water transfer). Respondents cannot have it both ways: if water transfers do not cause any significant water quality impacts, then permitting would not be overly burdensome. In fact, some water transfers do cause significant water quality impacts. In the petition for certiorari filed by the State of New York, et al, Docket No. 17-418, ("State Petition"), the States provided several compelling examples of harms resulting from water transfers. State Petition at 16. The New York City water supply's transfers of turbid and warm water from the Schoharie Reservoir to the Esopus Creek routinely violate water quality standards for temperature and turbidity in a storied trout-fishing stream. *Id.* Transfers of polluted water into Florida's Lake Okeechobee result in algae blooms and potentially drastic harms resulting from human contact. *Id.* Over four hundred miles of water transfers into Lake Skinner in California caused potent algae blooms preventing use as a water supply. *Id.* The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251, yet Federal Respondents and the Western States seem to assert that the impact on water quality is not a

relevant factor for choosing how to interpret the Act.

CONCLUSION

For the foregoing reason, as well as the reasons stated in the Environmental Petitioners' Petition, the petition for writ of certiorari should be granted, or this petition should be granted and the case vacated and remanded in light of this Court's precedent in *Michigan v. EPA*.

Respectfully submitted,
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