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## A "Delicate Balance": How Agency Nonacquiescence and the EPA's Water Transfer Rule Dilute the Clean Water Act After Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York

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A “DELICATE BALANCE”: HOW AGENCY  
NONACQUIESCENCE AND THE EPA’S WATER  
TRANSFER RULE DILUTE THE CLEAN WATER ACT  
AFTER *CATSKILL MOUNTAINS CHAPTER OF TROUT  
UNLIMITED, INC. v. CITY OF NEW YORK*

*Kevin Haskins*

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Kevin Haskins\*

I. INTRODUCTION

Congress enacted the Clean Water Act (CWA) in 1972 with the express objective of restoring and maintaining the health of the nation’s waters. To achieve this objective, Congress declared that discharges of pollutants into the nation’s waters are prohibited unless they comply with permit requirements. The CWA’s primary vehicle for regulating discharge permits is the National Pollutant Discharge Elimination System, or NPDES.

The CWA defines the phrase “discharge of a pollutant” as the “addition of any pollutant to navigable waters from any point source.”<sup>1</sup> Although the CWA further defines the terms “pollutant,” “navigable waters,” and “point source,” it fails to provide a definition for the term “addition.”<sup>2</sup> As a result, courts have struggled to delineate the circumstances under which an “addition” occurs under the Act. In particular, courts have wrestled with whether a transfer of polluted water from one distinct water body into another distinct water body, referred to as an “interbasin transfer,” is an “addition” that requires a NPDES permit. In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,<sup>3</sup> the Second Circuit held that such transfers are “additions,” and distinguished them from “intra-basin transfers,” or transfers that occur within a single water body, which the court stated did not require NPDES permits.<sup>4</sup> Subsequently, in strong dicta, the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*<sup>5</sup> suggested that it agreed with the Second Circuit’s framework for distinguishing “additions” based on the extent to which the water bodies involved in a water transfer are distinct.<sup>6</sup>

Following the Supreme Court’s decision in *Miccosukee*, the EPA announced plans to amend its CWA regulations to categorically exclude water transfers from the NPDES permitting program,<sup>7</sup> and, in June 2006, it published a proposed rule having

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1. 33 U.S.C. § 1362(12) (2000).

2. *Id.* § 1362(6), (7), (14); *see generally id.* § 1362.

3. (*Catskill I*), 273 F.3d 481 (2d Cir. 2001), *aff’d on reh’g*, (*Catskill II*), 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1371 (2007).

4. *Id.*

5. 541 U.S. 95 (2004).

6. *Id.* at 109-10.

7. ANN R. KLEE & BENJAMIN H. GRUMBLES, EPA, AGENCY INTERPRETATION ON APPLICABILITY OF SECTION 402 OF THE CLEAN WATER ACT TO WATER TRANSFERS (2005).

that effect.<sup>8</sup> Contrary to the rationale in *Catskill* and *Miccosukee*, the EPA's proposed water transfer rule does not distinguish between interbasin and intrabasin water transfers. Rather, the EPA claims that several provisions in the CWA indicate that the regulation of water transfers falls under the authority of the states to manage water allocations.<sup>9</sup> Because the NPDES program would interfere with the authority of states to allocate quantities of water, the EPA concluded that water transfers are expressly excluded from NPDES requirements.<sup>10</sup>

Agency nonacquiescence is the refusal by administrative agencies to follow the decisions of lower federal courts. Nonacquiescence takes two forms: intercircuit nonacquiescence and intracircuit nonacquiescence. Intercircuit nonacquiescence occurs when an agency refuses to apply the law of one circuit in proceedings taking place in another circuit. In contrast, intracircuit nonacquiescence occurs when an agency refuses to adjust its policies within a circuit after an adverse ruling by that circuit. Generally, agencies argue that nonacquiescence is necessary to ensure the uniform administration of agency regulations and the development of law that takes place through intercircuit dialogue. However, nonacquiescence also implicates grave separation of powers concerns, and it is questionable whether the presumed benefits of uniformity and intercircuit dialogue outweigh the harms that nonacquiescence presents to the judiciary and the development of administrative law.

The purpose of this Note is to evaluate the EPA's proposed water transfer rule in the context of agency nonacquiescence. This Note begins with a discussion of agency nonacquiescence and explores the differences between its two varieties, intercircuit and intracircuit nonacquiescence. In particular, this Note focuses on the primary justifications for, and arguments against, the use of the doctrine. It then discusses the evolution of the EPA's proposed water transfer rule. The discussion begins with an overview of relevant CWA provisions, turns to a review of the precedent that has explored the meaning of the term "addition," and concludes with an analysis of the proposed rule. Next, this Note moves to an analysis of the *Catskill* litigation and the Second Circuit's decisions in 2001 and 2006.

Finally, this Note evaluates whether the EPA's proposed water transfer rule represents a form of nonacquiescence in light of the *Catskill* and *Miccosukee* decisions. Concluding that it is, this Note argues that the EPA's proposed rule rejects the distinction between interbasin and intrabasin transfers that several courts have carefully articulated, and rejects the importance of that distinction in determining whether an "addition" is subject to NPDES permit requirements. Furthermore, this Note concludes that the EPA's proposed rule dramatically alters the view of cooperative federalism that several courts have attributed to the CWA. Because the EPA's nonacquiescence does not create any benefit by encouraging uniformity or intercircuit dialogue, this Note argues that the EPA is not justified in proposing a rule that conflicts with the considered judgments of several courts. The EPA's nonacquiescence is particularly unwarranted because, unlike the majority of regulations that are issued in

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8. National Pollutant Discharge Elimination System (NPDES) Water Transfer Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122) [hereinafter NPDES Proposed Rule].

9. *Id.* at 32,890-91.

10. *Id.* at 32,891.

the absence of judicial commentary, the EPA has chosen to propose a rule based on a rationale that has been previously criticized by several circuits.

## II. ADMINISTRATIVE AGENCY NONACQUIESCENCE

### A. Introduction to Nonacquiescence

A fundamental precept in American law familiar to even the most novice student is the power of the judiciary “to say what the law is.”<sup>11</sup> This principle, in turn, establishes one of the primary rationales for the doctrine of stare decisis.<sup>12</sup> Although courts regularly adhere to the principle of stare decisis without question, its application has caused a good deal of consternation in the “quasi-judicial” realm of administrative law. This consternation results from one situation in particular: agency refusal to follow lower federal court decisions, or agency nonacquiescence.<sup>13</sup>

Commentators generally differentiate between two forms of nonacquiescence: intercircuit and intracircuit.<sup>14</sup> Intercircuit nonacquiescence occurs when an agency refuses to apply the law of one circuit in proceedings taking place in another circuit.<sup>15</sup> In contrast, intracircuit nonacquiescence occurs when an agency refuses to adjust its policies within a circuit after an adverse ruling by that circuit.<sup>16</sup> Commentators distinguish between these two forms of nonacquiescence because each form carries constitutional burdens of varying weight; indeed, many commentators argue that it is

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

12. *See Lindh v. Murphy*, 96 F.3d 856, 887 (7th Cir. 1996) (“The inferior courts have a clear responsibility to refine the basic constitutional principles enunciated by the Supreme Court. The task is accomplished through the process of reasoned elaboration disciplined by the doctrines of stare decisis and precedent. The duty ‘to say what the law is’ is a unitary one within the unitary judicial department created by the Constitution.”); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969 (3d Cir. 1979) (“Instead of reappraising determinations that have been endorsed by our sister circuits, we must reaffirm certain fundamental tenets of the doctrine of stare decisis and thus reassert the power of the federal judiciary to interpret statutes enacted by Congress.”).

13. It is generally true that administrative agencies feel compelled to follow Supreme Court precedents, but “there exists a genuine controversy as to whether or not those agencies must follow the precedents of the lower federal courts that review their decisions.” Steven P. Eichel, “*Respectful Disagreement*”: *Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463, 464 (1983).

14. *See* William Wade Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985); Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339 (1991); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) [hereinafter Estreicher, *Nonacquiescence*]; Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence*, 99 YALE L.J. 831 (1990) [hereinafter Estreicher, *The Uneasy Case*]; Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). Many of these commentators also identify a third category, nonacquiescence in the face of venue choice, but this is not discussed in this Note.

15. Figler, *supra* note 14, at 1667; *see also* Estreicher, *Nonacquiescence*, *supra* note 14, at 687.

16. Harold H. Bruff, *Coordinating Judicial Review in Administrative Adjudication*, 39 UCLAL. REV. 1193, 1207 (1992).

only intracircuit nonacquiescence that presents serious constitutional concerns.<sup>17</sup> However, an evaluation of the harms and benefits of nonacquiescence in the context of the purposes of the administrative lawmaking system generally reveal that both categories exact a cost.<sup>18</sup>

Agencies often justify nonacquiescence by pointing out that they are responsible for administering nationally uniform regulations.<sup>19</sup> Because the lower federal courts have limited geographic jurisdiction, agencies argue that an obligation to follow any one circuit inevitably harms an agency's ability to administer its nationally applicable regulations.<sup>20</sup> The limited geographic reach of the courts of appeals results in a "law of the circuit" in which courts within a circuit are bound by that circuit's precedent, but not the precedent from sister circuits.<sup>21</sup> Although courts of appeals do not lightly create conflict with other circuits,<sup>22</sup> occasional circuit conflict is an inherent attribute of the federal judicial system.<sup>23</sup> Agencies thus argue that national uniformity in the administration of regulations can only be achieved when a challenged regulation "percolates" up to the Supreme Court.<sup>24</sup> Any resultant compromise in uniformity

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17. Estreicher, *Nonacquiescence*, *supra* note 14, at 719. For example, Estreicher and Revesz argue that intercircuit nonacquiescence by definition does not offend the Constitution because there is no constitutional requirement for intercircuit *stare decisis*; therefore, "in pursuing a policy of intercircuit nonacquiescence, by definition the agency is not acting inconsistently with the case law of the court of appeals that will review its action, and that court is under no obligation to follow the ruling of the circuit that previously rejected the agency's position." *Id.*

18. See Coenen, *supra* note 14; Estreicher, *Nonacquiescence*, *supra* note 14; Figler, *supra* note 14. To a large extent, regardless of constitutionality, the debate on nonacquiescence centers on whether it is justified, given the harms and benefits of nonacquiescence and the goals of administrative law. Estreicher and Revesz, for example, exert a considerable effort in evaluating "the policy considerations implicated by [intracircuit and intercircuit] nonacquiescence" and conclude that intercircuit nonacquiescence should not be limited because the limitations would not "advance the proper functioning of the administrative lawmaking system." Estreicher, *Nonacquiescence*, *supra* note 14, at 735. On the other hand, Diller and Morawetz respond to the Estreicher and Revesz thesis by advancing a different balancing of nonacquiescence harms and benefits, leading them to the conclusion that "[the Estreicher and Revesz] proposal upsets the balance between agencies and courts by rendering the judiciary essentially powerless to enforce congressional limitations on agency conduct." Diller & Morawetz, *supra* note 14, at 803.

19. Eichel, *supra* note 13, at 464.

20. *Id.*

21. *Newsweek, Inc. v. U.S. Postal Serv.*, 663 F.2d 1186, 1196 (2d Cir. 1981) ("[I]t is well settled that the decisions of one Circuit Court of Appeals are not binding upon another Circuit."); *United States v. Carney*, 387 F.3d 436, 444 n.7 (6th Cir. 2004) ("[T]he Sixth Circuit is not bound by *stare decisis* to adhere to the prior ruling of any sister circuit . . ."); see *Newmark v. Principi*, 283 F.3d 172, 174 (3d Cir. 2002) ("Because decisions made in other jurisdictions are not binding on us, we will examine and interpret the statute ourselves in the light of our precedent.").

22. *PNC Bank Del. v. F/V Miss Laura*, 381 F.3d 183, 186 (3d Cir. 2004) ("We . . . are mindful of our obligation to avoid circuit conflict."); *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) ("[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits.").

23. *Wash. Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996) ("[The federal appellate court] regime, by design, embraces the possibility of a considered difference in views among the circuit courts on a given question . . ."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis.").

24. Eichel, *supra* note 13, at 467.

among the circuits, they argue, is counterbalanced by a “well-reasoned development of the law.”<sup>25</sup>

Proponents of nonacquiescence also point to *United States v. Mendoza*,<sup>26</sup> which established the inapplicability of nonmutual collateral estoppel against the government.<sup>27</sup> In *Mendoza*, the Supreme Court reasoned that allowing nonmutual collateral estoppel against the government would prematurely freeze dialogue on a legal issue and “deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.”<sup>28</sup> By analogy, then, proponents of nonacquiescence argue that an obligation to follow a lower federal circuit court opinion would impose the same restrictions on the agency as nonmutual collateral estoppel would impose on the government.<sup>29</sup>

However, the extent to which *Mendoza* legitimizes nonacquiescence is questionable.<sup>30</sup> *Mendoza* dealt specifically with the doctrine of nonmutual collateral estoppel, which is not directly related to stare decisis.<sup>31</sup> The latter doctrine is arguably more narrow in that it only creates binding precedent within a jurisdiction, whereas the former doctrine would allow a decision in any court in any jurisdiction to estop an agency from further litigation.<sup>32</sup> Thus, some commentators have concluded that, as “a logical matter, the fact that the government may not be precluded in court from relitigating issues that it lost in prior cases does not imply that it may disregard rulings of the courts of appeals.”<sup>33</sup>

The relevance of *Mendoza* aside, a more significant argument against nonacquiescence is the extent to which it is appropriate within the framework of the Constitution.<sup>34</sup> First, nonacquiescence presents Fifth Amendment equal protection concerns because of the doctrine’s potential to treat rich and poor plaintiffs differently.<sup>35</sup> The inequity arguably occurs because only wealthy plaintiffs will be able to seek judicial review of an agency decision and procure a favorable application of circuit law. This differential treatment of plaintiffs violates the right of all citizens to

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25. *Id.*

26. 464 U.S. 154 (1984).

27. See Buzbee, *supra* note 14, at 590-91. Traditional collateral estoppel allows a defendant to prevent a plaintiff from re-litigating an issue decided against the plaintiff in a subsequent suit between the two parties. In contrast, the principle of non-mutual collateral estoppel enables a defendant to prevent a plaintiff from re-litigating an issue that the plaintiff previously lost in a proceeding involving an entirely different defendant. In practice, non-mutual collateral estoppel can be invoked by either plaintiffs or defendants. The key case authorizing the use of offensive non-mutual collateral estoppel by federal courts is *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

28. *Mendoza*, 464 U.S. at 160.

29. See Estreicher, *Nonacquiescence*, *supra* note 14, at 684.

30. Estreicher and Revesz claim that “*Mendoza*’s rejection of nonmutual collateral estoppel against the government, however, does not compel any particular answer to the nonacquiescence controversy.” *Id.* at 685 (footnote omitted). Yet the relevance of *Mendoza* is arguably dependent on the category of nonacquiescence, that is, whether an agency is defending its use of intercircuit nonacquiescence or intracircuit nonacquiescence. See discussion *infra* Part II.B.

31. See discussion *infra* Part II.B.

32. Buzbee, *supra* note 14, at 592.

33. Estreicher, *Nonacquiescence*, *supra* note 14, at 685.

34. See Coenen, *supra* note 14; Figler, *supra* note 14.

35. Coenen, *supra* note 14, at 1352.

meaningful access to controlling law.<sup>36</sup> Similarly, nonacquiescence arguably violates Fifth Amendment procedural due process rights because it increases the likelihood that plaintiffs will be deprived of the benefit of controlling law.<sup>37</sup>

Second, nonacquiescence directly conflicts with the theory of separation of powers.<sup>38</sup> The foundation of the argument against nonacquiescence stems from Chief Justice John Marshall's famous proclamation in *Marbury* that it "is emphatically the province and duty of the judicial department to say what the law is."<sup>39</sup> The argument finds further support in several Supreme Court cases that have affirmed judicial supremacy in the context of executive challenges to the judiciary.<sup>40</sup> For commentators critical of nonacquiescence, the argument leads to the conclusion that "[n]o sufficiently powerful interest justifies the serious affront to the judicial power posed by executive flouting of the considered pronouncements of a supervisory circuit court."<sup>41</sup>

### B. Intercircuit Agency Nonacquiescence

Because intercircuit stare decisis does not exist, some commentators argue that there should be no constraint on an agency's refusal to acquiesce to a circuit court decision when the agency is not operating within that circuit's jurisdiction.<sup>42</sup> As a result, the rationale of *Mendoza* is most applicable in the context of intercircuit nonacquiescence.<sup>43</sup> For example, if an agency were forced to adjust its policies according to the first court of appeals decision that ruled against it on an issue, then not only would the agency be deprived of the subsequent percolation of the issue in other circuits, but there would be a "one-way ratchet" working against the agency.<sup>44</sup> More important, even if several circuits had previously ruled favorably for an agency, the

36. *Id.* at 1352-54.

37. *Id.* at 1355.

38. *Id.* at 1357-58.

39. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

40. Coenen, *supra* note 14, at 1358-59. Cases cited by Coenen and other commentators include *Cooper v. Aaron*, 358 U.S. 1 (1958), and *Crowell v. Benson*, 285 U.S. 22 (1932).

41. Coenen, *supra* note 14, at 1347.

42. *E.g.*, Estreicher, *Nonacquiescence*, *supra* note 14, at 735-36.

43. *See* Bruff, *supra* note 16, at 1207 ("*Mendoza* implies the legitimacy of intercircuit nonacquiescence, under which a loss in one circuit does not cause an agency to change its internal policy while it attempts to relitigate the issue elsewhere."); Figler, *supra* note 14, at 1670.

44. Estreicher, *Nonacquiescence*, *supra* note 14, at 739. The ratchet would work against the agency in that "the authoritative voice would be that of the first court of appeals to rule *against* the agency." *Id.* Estreicher and Revesz illustrate this scenario with a hypothetical built on *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984), which involved the EPA's use of independent contractors in Clean Air Act enforcement proceedings:

If the first court of appeals to face this question determined that EPA could not use independent contractors, a bar against intercircuit non-acquiescence would prevent the agency from using such contractors anywhere in the country. In addition, it is unlikely that any private party would have standing to argue that the agency should be given the option of using such contractors. Thus, no subsequent court would have the opportunity to decide whether independent contractors are part of the permissible arsenal of enforcement options. As a practical matter, and contrary to the systemic judgment underlying the Supreme Court's ruling in *Mendoza*, the adverse ruling of the court of appeals would therefore become binding and no further dialogue among the circuits would be possible.

Estreicher, *Nonacquiescence*, *supra* note 14, at 737-38.



agency would be required to adjust its policy according to the first court of appeals to issue an unfavorable ruling.<sup>45</sup>

In contrast, the absence of a bar against intercircuit nonacquiescence arguably contributes to the development of intercircuit dialogue.<sup>46</sup> There are several presumed benefits rising from intercircuit dialogue: first, the refinement of legal issues through “doctrinal dialogue” can occur only when courts of appeals address one another’s legal reasoning; second, “experiential dialogue” enables circuit courts to evaluate each other and the “consequences of different legal rules”; third, conflicts in intercircuit dialogue help the Supreme Court identify relevant cases and issues for certiorari; and fourth, doctrinal and experiential dialogue ultimately enables the Supreme Court to evaluate the merits of the cases it reviews.<sup>47</sup> Additionally, intercircuit dialogue arguably preserves the role of the agency as the primary delegate of congressional authority. In fact, some commentators argue that allowing the first court of appeals to determine the scope of agency policies runs contrary to the holdings of several foundational cases vesting primary policymaking powers in agencies, not courts.<sup>48</sup>

That is not to say that intercircuit nonacquiescence does not exact any harm on the administrative law system. The legal principle harmed the most from intercircuit nonacquiescence is the uniform application of regulatory law.<sup>49</sup> In establishing the administrative legal system, Congress intended that each agency would administer programs uniformly throughout the United States.<sup>50</sup> However, when agencies ignore circuit court rulings, uniformity is inevitably compromised because an agency may continue to enforce policies and practices in some jurisdictions, despite the fact that those same policies and practices are unenforceable in other jurisdictions.<sup>51</sup> Therefore, given the congressional intent to create uniform regulatory law, intercircuit nonacquiescence flouts a primary goal of the administrative system.<sup>52</sup>

### C. Intracircuit Agency Nonacquiescence

Many commentators believe that in terms of constitutional violations, intracircuit nonacquiescence presents a greater risk to the government’s separation of powers than intercircuit nonacquiescence.<sup>53</sup> However, weighing the harms and benefits of intracircuit nonacquiescence is not altogether different from weighing the harms and benefits of intercircuit nonacquiescence and focuses to a significant extent on the same principles of intercircuit dialogue and uniformity.<sup>54</sup>

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45. *Id.* at 738.

46. *Id.* at 736.

47. *Id.* at 736-37.

48. *Id.* at 739 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194, 202, 209 (1947); *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-44 (1984)).

49. Figler, *supra* note 14, at 1672.

50. Coenen, *supra* note 14, at 1414 (citing the Supreme Court’s recognition in *Heckler v. Day*, 467 U.S. 104, 116 (1984), of “Congress’ oft-repeated goal of uniform administration of the [Social Security] Act”).

51. Figler, *supra* note 14, at 1672.

52. *Id.*

53. See Coenen, *supra* note 14; Diller & Morawetz, *supra* note 14.

54. See Estreicher, *Nonacquiescence*, *supra* note 14, at 743-48; Coenen, *supra* note 14, at 1414-31.

Unlike a bar against intercircuit nonacquiescence, a prohibition on intracircuit nonacquiescence would not prematurely freeze dialogue and impede the development of agency law. If an agency were to lose a case in one circuit, the agency could still advocate for favorable rulings and develop case law in other jurisdictions; if the agency were successful in its endeavors and the litigated issue eventually obtained certiorari, then the Supreme Court would have the advantage of reviewing the circuits' varying treatment of the law.<sup>55</sup> However, some commentators argue that a bar against intracircuit nonacquiescence would still hamper the development of dialogue, especially where it would prevent a jurisdiction from reconsidering a prior decision in light of differing treatment in another jurisdiction.<sup>56</sup> Additionally, like a bar against intercircuit nonacquiescence, prohibiting intracircuit nonacquiescence could potentially produce a similar "one-way ratchet" against agency action because only circuits that ruled favorably for an agency would be open for reconsideration.<sup>57</sup> Again, commentators argue, the result is one that conflicts with traditional norms of agency deference and respect for agency policymaking.<sup>58</sup>

In terms of uniformity, commentators suggest that a bar against intracircuit nonacquiescence would likely inhibit the harmonization of federal law.<sup>59</sup> The lack of uniformity could be felt in at least three ways. First, if a circuit ruled against an agency, that circuit's ruling could create economic "externalities" in neighboring circuits.<sup>60</sup> Second, lack of uniformity might encourage forum shopping, a result antithetical to the purposes of federal regulation.<sup>61</sup> Third, a bar against intracircuit nonacquiescence could create problems of fairness among beneficiaries of federal law because agencies would not be able to achieve "horizontal" uniformity.<sup>62</sup>

Contrary to the arguments in favor of intracircuit nonacquiescence, the argument against it assumes that the interests in pure circuit dialogue and uniformity do not justify the harms to the judiciary and the law that nonacquiescence produces.<sup>63</sup> According to some commentators, the justification is lacking because agencies

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55. Estreicher, *Nonacquiescence*, *supra* note 14, at 743.

56. *Id.* at 743-44. "Thus, a total bar against intracircuit nonacquiescence would make it impossible for a circuit that at one time ruled against the agency to continue a dialogue with circuits that subsequently ruled for the agency." *Id.* at 744.

57. *Id.*

58. *Id.*

59. *Id.* Estreicher and Revesz suggest that prohibiting intracircuit nonacquiescence would require the Supreme Court to intervene more often than it should, meaning that "conflicts could be harmonized without intervention by the Supreme Court only if the courts of appeals that ruled *for* the agency reconsidered their position." *Id.*

60. *Id.* at 747. Estreicher and Revesz illustrate this scenario by describing the effects of a court's decision on the EPA's ambient air pollution standards:

If one circuit were to strike down regulations limiting the permissible emissions of a particular pollutant, the effects would be felt not only in that circuit, but in downwind circuits as well. For the ambient standards to be met in those circuits, the agency would have to define more stringent circuit-specific emission standards for those downwind states.

*Id.*

61. *Id.* at 748.

62. *Id.* Horizontal uniformity refers to the "equal treatment of regulatees or claimants regardless of where in this country the dispute or claim arose." *Id.*

63. Coenen, *supra* note 14, at 1413-14.

generally can seek alternate remedies to adverse rulings that do not involve ignoring circuit case law.<sup>64</sup> For example, an agency could still develop circuit dialogue by filing declaratory judgment actions or seeking “reconsideration of a disfavored circuit court precedent whenever occasions arise for testing the scope and limits of that precedent.”<sup>65</sup> Agencies also have avenues for seeking uniformity other than nonacquiescence. In particular, agencies are often able to relieve a lack of uniformity by obtaining timely Supreme Court review.<sup>66</sup> Commentators also balk at the use of uniformity to defend nonacquiescence because some degree of nonuniformity inheres in the design of the federal circuit court system.<sup>67</sup>

In addition, because of the operation of *stare decisis* within a circuit, it is questionable whether intracircuit nonacquiescence could achieve the benefits of circuit dialogue and uniformity in the first instance.<sup>68</sup> First, the argument that full “percolation” can occur only if circuits freely reconsider previous decisions ignores “circuit court rules designed to achieve stability of precedent.”<sup>69</sup> Second, the assumption that nonacquiescence promotes uniformity is flawed because “[o]nly in exceptional circumstances where the circuit will depart from its past precedent is there any possibility that intracircuit nonacquiescence will advance intercircuit uniformity.”<sup>70</sup>

Finally, in responding to the assumed infringement on agency deference that a bar to nonacquiescence presents, commentators argue that questions of respect for agency policy decisions are entirely separate from the nonacquiescence inquiry.<sup>71</sup> Thus, given the lack of perceived benefits from nonacquiescence, some commentators conclude that a proper balancing of nonacquiescence and the goals of administrative law simply does not justify the harm to the federal design of reliance on circuit court rulings.<sup>72</sup> Indeed, even those commentators who perceive no threat from intracircuit nonacquiescence are careful to note that it is “justified only as an interim measure that allows the agency to maintain a uniform administration of its governing statute at the

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64. *Id.* at 1414-32.

65. *Id.* at 1429.

66. *Id.* at 1414-15 (“For example, complaints of nonuniformity have something of a hollow ring because the agencies themselves can cure most problems of nonuniformity by promptly seeking Supreme Court review and a resulting clarification of national law.”).

67. *Id.* at 1415. Coenen, in responding to Estreicher and Revesz’s concern with externalities, argues that “[t]he best response to this observation is: So what? The ‘externalities’ problem . . . exists not because of the unavailability of intracircuit nonacquiescence, but because Congress has created a system of geographically defined circuit courts.” *Id.* at 1417. Coenen argues that similar defenses of nonacquiescence based on intercircuit competition and fairness are “fantasy,” *id.* at 1418, and “makeweight,” *id.* at 1420-21.

68. Diller & Morawetz, *supra* note 14, at 812-13 (arguing that the “suggested benefits disappear when one recognizes that *stare decisis* plays a central role in maintaining the stability of law within the circuits”).

69. *Id.*

70. *Id.* at 813.

71. *Id.* at 818 (“The respect for agency interpretation of statutes . . . does not address the question posed by nonacquiescence – namely the agency’s authority to limit the effect of judicial decisions finding that the agency acted in violation of congressional intent.”). Coenen also argues that defending nonacquiescence based on deference to agency expertise is unfair. Coenen, *supra* note 14, at 1432 (“[W]hen an agency invokes its expertise to nonacquiesce in an earlier decision invalidating an agency rule, it is seeking a second bite at the *Chevron* apple.”).

72. Diller & Morawetz, *supra* note 14, at 829.

agency level, and only while federal law on the subject remains in flux and the agency is making reasonable attempts to persuade the courts to validate its position.”<sup>73</sup>

### III. THE BACKGROUND OF EPA’S WATER TRANSFER RULE

#### A. Relevant Clean Water Act Provisions

Congress enacted the CWA in 1972. The first words of the statute, which declare the Act’s goals and policies, make clear that Congress aspired to achieve an environmental ideal. Thus, section 101(a) states that it is the objective of the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>74</sup> To achieve this objective, section 301(a) prohibits “the discharge of any pollutant by any person”<sup>75</sup> unless it complies with certain provisions of the Act. The primary provision governing discharges is section 402, which establishes the National Pollutant Discharge Elimination System (NPDES).<sup>76</sup> Furthermore, section 502(12) defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”<sup>77</sup> Although “point source” is further defined in section 502(14) as “any discernible, confined and discrete conveyance [such as a] channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged,”<sup>78</sup> the CWA does not provide a definition for the term “addition.” As discussed below, this critical definitional absence has led to a substantial amount of litigation.

Although section 101(a) voices Congress’s desire for environmental standards on a national scale, Congress also envisioned a substantial role for the states in implementing those standards.<sup>79</sup> Thus, section 101(b) states that “[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”<sup>80</sup> Similarly, section 101(g) expressly provides that “the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired.”<sup>81</sup> Finally, section 510(2) states that, except as expressly provided elsewhere in the CWA,

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73. Estreicher, *Nonacquiescence*, *supra* note 14, at 683.

74. 33 U.S.C. § 1251(a) (2000).

75. *Id.* § 1311(a). Section 301(a) is often referred to as the “jurisdictional trigger” for both the National Pollutant Discharge Elimination System (NPDES) program under section 402, *id.* § 1342, and the dredge and fill program under section 404, *id.* § 1344.

76. *Id.* § 1342.

77. *Id.* § 1362(12).

78. *Id.* § 1362(14).

79. See CRAIG N. JOHNSTON, WILLIAM F. FUNK & VICTOR B. FLATT, *LEGAL PROTECTION OF THE ENVIRONMENT* 150 (2005). The CWA is based on the principle of “cooperative federalism,” which gives states significant authority in implementing Federal standards. *Id.* (noting that Congress declined to give the EPA complete authority in administering the CWA and instead chose to “give the States the option of staying involved in significant ways”). Most important, section 402(b) allows a state to assume primary responsibility for the management of the state’s NPDES program. 33 U.S.C. § 1342(b). Additionally, section 303 reserves to a state the authority to establish water quality standards within that State. *Id.* § 1313.

80. *Id.* § 1251(b).

81. *Id.* § 1251(g).

“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 . . . of such States.”<sup>82</sup>

The CWA uses the section 402 NPDES program as the primary method of dealing with pollution from point sources. Nonpoint pollution, however, is not controlled by a single program, and is instead tackled through a number of provisions.<sup>83</sup> One such provision, section 304(f), requires the EPA Administrator to issue guidelines for identifying and controlling nonpoint pollution resulting from “changes in the movement, flow, or circulation of any navigable waters . . . caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.”<sup>84</sup> Yet unlike the section 402 NPDES program, the CWA’s nonpoint pollution provisions “do not require the states or EPA to impose pollution controls tied precisely to [water quality standards].”<sup>85</sup> As a result, the extent to which these provisions reflect a concerted effort to control nonpoint pollution is questionable.<sup>86</sup>

### B. Precedent Exploring the Meaning of “Addition”

Although the CWA does not provide a definition for the term “addition,” several key cases have explored the circumstances under which a flow of water between water bodies can constitute an “addition” under the CWA. Generally, these cases fall into two categories. The first category, the “dams cases,” includes *National Wildlife Federation v. Gorsuch*<sup>87</sup> and *National Wildlife Federation v. Consumers Power Co.*<sup>88</sup> The second category, the “pumping cases,” includes *Dubois v. United States Department of Agriculture*,<sup>89</sup> the *Catskill* decisions that are the focus of this Note,<sup>90</sup> and the Eleventh Circuit and Supreme Court decisions in *South Florida Water Management District v. Miccosukee Tribe of Indians*.<sup>91</sup> Only in the latter category have courts found that an “addition” can occur, primarily because “pumping cases”

82. *Id.* § 1370.

83. For example, section 303(d)(1)(C) requires states to establish “total maximum daily load[s]” (TMDL) for water bodies where section 402 effluent limitations “are not stringent enough to implement any water quality standard applicable to such waters.” *Id.* § 1313(d)(1)(A), (C). The EPA has captured nonpoint pollution by defining TMDL as including both “wasteload allocations” from point sources and “load allocations” from nonpoint sources. 40 C.F.R. § 130.2 (2006). Additionally, section 208 requires states to identify “those areas which, as a result of urban-industrial concentrations or other factors, have substantial water quality control problems,” and “to control to the extent feasible such sources.” 33 U.S.C. § 1288(a)(1), (b)(2)(F)(ii). Finally, section 319 requires states to identify waters that are polluted from nonpoint sources and develop a “management program for controlling pollution added from nonpoint sources.” *Id.* § 1329(b)(1).

84. *Id.* § 1314(f)(2)(F).

85. Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 227 (1999).

86. *Id.* at 228 (“For waters impaired by both point and nonpoint source pollution, this lack of precision in the nonpoint source program adds significant uncertainty to water quality-based controls for point sources as well.”).

87. 693 F.2d 156 (D.C. Cir. 1982).

88. 862 F.2d 580 (6th Cir. 1988).

89. 102 F.3d 1273 (1st Cir. 1996).

90. *Catskill I*, 273 F.3d 481 (2d Cir. 2001); *Catskill II*, 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1373 (2007).

91. 280 F.3d 1364 (11th Cir. 2002), *vacated*, 541 U.S. 95 (2004).

involve the movement of polluted water from one water body into another entirely distinct water body, unlike “dams cases,” where the movement of polluted water occurs within a substantially singular water body.

For example, in *Gorsuch*, the National Wildlife Federation (NWF) sued the EPA seeking a declaration that water quality changes resulting from impounded dam water<sup>92</sup> must be regulated by discharge permits under the NPDES program.<sup>93</sup> The EPA conceded that dams affected water quality in the manner alleged by the NWF, but argued that in order for an addition of a pollutant to occur, a “point source must *introduce* the pollutant into navigable water from the outside world.”<sup>94</sup> Because “dam-caused pollution . . . merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river),” the EPA argued that water released from dams was outside the scope of the NPDES program.<sup>95</sup> Giving deference to the EPA’s interpretation, the D.C. Circuit agreed with the EPA, but stressed the “narrowness of our decision” and held “merely that EPA’s interpretation is reasonable.”<sup>96</sup>

Similarly, *Consumers Power* involved a suit initiated by the NWF to prohibit a hydro-electric facility from discharging dead fish and fish remains that resulted from the operation of the facility’s turbines.<sup>97</sup> The facility, “one of the largest pumped storage facilities in the world,” generated electricity by pumping water from Lake Michigan into a reservoir and then releasing the water back into the lake through a system of turbines.<sup>98</sup> In addition to generating electricity, the pumping process destroyed a significant number of fish and then released their remains back into Lake Michigan.<sup>99</sup> Relying on *Gorsuch*, the court noted that although the fish remains were “pollutants,” the “movement of pollutants already in the water [was] not an ‘addition’ of pollutants to navigable waters of the United States.”<sup>100</sup>

The *Gorsuch* and *Consumers Power* courts also looked to sections 101(g) and 304(f)(2)(F) to determine the scope of an “addition” and the extent to which Congress intended the movement of water to be regulated by the CWA. Neither court, however, found that those sections spoke to the issue in any definitive manner. For example, the *Gorsuch* court noted that, regarding section 101(g), “[i]n light of its intent to minimize federal control over state decisions on water *quantity*, Congress might also, if confronted with the issue, have decided to leave control of dams insofar as they affect water *quality* to the states.”<sup>101</sup> However, the court noted the conditional nature of this

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92. *Gorsuch*, 693 F.2d at 161. The alleged water quality changes included low dissolved oxygen, high concentrations of dissolved minerals and nutrients, temperature changes, sediment, and supersaturation. *Id.* at 161-64.

93. *Id.* at 164-65.

94. *Id.* at 165.

95. *Id.*

96. *Id.* at 183.

97. Nat’l Wildlife Fed’n v. Consumers Power Co., 862 F.2d 580, 581 (6th Cir. 1988).

98. *Id.*

99. *Id.* at 582.

100. *Id.* at 581.

101. Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 179 (D.C. Cir. 1982).

conjecture, observing that “[s]ection 101(g) was not intended to take precedence over ‘legitimate and necessary water quality considerations.’”<sup>102</sup>

Examining section 304(f)(2)(F), the *Consumers Power* court agreed with *Gorsuch* that that section did not clearly indicate a congressional intent to exempt section 304(f) activities from NPDES requirements.<sup>103</sup> At the same time, the court noted that “it does not . . . necessarily indicate that dam-caused pollution would be subject to § 402 permit requirements.”<sup>104</sup> Having determined that section 304(f)(2)(F) did not “necessarily” subject dams to or exclude them from the CWA, the court simply read the ambiguity in section 304(f) as favoring an interpretation that “water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the ‘nonpoint source’ category of pollution.”<sup>105</sup>

Beginning the line of “pumping cases,” *Dubois* involved a ski resort that pumped water from a polluted river into a pristine pond that the resort used for snowmaking activities.<sup>106</sup> In concluding that the pumping resulted in an “addition” of a pollutant to a navigable water, the court emphasized that the river and the pond were distinct bodies of water such that “the transfer of water or its contents from the [river to the pond] would not occur naturally.”<sup>107</sup> According to the court, to conclude otherwise and exempt water transfers from NPDES requirements, regardless of the pollution in the river or pond, would lead to an “irrational result.”<sup>108</sup>

Following a similar line of reasoning, the Eleventh Circuit in *Miccosukee* determined that the pumping of polluted water from a drained basin over levees and into a water conservation area was an “addition” because “the pollutants [from the basin] would not have entered the [water conservation area] *but for* the change in flow caused by” the pumping.<sup>109</sup> Although the court noted that the basin and water conservation area were at one time hydrologically connected, it nevertheless concluded that the levees separating the basin and the water conservation area “made the two bodies of water two separate and distinct bodies of water.”<sup>110</sup>

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102. *Id.* at 179 n.67 (quoting 123 CONG. REC. 39,212 (1977)).

103. *Consumers Power*, 862 F.2d at 588.

104. *Id.*

105. *Id.* (citing *Gorsuch*, 693 F.2d at 177).

106. *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273 (1st Cir. 1996). The river at issue was the Pemigewasset River, which was “for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns.” *Id.* at 1297. The pond in dispute was Loon Pond, a Class A water body “unusual for its relatively pristine nature.” *Id.* at 1277. The ski resort pumped water from the Pemigewasset in order to “pressurize and prevent freezing in its snowmaking equipment, and then discharge[d] the used water into Loon Pond.” *Id.* at 1296.

107. *Id.* at 1297.

108. *Id.*

109. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368-69 (11th Cir. 2002). The basin (C-11 Basin) and the water conservation area (WCA-3A) were both once part of the Everglades. *Id.* at 1366. In the early 1900’s, the Army Corps of Engineers constructed the C-11 Canal in order to drain the portion of Broward County constituting the C-11 Basin. *Id.* In the 1950’s, the Corps built several levees, created WCA-3A, and completed the S-9 pump station. *Id.* Today, the C-11 Canal collects water run-off from the C-11 Basin and seepage from the WCA-3A levees and pumps the collected water through the S-9 pumps station into WCA-3A. *Id.*

110. *Id.* at 1369 n.8.

In its review of *Miccosukee*, the Supreme Court did not disagree with the Eleventh Circuit's rationale but remanded the case, holding specifically that the record was insufficient to determine whether the basin and the water conservation area were "meaningfully distinct water bodies."<sup>111</sup> However, the Court's discussion included unusually strong dicta indicating that the resolution of the dispute "involves the application of agreed-upon law to disputed facts."<sup>112</sup> More important, the agreed-upon law discussed by the Court arguably confirmed that the proper paradigm for determining whether the movement of water between water bodies is an "addition" focuses exclusively on the extent to which the water bodies are distinct.<sup>113</sup>

*C. The EPA's Proposed Water Transfer Rule—"A Delicate Balance"*

Despite references to agreed-upon law, the Court in *Miccosukee* declined "to resolve all . . . the legal disagreements."<sup>114</sup> In particular, the Court left unresolved a "unitary waters" theory advanced by the EPA in an amicus brief positing that "all the water bodies that fall within the Act's definition of 'navigable waters' . . . should be viewed unitarily for purposes of NPDES permitting requirements."<sup>115</sup> The EPA argued that because the word "any" does not precede the phrase "navigable waters" in section 502(12), Congress intended that "NPDES permits would not be required for pollution caused by the engineered transfer of one 'navigable water' into another."<sup>116</sup> Rather, the EPA asserted that "Congress intended that such pollution instead would be addressed through local nonpoint source pollution programs" as indicated in section 304(f)(2)(F).<sup>117</sup>

Expressing strong reservations about the theory's legal underpinnings, the Court observed initially that section 304(f)(2)(F) "does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition."<sup>118</sup> Furthermore, the Court pointed to other provisions in the CWA that suggested that the CWA "protects individual water bodies as well as the 'waters of the

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111. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004) ("We find that further development of the record is necessary to resolve the dispute over the validity of the distinction between C-11 and WCA-3.").

112. *Id.* at 104. Had the Supreme Court not spoken in dicta, and instead held definitively that an "addition" occurs when polluted water is transferred between two water bodies, the EPA's subsequent rule would be not only a form of nonacquiescence, it would be a form of contempt.

113. *Id.* at 109-12. The *only* caselaw cited by the Court in discussing the application of "agreed-upon law to disputed facts" was *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481 (2d Cir. 2001). *Id.* As discussed below, the *Catskill* decisions followed *Dubois* in concluding that the movement of polluted water from one distinct water body into another distinct water body is an "addition" subject to NPDES permitting requirements. See discussion *infra* Part IV.B.

114. *Miccosukee*, 541 U.S. at 104.

115. *Id.* at 105-06. The Court left the "unitary waters" argument open because the EPA had never embodied the theory in an administrative document and "neither the District nor the Government [had] raised the unitary waters approach before the Court of Appeals or in their briefs respecting the petition for certiorari." *Id.* at 109.

116. *Id.* at 106.

117. *Id.*

118. *Id.*



United States' as a whole."<sup>119</sup> Finally, responding to a concern that subjecting "engineered transfers among various natural water bodies" to NPDES permitting requirements would violate state authority over water allocations protected by section 101(g), the Court concluded that "it may be that such permitting authority is necessary to protect water quality."<sup>120</sup>

Although the Court appeared skeptical of the EPA's theory, it nevertheless indicated that the "'unitary waters' argument [was] open to the District on remand."<sup>121</sup> Perhaps perceiving a window of opportunity to articulate its position in a regulatory form, the EPA issued an agency interpretation in August 2005 that addressed the scope of the section 402 NPDES program.<sup>122</sup> However, rather than fleshing out its "unitary waters" theory, the EPA's interpretive letter posed the question of whether the NPDES program "is applicable to water control facilities that merely convey or connect navigable waters."<sup>123</sup> Noting that the issue "touches on the delicate balance created in the [CWA] between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States,"<sup>124</sup> the EPA's interpretation concluded that Congress did not intend water transfers to be subject to permit requirements under section 402.<sup>125</sup> On June 7, 2006, the EPA initiated a rulemaking to formalize its conclusions as regulatory law.<sup>126</sup>

The EPA's proposed water transfer rule seeks "to expressly exclude water transfers from regulation under the [NPDES] permitting program."<sup>127</sup> Under the rule, water transfers are defined as "an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use."<sup>128</sup> The rule therefore applies to any entity "involved in the transfer of waters of the United States," and specifically includes resource management and public water supply entities.<sup>129</sup>

The rationale for the EPA's proposed rule rests on several grounds. First, the EPA asserts that the CWA should be viewed holistically and with an eye toward "the provisions of the whole law, and its object and policy."<sup>130</sup> This is particularly important, according to the EPA, because "the heart of this matter is the balance

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119. *Id.* at 107. The Court pointed primarily to the provisions regarding water quality limited water bodies, found in sections 303(c)(2)(A) and 303(d). *Id.*

120. *Id.* at 108.

121. *Id.* at 112.

122. KLEE & GRUMBLES, *supra* note 7.

123. *Id.* at 1. The EPA's interpretation does not shed any light on why the agency has chosen not to pursue its "unitary waters" theory.

124. *Id.* at 2.

125. *Id.* at 3.

126. NPDES Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122).

127. *Id.*

128. *Id.*

129. *Id.* at 32,887-88. Entities mentioned in the public water supply category include those "operating water treatment plants and/or operating water supply systems . . . [that] include pumping stations, aqueducts, and/or distribution mains." *Id.* at 32,888. Entities mentioned in the resource management category include "state departments of fish and wildlife, state departments of pesticide regulation, state environmental agencies, and universities." *Id.*

130. *Id.* at 32,889 (quoting *United States v. Boisdore's Heirs*, 49 U.S. (1 How.) 113, 122 (1850)).

Congress created between federal and State oversight of activities affecting the nation's waters."<sup>131</sup>

Reading the CWA holistically, the EPA claims a second ground for the rule's rationale comes from the Act's statutory language and structure. Observing that "[w]hile no one provision of the Act expressly addresses whether water transfers are subject to the NPDES program,"<sup>132</sup> the EPA notes that section 101(b) provides that "States have primary responsibilities with respect to the 'development and use . . . of land and water resources.'"<sup>133</sup> The EPA also relies on the mandate within section 101(g), which "establishes Congress' general direction against unnecessary Federal interference with State allocations of water rights."<sup>134</sup> Finally, the EPA points to section 304(f) and notes that although the activities mentioned in that section are not exclusively nonpoint source in nature, section 304(f) nevertheless "reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program[s]."<sup>135</sup> Reading these statutory provisions in light of the CWA's overall structure, which is to regulate "effluent from an industrial, commercial or municipal operation,"<sup>136</sup> the EPA concludes that "taken as a whole, the statutory language and structure of the [CWA] indicate that Congress did not generally intend to subject water transfers to the NPDES program."<sup>137</sup>

The EPA finds a third ground for the rule's rationale in the CWA's legislative history. Most important, the EPA observes that the legislative history "discusses water flow management activities only in the context of the nonpoint source program,"<sup>138</sup> and that, in discussing section 304(f), Congress "specifically mentioned water flow management as an area where EPA would provide technical guidance to States for their nonpoint source programs, rather than an area to be regulated under section 402."<sup>139</sup> Thus, the EPA concludes that Congress recognized that the NPDES program "was not the only viable approach for addressing water quality issues associated with State water resource management."<sup>140</sup>

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131. *Id.*

132. *Id.* at 32,890.

133. *Id.* (quoting 33 U.S.C. § 1251(b) (2000)).

134. *Id.*

135. *Id.* The EPA, however, does not explain why a congressional understanding that water movement *could* contribute to pollution necessarily indicates an intent that such pollution *would* be managed by states rather than the NPDES program.

136. *Id.* at 32,891. The EPA claims that water transfers are different from "effluent" released by industrial, commercial, and municipal operations, because "[r]ather than discharge effluent, water transfers release one water of the U.S. into another." *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (citing H.R. REP. NO. 92-911, at 109 (1972)).

140. *Id.*

## IV. THE CATSKILL DECISIONS

A. *Factual Background*

New York City (the City) has obtained a portion of its drinking water from the Schoharie Dam and Reservoir in the Catskill Mountains since before World War II.<sup>141</sup> Under natural conditions, water from the Schoharie Reservoir would flow north through the Schoharie Creek and into the Hudson River.<sup>142</sup> However, to deliver water from the Schoharie Reservoir to the City, the City conveys the water eighteen miles south through the Shandaken Tunnel where it blends with the water of Esopus Creek.<sup>143</sup> After flowing through Esopus Creek, the blended waters eventually pool into the Ashokan Reservoir before flowing ninety-two miles south to the City through the Catskill Aqueduct.<sup>144</sup> Without the transfer facilitated by the Shandaken Tunnel, the waters of Schoharie Creek and Esopus Creek would remain hydrologically separated, although each watershed is a natural tributary of the Hudson River.<sup>145</sup>

Water in the Schoharie Reservoir contains both natural and man-made suspended solids and is naturally more turbid than the water of Esopus Creek.<sup>146</sup> When these

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141. New York City Department of Environmental Protection, NYC Water Supply Watersheds History, <http://www.nyc.gov/html/dep/watershed-protection/html/history.html> (last visited Oct. 6, 2007). Currently, New York City draws water from three reservoir systems, consisting of the Croton, Catskill, and Delaware Systems. *Id.* The City developed the Croton Reservoir System first and built the City's first aqueduct, the Old Croton Aqueduct, in 1842. *Id.* A second aqueduct, the New Croton Aqueduct, was completed in 1890. *Id.*

In 1905, the New York State Legislature established the New York City Board of Water Supply, which immediately began plans to tap into watersheds in the Catskill Mountains. *Id.* During the first phase of development of the Catskill Reservoir System, from 1907 to 1915, the City dammed Esopus Creek, constructed the Ashokan Reservoir, and built the ninety-two-mile long Catskill Aqueduct in order to deliver the Ashokan Reservoir's water to the City. The Catskill Watershed Corporation, Watershed History, [http://www.cwconline.org/about/ab\\_hist1.html](http://www.cwconline.org/about/ab_hist1.html) (last visited Oct. 6, 2007). During the second phase of development, from 1919 to 1927, the City turned north to a new watershed and constructed the Schoharie Reservoir by damming Schoharie Creek. *Id.* As part of the Schoharie Reservoir construction, the City built the eighteen-mile long Shandaken Tunnel, which drains water from Schoharie Reservoir into Esopus Creek and ultimately into the Ashokan Reservoir. *Id.*

Finally, in 1931, the City began constructing the Delaware Reservoir System after the Supreme Court denied an injunction sought by New Jersey to prohibit the City from drawing water from the Delaware River. New York City Department of Environmental Protection, *supra* (referencing *New Jersey v. New York*, 283 U.S. 805 (1931)). Water from the Delaware System, which now provides fifty percent of the City's drinking water, began flowing to the City in 1944 with the completion of the Delaware Aqueduct. *Id.* Today, the New York City Water Supply System draws water from the world's largest unfiltered surface water supply: a total watershed covering 1,969 square miles, consisting of nineteen individual reservoirs with a storage capacity of 580 billion gallons, and capable of delivering 1.3 billion gallons of water every day to the City and nearby counties. *Id.*

For an interesting account of how geographical factors influenced the construction of the City's water supply system, see Anastasia von Burkalow, *The Geography of New York City's Water Supply: A Study of Interactions*, 49 GEOGRAPHICAL REV. 369 (1959). For a fascinating documentary on the Catskill water system and the communities that were flooded in order to build it, see DEEP WATER: BUILDING THE CATSKILL WATER SYSTEM (Willow Mixed Media 2001).

142. *Catskill I*, 273 F.3d 481, 484 (2d Cir. 2001).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Catskill II*, 451 F.3d 77, 80 (2d Cir. 2006).

suspended solids are discharged into Esopus Creek via the Shandaken Tunnel, the resultant increase in turbidity interferes with recreational uses of the creek, primarily fly fishing.<sup>147</sup> Historically, the New York Department of Environmental Conservation (NYDEC), which administers the CWA in New York State, has not used the CWA permitting scheme to regulate turbidity in the Shandaken Tunnel.<sup>148</sup> Instead, the City has tried to tackle the turbidity problem by studying ways to mitigate turbid discharges from the tunnel.<sup>149</sup> Prior to the *Catskill* litigation, however, the City had failed to develop an adequate remedy.<sup>150</sup>

### B. Catskill I

In March 2000, Catskill Mountain Chapter of Trout Unlimited and other environmental groups<sup>151</sup> (collectively, Catskill) filed suit in district court claiming that the City's operation of the Schoharie Reservoir and Shandaken Tunnel violated section 301(a) of the CWA, which prohibits the discharge of a pollutant in the absence of a discharge permit.<sup>152</sup> Catskill alleged that the Shandaken Tunnel discharges a variety of pollutants into Esopus Creek, including suspended solids, turbidity, and heat, and that the resulting turbidity and temperature of Esopus Creek violated state water quality standards and endangered "one of the premier trout fishing streams in the Catskill Region."<sup>153</sup>

In its response to the Catskill complaint, the City argued that it did not need a permit because the discharges from the Shandaken Tunnel did "not effect an 'addition' of a pollutant, as required to constitute a 'discharge' for which a permit must be sought."<sup>154</sup> The district court agreed with the City and granted its motion to dismiss, deciding as a matter of law that water from the Shandaken Tunnel was not an "addition" of a pollutant to Esopus Creek that necessitated a permit under the CWA.<sup>155</sup> Catskill appealed the district court's decision.<sup>156</sup>

On appeal before the Second Circuit Court of Appeals, Catskill contended that the district court had erred in holding that Catskill's complaint "did not properly plead the existence of the 'addition' element."<sup>157</sup> Based on the policy, goals, and legislative history of the CWA, Catskill argued that it is "clear that the [CWA] intended to cover any discharge that interferes with the natural integrity of the nation's waters."<sup>158</sup>

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. The environmental groups constituting the plaintiffs included Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc.. *Catskill I*, 273 F.3d 481, 484 (2d Cir. 2001).

152. *Id.* at 484-85.

153. *Id.* at 485.

154. *Id.*

155. *Id.*

156. *Id.*

157. Brief of Plaintiffs-Appellants at 6, *Catskill I*, 273 F.3d 481 (2d Cir. 2001) (No. 00-9447), 2001 WL 34113732.

158. *Id.* at 10.

Specifically, Catskill argued that the “integrity” of which the CWA spoke prohibited the addition of pollutants resulting from water transfers between two separate water bodies belonging to two separate watersheds.<sup>159</sup> According to Catskill, the City’s definition of “addition” led to the anomalous result where “trucking floating garbage from the most polluted urban backwater and dumping it into a mountain trout stream” would not be prohibited “on the theory that the garbage was already in waters of the United States somewhere, and therefore it was not an ‘addition’ of pollutants to the trout stream.”<sup>160</sup>

Catskill supported its argument by claiming that the water transfer at issue in *Dubois* is indistinguishable from the Shandaken Tunnel water transfer.<sup>161</sup> Catskill emphasized that the court in *Dubois* held that “the transfer of pollutants between . . . two distinct water bodies would constitute an ‘addition’ of a pollutant.”<sup>162</sup> Similarly, Catskill argued that Schoharie Reservoir and Esopus Creek are “two distinct bodies of water . . . existing in two distinct watersheds,” and that the “discharge of pollutants from the Shandaken Tunnel into the Esopus Creek is clearly an ‘addition’ under the meaning of the Clean Water Act.”<sup>163</sup>

The City rejected Catskill’s assertion that an “addition” occurs when water is diverted from one water body to another.<sup>164</sup> Rather, the City argued that the transfer of water from Schoharie Reservoir into Esopus Creek was indistinguishable from cases involving dam-induced water quality changes, which the courts in *Gorsuch* and *Consumers Power* found to be outside the permitting requirements of the CWA.<sup>165</sup> The City argued that, according to *Gorsuch* and *Consumers Power*, an “addition” occurs only when a pollutant is physically introduced “into the water from the outside world.”<sup>166</sup> In particular, the City asserted that the “key inquiry for purposes of ‘addition’ is whether the defendant has him/her/itself introduced anything to the waters.”<sup>167</sup> Thus, the City argued that because “the City does not ‘do’ anything to the water it diverts to the Esopus Creek,”<sup>168</sup> the Catskill complaint “failed to allege facts establishing the element of ‘addition.’”<sup>169</sup>

Additionally, the City indicated that *Gorsuch* “emphasized that there is ‘specific indication in the [CWA] that Congress did not want to interfere any more than necessary with state water management, of which dams are an important component.’”<sup>170</sup> Equating the dam in *Gorsuch* to the Shandaken Tunnel, the City claimed that the tunnel’s water transfer was “part of a public water supply system . . .

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159. *Id.* at 11.

160. *Id.*

161. *Id.* at 13.

162. *Id.* at 12.

163. *Id.* at 13.

164. Brief of Defendants-Appellees at 23, *Catskill I*, 273 F.3d 481 (2d Cir. 2001) (No. 00-9447), 2001 WL 34113733.

165. *Id.* at 23.

166. *Id.* at 24 (quoting *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982)).

167. *Id.* at 27.

168. *Id.* at 29.

169. *Id.* at 34.

170. *Id.* at 25 (quoting *Gorsuch*, 693 F.2d at 178).

which specifically has been authorized by the State.”<sup>171</sup> Furthermore, the City argued that New York State was already addressing turbidity problems in the Shandaken Tunnel as required by State regulations.<sup>172</sup>

The Second Circuit ruled in favor of Catskill, holding that an “addition” to a water body occurs when pollutants are introduced “from the outside world,” which “is construed as any place outside the particular water body to which pollutants are introduced.”<sup>173</sup> Central to the court’s reasoning was its distinction between intrabasin and interbasin water transfers.<sup>174</sup> Using a soup ladle analogy, the court characterized *Gorsuch* and *Consumers Power* as intrabasin transfers that effectively ladled soup from a pot, lifted it above the pot, and poured it back in without “‘add[ing]’ soup or anything else to the pot.”<sup>175</sup> However, the court determined that an interbasin transfer, such as the Shandaken Tunnel, “strains past the breaking point the assumption of ‘sameness’ made by the *Gorsuch* and *Consumers Power* courts.”<sup>176</sup> The court viewed interbasin transfers as equivalent to transferring soup from one pot to another pot such that “an ‘addition’ of a ‘pollutant’ from a ‘point source’ has been made to a ‘navigable water.’”<sup>177</sup> Thus, the court’s holding was a rejection of the “singular entity” theory of navigable waters, which assumed that an “addition to one water body is deemed an addition to all of the waters of the United States.”<sup>178</sup>

Finally, the court also rejected the City’s argument that the provisions of the CWA reserving the power to the states to allocate water resources superseded the explicit permit requirements mandated by the CWA under section 301(a).<sup>179</sup> Observing that the CWA “balances a welter of consistent and inconsistent goals,” the court concluded that “none of the statute’s broad purposes sways us from what we find to be the plain meaning of its text.”<sup>180</sup> The court reversed the judgment dismissing the case and remanded it to the district court.<sup>181</sup>

### C. Catskill II

On remand, the district court granted Catskill’s motion for summary judgment and later assessed civil penalties against the City for failing to obtain a NPDES permit

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171. *Id.*

172. *Id.* at 25-26 (citing N.Y. COMP. CODES R. & REGS. tit. 6, § 670.4 (West, Westlaw through Sept. 2007)).

173. *Catskill I*, 273 F.3d 481, 491 (2d Cir. 2001) (quoting *Gorsuch*, 693 F.2d at 165).

174. *Id.* at 491-92.

175. *Id.* at 492.

176. *Id.*

177. *Id.*

178. *Id.* at 493 (citing *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1296-97 (1st Cir. 1996)).

179. *Id.* at 493-94. In particular, the City had relied on section 101(g), *id.*, which states that “[i]t 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 [Act].” 33 U.S.C. § 1251(g) (2000). The court noted that the policy goal articulated in section 101(g) is only one of many listed in the Act, which also includes section 101(a)’s objective of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” *Catskill I*, 273 F.3d at 494 (quoting 33 U.S.C. § 1251(a) (2000)).

180. *Catskill I*, 273 F.3d at 494.

181. *Id.*

within a reasonable time.<sup>182</sup> The City appealed the decision and returned to the Second Circuit Court of Appeals, claiming the assessed penalty was exorbitant and asking the court to reconsider its holding in *Catskill I*.<sup>183</sup> The court stated that it would “reconsider our holding in *Catskill I* if there are cogent, compelling reasons . . . such as a change in controlling law.”<sup>184</sup> The court then noted that two such intervening legal developments had occurred since the decision in *Catskill I*: first, the Supreme Court had issued its decision in *Miccossukee*, and second, the EPA had issued an agency interpretation explaining the applicability of NPDES permits to water transfers.<sup>185</sup>

Beginning its argument, the City claimed that *Miccossukee* held that intrabasin transfers do not trigger NPDES permitting requirements and that there is no reasoned basis for viewing interbasin transfers differently.<sup>186</sup> First, the City noted that the Court in *Miccossukee* “did not decide whether there is a distinction between inter- and intra-basin transfers” and instead “left the question open” to be addressed in the “context of the ‘unitary waters’ approach.”<sup>187</sup> Second, the City asserted that there is “no scientific basis for a distinction between inter- and intra-basin transfers” and that as a result “Congress did not write one into the [CWA].”<sup>188</sup> Third, offering an embellished version of the “unitary waters” theory discredited by the court in *Catskill I*, the City argued that the language of section 502(12), which provides the definition for a pollutant discharge, “signals Congress’ understanding that NPDES permits would not be required for pollution caused by the engineered transfer of one ‘navigable water’ into another.”<sup>189</sup>

Furthermore, the City asserted that sections 101(g) and 510 reserve to the states the power to manage water transfers for water supply purposes and that NPDES permit requirements would improperly “restrict the City’s use of the Shandaken Tunnel.”<sup>190</sup> According to the City, *Miccossukee*’s proposal to resolve possible violations of section 101(g) resulting from NPDES oversight of water transfers through the issuance of

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182. *Catskill II*, 451 F.3d 77, 80 (2d Cir. 2006). The district court determined that eight months was a reasonable amount of time for the City to comply with the *Catskill I* decision; the City’s failure to obtain a permit between June 22, 2002, and December 31, 2002, resulted in the court imposing the maximum penalty of \$5,749,000. *Id.*

183. *Id.*

184. *Id.* (citing *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)).

185. *Id.* at 82.

186. Brief of Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees at 22-23, *Catskill II*, 451 F.3d 77 (2d Cir. 2006) (No. 03-7203), 2004 WL 3559563.

187. *Id.* at 24 (quoting *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004)).

188. *Id.* at 25. The City claimed that there was no scientific basis for distinguishing interbasin and intrabasin transfers because the water quality changes resulting from a dam’s impoundment of water were “no less significant than those resulting from inter-basin transfers.” *Id.* Arguing that the factual record in *Catskill I* did not highlight the water quality changes resulting from dam impoundments, the City claimed that the soup ladle analogy in *Catskill I* was inapt and the new factual record developed on remand “supports this Court’s reconsideration of the soup ladle analogy.” *Id.* at 26.

189. *Id.* at 29. Section 502(12) defines the discharge of a pollutant as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12) (2000). The City asserted that the absence of the word “any” before the term “navigable waters” embodied Congress’ intent not to distinguish one water body from another. Brief of Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees, *supra* note 186, at 29. The City also asserted that the plural use of “waters” indicated Congress’ intent to treat “navigable waters as a whole.” *Id.*

190. *Id.* at 31.

general permits presented an entirely inadequate remedy.<sup>191</sup> Arguing from the CWA's affirmation of the "traditional powers of states over water allocation,"<sup>192</sup> the City concluded that the regulation of the Shandaken Tunnel should be left to state and federal laws and regulations other than the CWA.<sup>193</sup> Finally, the City pointed to section 304(f)(2)(F), which discusses "flow diversion facilities" in the context of non-point sources of pollution, as a clear indication that the CWA treats "changes in the flow of water differently from point sources of pollutants" subject to NPDES permit requirements.<sup>194</sup>

After summarizing the salient points of its decision in *Catskill I*, the court proceeded to dispense with the City's claims for reconsideration, describing them as "warmed-up arguments" that the court had previously rejected.<sup>195</sup> Contrary to the City's contention that *Miccusukee* did not distinguish between intrabasin and interbasin water transfers, the court noted that *Miccusukee* made express reference to the "soup ladle" analogy from *Catskill I* and drew a clear distinction between the two types of transfers.<sup>196</sup> Indeed, the Supreme Court had remanded the case specifically to determine whether the waters in dispute were essentially "two pots of soup, not one."<sup>197</sup>

The court also refuted the City's contention that "new evidence" suggested no scientific basis for distinguishing intrabasin and interbasin transfers.<sup>198</sup> Responding to the City's argument that intrabasin transfers of water are "no less likely to add pollutants"<sup>199</sup> than interbasin transfers, the court noted that it had previously considered "the presence of pollutants in intrabasin transfers" when it reviewed *Gorsuch* and *Consumers Power* in the context of *Catskill I*.<sup>200</sup> The court emphasized that the key

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191. *Id.* at 32-33. The City believed that general permits would be inadequate because their use did "not provide for the 'meaningful review by an appropriate regulating agency' necessary to ensure that a permit program meets the requirements of the CWA." *Id.* at 33 (quoting *Env'tl. Def. Ctr. Inc. v. EPA*, 344 F.3d 832, 856 (9th Cir. 2003)). The City also claimed that because the factual record on remand showed that there was no reasonable method to ensure that discharges from the Shandaken Tunnel "consistently achieve the State water quality standard for turbidity," the effluent limitations in general permits requiring compliance with water quality standards presented the same practical problems as those in an individual NPDES permit. *Id.* at 33-34. Finally, the City also pointed out that *Miccusukee*'s discussion of the availability of general permits was "a concept . . . that had not been developed in the record in *Miccusukee*," and therefore did not "reflect a full factual analysis." *Id.* at 34.

192. *Id.* at 36.

193. *Id.* at 38-39. The City explained that it was already operating the Catskill water supply system pursuant to Filtration Avoidance Determinations, or FAD's, under the Safe Drinking Water Act. *Id.* at 39-40 (citing 42 U.S.C. § 300f (2000)). The latest FAD, from 2002, required the City "to address and control pollution entering the City's Catskill and Delaware water supply systems from both point and nonpoint sources." *Id.* at 40. The City also indicated that discharges from the Shandaken Tunnel must comply with New York State water quality standards and that violations are already "subject to enforcement by the Commissioner of the New York State Department of Environmental Conservation." *Id.* at 44 (citing N.Y. ENVTL. CONSERV. LAW §§ 15-0313(2), 17-0501 (West, Westlaw through 2007 legislation Ch. 1-678); N.Y. COMP. CODES. R. & REGS. tit. 6, Parts 700-704 (West, Westlaw through Aug. 2007)).

194. *Id.* at 43.

195. *Catskill II*, 451 F.3d 77, 82 (2d Cir. 2006).

196. *Id.* at 83.

197. *Id.* (quoting *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004)).

198. *Id.* at 82-83.

199. *Id.* at 82.

200. *Id.* at 82-83. The court essentially concluded that the City's "new evidence" was not "new" at all because "it simply show[ed] that the release of water from a dam into downstream water is no less likely to add pollutants as would a transfer of water from a distinct water body"; the court emphasized that it was



point was not that pollutants are present in both intrabasin and interbasin transfers, but that only interbasin transfers “‘add’ pollutants to the navigable waters” and thus trigger NPDES permitting requirements.<sup>201</sup>

Next, the court turned its attention to the City’s renewed “unitary waters” theory and found that *Miccosukee* confirmed its previous rejection of the theory in *Catskill I.*<sup>202</sup> The court pointed particularly to *Miccosukee*’s reference to several provisions of the CWA that distinguish the navigable waters of the United States, “implying that, at least in the context of the CWA, the unitary-water theory has no place.”<sup>203</sup> Given that *Miccosukee* did nothing more than “note the existence of the theory and raise possible arguments against it,” the court concluded that *Miccosukee* did not represent a change in the law that warranted reconsideration of *Catskill I.*<sup>204</sup>

Turning to the City’s final argument, the court dismissed the contention that a “holistic” reading of the CWA, and in particular sections 101(g), 510, and 304(f), required a reconsideration of *Catskill I.*<sup>205</sup> Considering the CWA provisions relating to state rights in water allocations, the court observed that the “power of the states to allocate *quantities* of water within their borders is not inconsistent with federal regulation of water *quality*.”<sup>206</sup> Specifically, the court reasoned that section 510 only preserves state rights “not in conflict with the other requirements of the CWA,” suggesting Congress did not intend for the NPDES program to be superseded by state water allocation programs.<sup>207</sup> Support for the court’s reasoning came from *PUD No. 1 v. Washington Department of Ecology*,<sup>208</sup> in which the Supreme Court explained 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.”<sup>209</sup> Although *Miccosukee* raised the concern that federal NPDES requirements may at times violate state authority under section 101(g) and prohibitively raise costs on projects such as the Shandaken Tunnel, the court pointed out that *Miccosukee* also

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already aware of this possibility and had previously considered it in its review of *Gorsuch* and *Consumers Power* in *Catskill I.* *Id.* at 82.

201. *Id.* at 83.

202. *Id.*

203. *Id.* (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-09 (2004)). The provisions referenced by the Court in *Miccosukee* included section 304(f)(2)(F), which covers non-point sources of pollution, section 303(c)(2)(A), which allows states to set ambient water quality standards, and section 303(d), which establishes the CWA’s Total Maximum Daily Load (TMDL) program for State water bodies that have failed to achieve NPDES-mandated water quality standards. *Miccosukee*, 541 U.S. at 105-09. The Court in *Miccosukee* suggested that these provisions “suggest[] that the [CWA] protects individual water bodies as well as the ‘waters of the United States’ as a whole.” *Id.* at 107.

204. *Catskill II*, 451 F.3d at 83.

205. *Id.* The City relied on the 2005 EPA interpretation that insisted that a water transfer between two navigable waters should not be looked at through the narrow prism of an “addition.” Rather, the EPA urged that a holistic view that considered “Congress’s intent that such transfers be regulated by the states” was more appropriate. *Id.* at 82. *See also* KLEE & GRUMBLES, *supra* note 7, at 5.

206. *Catskill II*, 451 F.3d at 84.

207. *Id.*

208. 511 U.S. 700 (1994).

209. *Catskill II*, 451 F.3d at 84 (quoting *PUD No. 1*, 511 U.S. at 720).

recognized that “such permits nevertheless might be necessary to protect water quality.”<sup>210</sup>

The court also found the City’s section 304(f)(2)(F) argument unavailing because that section’s reference to “flow diversion facilities” in the context of non-point sources of pollution did not clearly indicate that “changes in the circulation of navigable waters . . . [should] be exempt from the permit requirements that apply to point sources.”<sup>211</sup> The court supported its reasoning by pointing to *Miccosukee*, in which the Supreme Court explained that section 304(f)(2)(F) “does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall with the ‘point source’ definition.”<sup>212</sup> Using a similar line of reasoning to dismiss the City’s claim that programs other than the CWA are more appropriate for regulating the Shandaken Tunnel, the court explained that “the City does not explain how their existence invalidates a separate, independent requirement imposed by the permitting scheme of the CWA.”<sup>213</sup>

In conclusion, the court stated that the City’s “‘holistic’ arguments about the allocation of state and federal rights . . . simply overlook [the CWA’s] plain language.”<sup>214</sup> The critical question for the court was the significance of the word “addition,” the meaning of which had not changed since *Catskill II*, “despite the City’s attempts to shift attention away from the text of the CWA to its context.”<sup>215</sup> Noting that the CWA attempts to strike a balance between state water allocation rights and uniform standards designed to protect the nation’s waters, the court criticized the City and the EPA for trying to “tip the balance toward the allocation goals.”<sup>216</sup> Because the court believed the CWA already provided enough flexibility to accommodate both federal regulation of water quality and state regulation of water quantity allocation, the court declared it would “adhere to the balance that Congress has struck and remains free to change.”<sup>217</sup>

## V. ANALYSIS

Contrary to the *Catskill* decision and the precedent upon which it was based, the EPA’s proposed rule seeks to “expressly exclude” from section 402 NPDES regulation any “activity that conveys waters of the United States to another water of the United States,” provided the water is not subjected to “intervening industrial, municipal, or

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210. *Id.*

211. *Id.*

212. *Id.* (quoting *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004)).

213. *Id.* at 85.

214. *Id.* at 84.

215. *Id.*

216. *Id.* at 85.

217. *Id.* The court detailed the flexibility that inheres in the CWA. It began by observing that effluent limitations in NPDES permits are established with both technology-based effluent limits (TBELs) and water-quality-based effluent limits (WQBELs). *Id.* In those cases where TBELs have not been established for a given source, such as tunnels like the Shandaken Tunnel, permit-writers set TBELs using their best professional judgment. *Id.* The court believed this “process thus affords the permit-writer ‘considerable flexibility in establishing permit terms and conditions.’” *Id.* (quoting EPA, NPDES PERMIT WRITERS’ MANUAL 69 (1996)).

commercial use.”<sup>218</sup> In two ways in particular, the proposed rule contradicts caselaw: first, it refuses to acquiesce in several courts’ understanding of the meaning and importance of “addition” as used in section 502(12); second, it rejects the considered judgments of several courts regarding the proper balance of state and federal interests under the Act. Ultimately, as this Note concludes, the EPA’s nonacquiescence is harmful not only to the administration of the CWA, but to the integrity of the Act itself.

*A. The EPA’s Nonacquiescence to the Meaning of “Addition”*

Under the EPA’s proposed rule, water transfers between different water bodies are acceptable regardless of the pollution levels in each water body. The rule therefore exempts from section 402 NPDES regulation the very event that the *Catskill* court found unacceptable: a transfer from one polluted water body to another pristine water body. The effect of the rule is to reject any distinction between interbasin and intrabasin water transfers, which the *Catskill* court, echoed by *Dubois* and *Miccosukee*, found to be critical to the meaning of “addition.”<sup>219</sup>

In *Miccosukee*, for example, the water transfer between the two disputed water bodies did not add any pollutant that was not already present. Indeed, the Court firmly established that a point source facilitating a transfer does not need to add a pollutant in order to trigger the CWA. Rather, the Court found that a point source “need only convey the pollutant to ‘navigable waters,’”<sup>220</sup> concluding that whether an “addition” of a pollutant had occurred hinged on whether the two water bodies were “meaningfully distinct water bodies.”<sup>221</sup> Similarly, in the *Catskill* decisions, the court concluded that interbasin transfers merited special attention under the CWA because, unlike intrabasin transfers, they “‘add’ pollutants to the navigable waters” and thus satisfy the “addition” element, triggering NPDES permitting requirements.<sup>222</sup>

The EPA’s rule, on the other hand, gives effect to the term “addition” only to the extent that “intervening industrial, municipal, or commercial use[s]” add pollutants during a water transfer.<sup>223</sup> By excluding water transfers from regulation except when the transfer itself adds pollutants, the rule obviates any need to distinguish between interbasin and intrabasin transfers. In fact, the EPA’s rule essentially achieves the exact ends as the agency’s “unitary waters” theory,<sup>224</sup> a theory the *Catskill* court called

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218. NPDES Proposed Rule, 71 Fed. Reg. 32,887, 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122).

219. See *Catskill II*, 451 F.3d at 83; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-10 (2004).

220. *Miccosukee*, 541 U.S. at 105.

221. *Id.* at 112.

222. *Catskill II*, 451 F.3d at 83.

223. NPDES Proposed Rule, 71 Fed. Reg. at 32,887.

224. The “unitary waters” theory and the EPA’s rule arguably achieve the same ends because both would exempt from CWA regulation water transfers between distinct water bodies. However, the “unitary waters” theory and the EPA rule rely on different definition-based rationales. The “unitary waters” theory exempts water transfers by defining the waters of the U.S. as one singular water body, thereby eliminating the need to distinguish between interbasin and intrabasin water transfers. The EPA’s proposed rule changes the definitional focus and simply defines water transfers as categorically exempt from the CWA, regardless of whether the transfer is an interbasin or intrabasin transfer.

“absurd,”<sup>225</sup> the *Miccosukee* Court suggested would “conflict with current NPDES regulations,”<sup>226</sup> and that numerous commentators have questioned.<sup>227</sup>

Furthermore, the EPA’s rule creates a categorical exemption from the CWA for water transfers that is at odds with the interpretation of the Act given by most courts. In *Natural Resources Defense Council, Inc. v. Costle*,<sup>228</sup> for example, the court struck down an EPA regulation that exempted several classes of point sources because of “administrative infeasibility.”<sup>229</sup> The court held, based on the CWA’s language and legislative history, that the EPA did not have the authority to create categorical exemptions to CWA regulation.<sup>230</sup> Therefore, to the extent that the EPA’s rule exempts an entire activity from the CWA’s section 402 NPDES regulations, the EPA’s rule is in direct conflict with prior precedent.

*B. The EPA’s Nonacquiescence to the Clean Water Act’s  
Balance of Cooperative Federalism*

The EPA’s proposed rule seeks to exempt water transfers from CWA requirements based on “the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States.”<sup>231</sup> According to the EPA’s “delicate balance,” at least in the context of water transfers, federal protection of water quality and State management of water quantity are mutually exclusive categories; once water transfers are defined as belonging to State water allocation schemes, they are categorically removed from the NPDES program and the federal interest in protecting water quality. More than “tip[ping] the balance toward the allocation goals,”<sup>232</sup> as the *Catskill* court described, the EPA’s rule simply removes the federal interest in protecting water quality from the scale.

As the *Catskill* court and *Miccosukee* Court both emphasized, state interests in managing water allocation and federal interests in protecting water quality are not only expressly provided for in the CWA, but are intended to exist harmoniously within the

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225. *Catskill II*, 451 F.3d at 81.

226. *Miccosukee*, 541 U.S. at 107. The Court suggested that the “unitary waters theory” would conflict with 40 C.F.R. § 122.45(g)(4), which allows an industry to obtain “intake credits” when it withdraws water from a source and then discharges the water after use without removing pollutants that were present when the water was originally withdrawn. The Court noted that the EPA only allows the use of the credit when the water is withdrawn and then discharged into the same water body, suggesting that the CWA distinguished between discrete water bodies. *Id.* at 107-08.

227. See, e.g., Gregory L. Sattizahn, *Does It Hold Water? Repudiating the “Singular Entity” or “Unitary Waters” Approach to the Clean Water Act*, 23 UCLA J. ENVTL. L. & POL’Y 101 (2005); Brad W. Blank, *The Unitary Waters Approach: The Government’s Misguided Attempt to Limit the Reach of the Clean Water Act*, 42 SAN DIEGO L. REV. 1259 (2005); Crystal Mothershead Gaudette, *S. Florida Water Management District v. Miccosukee Tribe of Indians: The Slippery Slope to Federal Control of State Water Diversions*, 39 U.C. DAVIS L. REV. 669 (2006); Heide Hande, *Is the EPA’s Unitary Waters Theory All Wet?*, 6 WYO. L. REV. 401 (2006).

228. 568 F.2d 1369 (D.C. Cir. 1977).

229. *Id.* at 1372, 1379. In particular, the EPA had identified the need to regulate uncontaminated storm water discharge as a source of severe administrative burden. *Id.*

230. *Id.* at 1377.

231. KLEE & GRUMBLES, *supra* note 7, at 2.

232. *Catskill II*, 451 F.3d 77, 85 (2d Cir. 2006).

Act's cooperative federalism structure.<sup>233</sup> The *Catskill* court, in particular, highlighted the interaction between state and federal interests by referencing the Supreme Court's determination 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."<sup>234</sup> According to *Catskill*, although a state may claim that a water transfer falls entirely under its authority to manage water allocation quantities, by no means does that claim extinguish the federal interest in protecting water quality through the NPDES program. The EPA's proposed rule, however, rejects *Catskill*'s formulation of the CWA's cooperative federalism and states that, because of sections 101(g) and 510, "it is reasonable to read the statute as not requiring NPDES permits for water transfers."<sup>235</sup>

Similarly, the EPA's reliance on section 304(f)(2)(F) is at odds with *Catskill* and *Miccossukee*. Because section 304(f)(2)(F) directs the EPA to issue guidelines for controlling nonpoint pollution from "changes in the movement, flow or circulation of any navigable waters . . . caused by . . . flow diversion facilities,"<sup>236</sup> the EPA concludes that Congress was aware "that water movement could result in pollution, and that such pollution would be managed by states under their nonpoint source program authorities, rather than the NPDES program."<sup>237</sup> However, as the *Miccossukee* Court noted, section 304(f) "does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition."<sup>238</sup> Because the "dams, levees, channels, causeways, [and] flow diversion facilities" mentioned in section 304(f)(2)(F) are likely to qualify as point sources as defined in section 502(14), *Miccossukee* seems to suggest that these facilities can never be wholly exempt from the NPDES program.

Indeed, the most natural reading of section 304(f)(2)(F) suggests that it is an *additional* regulatory procedure beyond the NPDES program, not an *alternate* regulatory procedure that exempts the facilities mentioned in section 304(f) from the NPDES requirements. In essence, section 304(f) simply states that to the extent that "flow diversion facilities" contribute to nonpoint pollution, the EPA should issue guidelines that identify and evaluate "processes, procedures, and methods to control" such pollution. Nowhere in the language of section 304(f) is there an indication that, by virtue of its contribution to nonpoint pollution, a "flow diversion facility" that also

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233. In *Miccossukee*, the Court noted that promoting state interests in managing water quantity allocations and federal interests in protecting national water quality are not mutually exclusive. The Court observed that, in some circumstances, NPDES permit requirements for water transfers may violate section 101(g)'s mandate not to interfere with a State's authority to allocate quantities of water, but concluded that "such permitting authority [may be] necessary to protect water quality." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004). Similarly, the *Catskill* court emphasized the different nature of the interests at stake, observing that "[t]he power of the states to allocate *quantities* of water within their borders is not inconsistent with federal regulation of water *quality*." *Catskill II*, 451 F.3d at 84.

234. *Catskill II*, 451 F.3d at 84 (quoting PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 720 (1994)).

235. NPDES Proposed Rule, 71 Fed. Reg. 32,887, 32,890 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122).

236. 33 U.S.C. § 1314(f)(2)(F) (2000).

237. NPDES Proposed Rule, 71 Fed. Reg. at 32,890.

238. *Miccossukee*, 541 U.S. at 106.

qualifies as a point source should be exempt from NPDES regulations aimed at controlling pollution from point sources.

*C. The Effect of the EPA's Nonacquiescence on the Clean Water Act and its Administration*

Assuming that the main benefits of intercircuit and intracircuit nonacquiescence are increased regulatory uniformity and circuit dialogue, the EPA's nonacquiescence is justified only if these benefits outweigh the harms to the administration of the CWA and the integrity of the CWA itself. However, the EPA's nonacquiescence does not contribute to either regulatory uniformity or circuit dialogue. In fact, the EPA's rule creates greater regulatory disunity and disturbs "agreed-upon law" generated by several circuits. As a result, the EPA's rule only creates administrative confusion and dilutes the integrity of the CWA.

Unlike many regulations that are issued in the absence of judicial commentary, the EPA's proposed water transfer rule is unique because the rationale of the rule has already been discussed, developed and criticized in several court decisions. In essence, the EPA is consciously choosing to promulgate a rule that the agency knows is in conflict with several circuits. The EPA is thus in a very different position from an agency that promulgates a rule on a clean slate and then chooses not to acquiesce to subsequent adverse court decisions in the interests of maintaining regulatory uniformity and generating circuit dialogue. Here, the EPA is not seeking to maintain regulatory uniformity or generate circuit dialogue. Rather, the EPA is seeking to create a new regulatory regime and simply ignoring a significant amount of caselaw developed through circuit dialogue.

With its water transfer rule, the EPA has proposed a regulation with national application and significance. Under these circumstances, the EPA has an interest in preserving uniformity in its regulations under the CWA.<sup>239</sup> Indeed, this need for uniformity arguably constitutes a primary justification for the EPA's nonacquiescence to the *Catskill* and *Miccosukee* decisions.<sup>240</sup> Yet the EPA's water transfer rule does not bring uniformity to the CWA. Instead, the EPA's rule merely introduces a rationale that has been rejected by, or received negative treatment in, at least two circuits and a Supreme Court decision. By flying in the face of precedent, the EPA's rule works an immediate disunity into the CWA and, insofar as water transfers are concerned, makes its uniform administration throughout the circuits questionable.

At one time, the General Counsel to the EPA explained that "because of a special need to maintain uniformity in the environmental context, and a relatively responsive Congress," the agency has "eschew[ed] relitigation of an issue that has been squarely

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239. In the 1977 amendments to the CWA, the Senate noted that "[r]egulations and regulatory uniformity are necessary if this act is to be successful in cleaning the waters." S. REP. NO. 95-370, at 56 (1977), as reprinted in 1977 U.S.C.C.A.N. 4326, 4381. In its statement, the Senate merely echoed the intent of the CWA's drafters that "[u]niformity, finality, and enforceability' [are] the 'three essential elements' of the proposed legislation." Nat'l Res. Def. Council v. EPA, 437 F. Supp. 2d 1137, 1149 (C.D. Cal. 2006) (quoting ENVIRONMENTAL POLICY DIVISION OF THE CONGRESSIONAL REFERENCE SERVICE, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 162 (1973)).

240. See *supra* notes 19-25 and accompanying text.

decided against it in any circuit.<sup>241</sup> Although relitigation is not analogous to rule-making, the General Counsel's comments suggest that while the EPA could, through rulemaking, "develop a record that would support a policy that has been rejected,"<sup>242</sup> the EPA might better serve its regulatory interests and the interests of uniformity by seeking Congressional review rather than ignoring circuit court decisions.

Nor is circuit dialogue—the other benefit of nonacquiescence—served by the EPA's proposed water transfer rule. Proponents of nonacquiescence claim that bars against both intercircuit and intracircuit nonacquiescence stymie dialogue within circuits and between circuits.<sup>243</sup> Again, however, two circuits and a Supreme Court decision have already discussed the rationale for the EPA's water transfer rule, and none found it favorable. Furthermore, in *Catskill II*, the EPA secured reconsideration of *Catskill I*, thereby refuting the assumption that a prohibition against nonacquiescence creates a "one-way ratchet" against agency decision-making.<sup>244</sup>

Perhaps more fundamental than the harm to the administration of the CWA, the EPA's nonacquiescence represents a significant departure from the ideals of the CWA articulated in *Catskill* and its prior precedent.<sup>245</sup> As *Costle* established, the EPA does not have the authority to make categorical exemptions to the CWA.<sup>246</sup> To the extent that the EPA rule "expressly exclude[s]"<sup>247</sup> water transfers from the NPDES program, the rule is a retraction from the CWA's broad mandate to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>248</sup> Unless provided by statute, the CWA does not envision piecemeal application of its principles or make them turn on the EPA's determination of whether they are appropriate in a given situation. Yet, by classifying water transfers as an inappropriate regime for NPDES regulation, the EPA has worked a piecemeal excision from the CWA.

The EPA's water transfer rule also departs from the language of the CWA, effectively diluting the potency of the Act's provisions. Courts from *Gorsuch* and *Consumers Power to Dubois*, *Catskill I* and *II*, and *Miccosukee*, have reiterated the importance of finding an "addition" to determine whether NPDES permitting requirements have been triggered.<sup>249</sup> Conceptually, an "addition" of a pollutant is critical to

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241. Estreicher, *Nonacquiescence*, *supra* note 14, at 717.

242. *Id.*

243. *See* Part I.B-C.

244. *See supra* note 57 and accompanying text.

245. The court in *Catskill* described the EPA's departure from the CWA's ideals by "point[ing] out that complex statutes often have seemingly inconsistent goals that must be balanced . . . . The CWA 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." *Catskill II*, 451 F.3d 77, 84-85 (2d Cir. 2006).

246. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

247. NPDES Proposed Rule, 71 Fed. Reg. 32,887, 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122).

248. 33 U.S.C. § 1251(a) (2000).

249. In *Gorsuch*, for example, the meaning of "addition" was critical to determine whether a pollutant was introduced "into [the] water from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Similarly, in *Catskill*, the court concluded that "[i]t is the meaning of the word 'addition' upon which the outcome of *Catskill I* turned and which has not changed." *Catskill II*, 451 F.3d at 84. Finally, in *Miccosukee*, the Court specifically remanded the case to determine the factual distinction between the two disputed water bodies because the resolution was critical to whether an "addition" of a

the framework of the CWA's pollution programs. However, in exempting water transfers from the NPDES program, the EPA's rule trivializes the importance of an "addition;" again, the EPA's rule takes a piecemeal approach and disregards section 502(12)'s "any addition" language, choosing instead to define an "addition" as only those pollutants that come from "intervening industrial, municipal, or commercial use."<sup>250</sup> Nowhere in the CWA, or in the cases examining the Act, is it apparent that the Act's language is intended to be so malleable.

Finally, the EPA's nonacquiescence diminishes the CWA's vision of cooperative federalism as interpreted in *Catskill* and other decisions. As the EPA's rule recognizes, the CWA delicately balances "federal and State oversight of activities affecting the nation's waters."<sup>251</sup> Because complex statutes like the CWA seek to reconcile myriad competing policies, proper balancing "is not served by elevating one policy above the others."<sup>252</sup> Yet, by categorically exempting water transfers from the NPDES program, the EPA's proposed rule performs such an elevation. In effect, the EPA's rule promotes "State regimes for allocating water rights"<sup>253</sup> at the expense of uniform national environmental policies that are the foundational principles of the CWA. As the *Catskill* court explained, "where the balance struck in the text is sufficiently clear to point to an answer,"<sup>254</sup> such an unbalanced enlargement of state interests is not warranted, particularly where the CWA provides for the federal and state interests "to coexist without materially impairing either."<sup>255</sup>

## VI. CONCLUSION

Congress drafted the CWA on the basis of an ideal, and as such, the goal of restoring and maintaining the nation's waters is still an unrealized vision. However, the means provided by Congress to achieve the Act's goals are not similarly conceived and are instead practical and workable. In the context of water transfers, courts have developed a significant body of caselaw that considers the competing federal interests in preserving water quality and State interests in managing water quantities, and have concluded that water transfers between distinct water bodies are an "addition" that should be subject to the NPDES program. By ignoring these considered judgments, the EPA's proposed water transfer rule both obscures the language of the CWA and disturbs the Act's balance of cooperative federalism. Unfortunately, rather than bringing greater uniformity to the CWA, the EPA's nonacquiescence brings immediate disunity to the Act. As a result, the rule's "delicate balance" strikes an unsteady compromise and trades national environmental objectives for an increase in administrative convenience.

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pollutant to a navigable water had occurred. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004).

250. NPDES Proposed Rule, 71 Fed. Reg. at 32,887.

251. *Id.* at 32,889.

252. *Catskill I*, 273 F.3d 481, 494 (2d Cir. 2001).

253. NPDES Proposed Rule, 71 Fed. Reg. at 32,891.

254. *Catskill I*, 273 F.3d at 494.

255. *Catskill II*, 451 F.3d 77, 85 (2d Cir. 2006).