

No. 13–1234

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

vs.

SHIFTY MALEAU,
Defendant-Appellant.

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee,
and

SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross-Appellee,

vs.

JACQUES BONHOMME,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
PROGRESS, THE HONORABLE ROMULUS REMUS PRESIDING.

Case Nos. 155–CV–2012 & 165–CV–2012 (Consolidated)

BRIEF OF APPELLANT JACQUES BONHOMME

ORAL ARGUMENT REQUESTED

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JURISDICTION

The parties below cross-alleged addition of pollutants to navigable waters of the United States in violation of section 301 of the Federal Water Pollution Control Act, 33 U.S.C. § 1311(a). The Act grants district courts federal question jurisdiction without regard to amount in controversy or diversity. 33 U.S.C. § 1365(a). The lower court's final order dismissed the case and Appellant Bonhomme filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- I. Can a French national bring a citizen suit under the Clean Water Act when a federal treaty guarantees French citizens equal access to United States courts?
- II. Does the fact that a third party might gain a tertiary benefit from a lawsuit stop an individual who holds a substantive right under federal law, like Bonhomme, from being a real party in interest under Federal Rule of Civil Procedure 17?
- III. Is Reedy Creek a "water of the United States" under the Clean Water Act because it flows between two states and into a federally-owned marsh?
- IV. Does Clean Water Act jurisdiction extend to waters, like Ditch C-1, that are relatively permanent and continuously flowing tributaries of navigable interstate waters of the United States?
- V. Under the Clean Water Act, are piles of mining waste point sources when they discharge pollutants from discernible and discrete eroded channels into waters of the United States?
- VI. Is Bonhomme liable under the Clean Water Act and its implementing regulations when a culvert on his property simply transfers already-polluted water into Reedy Creek?

STATEMENT OF THE CASE

This case revolves around arsenic pollution, its entry into the environment, and the proper assignment of responsibility under the Clean Water Act. The arsenic originates in piles of mining waste that defendant Maleau trucks from his mine to the site at issue here. When it rains, the rainwater leaches arsenic out of the uncovered piles of waste. The polluted water then flows into an agricultural channel, makes its way into an interstate creek, and eventually ends up in an important national wildlife refuge.

Bonhomme, the plaintiff below, filed this citizen suit in an effort to clean up the arsenic-polluted waters that flow through and near his property in Progress. Bonhomme wants Maleau to control the pollution at its source through compliance with a discharge permit under the Clean Water Act. The State of Progress and Maleau filed a reciprocal suit countering that Bonhomme should be responsible for cleaning up the arsenic just because the polluted water happens to flow into Reedy Creek through a culvert on his property.

The district court disposed of the case by granting Maleau's motion to dismiss. It determined that Bonhomme's French nationality means that he is not a "citizen" under the Clean Water Act. It also found that Bonhomme is not a real party in interest under Federal Rule of Civil Procedure 17 because Precious Metals International might gain some benefit from Bonhomme's success. Finally, the court stated that it would have found for Maleau on all but one issue if the case had proceeded to the merits.

Bonhomme appeals from the granted motion to dismiss because his nationality is irrelevant to the Clean Water Act's citizen suit provision and his substantive rights under the Act make him a de facto real party in interest. This Court ordered additional briefing on the substantive merits of the case.

STATEMENT OF FACTS

Shifty Maleau. Mr. Maleau owns and operates a gold mine in Lincoln County, Progress. R. at 5. In the course of his business, Maleau trucks overburden and slag from his mine to a separate property in Jefferson County and piles the waste material there. R. at 5. When it rains, the water flows over and through the piles, leaching arsenic out of the waste material along the way. R. at 5. Over time, the rain has eroded channels that empty the contaminated water directly into Ditch C-1. R. at 5.

Ditch C-1. In 1913, a consortium of Progress landowners built Ditch C-1 to drain their saturated soils for agricultural use. R. at 5. From Maleau's property, the Ditch runs three miles through agricultural land before emptying into Reedy Creek. R. at 5. It averages three feet wide by one foot deep. R. at 5. Along the way, it gathers groundwater and surface water when it rains. R. at 5. Ditch C-1 flows continuously except for short intervals of drought. R. at 5. It terminates at Reedy Creek, emptying its contents into the Creek through a culvert on Bonhomme's land. R. at 5.

Reedy Creek and Wildman Marsh. Reedy Creek flows for fifty miles from New Union into Progress. R. at 5. It provides water for commercial and agricultural use in both states. R. at 5. The Creek runs past Bonhomme's property and ends in Wildman Marsh. R. at 5. The United States owns much of the extensive wetlands in the Marsh, and the U.S. Fish and Wildlife Service maintains the federal property and operates it as the Wildman National Wildlife Refuge. R. at 6. The Refuge attracts many hunters from across the nation and around the world. R. at 6. As a hunting destination, the Refuge is a boon—it adds over \$25 million to the local economy. R. at 6.

Jacques Bonhomme and the Arsenic Contamination. Mr. Bonhomme is a French citizen, r. at 8, and President of Precious Metals International (PMI). R. at 6. He owns land in Progress that borders both Reedy Creek and Wildman Marsh, and Ditch C-1 also flows through his property. R. at 5. A large lodge sits on his land near the Marsh and he uses it to go duck hunting with both professional and personal guests. R. at 6.

Before filing suit, Bonhomme tested the waters around his property. R. at 6. The tests show that Ditch C-1 contains no arsenic before it reaches Maleau's property, yet downstream from his property tests show high concentrations of the poison. R. at 6. On its way to the Reedy, the arsenic concentration drops proportionately to the additional water gathered by the Ditch. R. at 6.

Likewise, Reedy Creek contains no arsenic above the culvert on Bonhomme's property. R. at 6. Downstream of C-1's discharge, however, the Creek contains significant concentrations of arsenic. R. at 6. Tests also show detectable levels of arsenic throughout Wildman Marsh and in some of its wildlife. R. at 6. The arsenic contamination forced Bonhomme to reduce the use of his property by seventy-five percent. R. at 6.

SUMMARY OF THE ARGUMENT

This case arises under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (2006) (Clean Water Act or CWA). Appellant Bonhomme brought a CWA citizen suit against Appellee Maleau because pollutants discharged from Maleau's property are continually degrading waters on and near Bonhomme's property. The district court dismissed his claim. Bonhomme maintains that the district court erred in all but one of its holdings below. The court correctly found that Reedy Creek is a "water of the United States," and this Court should affirm. With respect to the remaining five issues, this Court should reverse and remand for further proceedings.

The district court dismissed Bonhomme's suit, holding that he is not a real party in interest under Federal Rule of Civil Procedure 17(a). The court incorrectly reasoned that Bonhomme was not a real party in interest simply because a third party might gain benefit from his success. Further, the district court determined that the CWA's citizen suit provision only applies to United States citizens, thus precluding Bonhomme, a French national, from bringing his suit. In light of a bilateral United States treaty with

France that grants French citizens full access to U.S. courts, Bonhomme's nationality has no bearing on his ability to maintain suit. Even without the treaty, a plain reading of "citizen" in the Act shows that the lower court's determination was wrong.

Second, the district court properly concluded that Reedy Creek, an interstate water with direct ties to interstate commerce and a federal wildlife preserve, was a "navigable water" under the CWA. But, its interrelated jurisdictional determination regarding Ditch C-1 was incorrect. The district court facially determined that, simply because Ditch C-1 is called a "ditch" and merges with Reedy Creek via a culvert, the Ditch is a point source. However, the court's reasoning and conclusion are flawed. The Ditch is a tributary to a water of the United States that is permanent, maintains a constant flow for the majority of the year, and significantly affects the chemical and biological integrity of interstate waters. Thus, under both Supreme Court precedent and agency interpretation of that precedent, the Ditch is a "water of the United States," not a point source.

Finally, the lower court concluded that Maleau's mining waste piles are not point sources under the CWA. Further, it decided that Bonhomme, not Maleau, is violating the Act because the arsenic passes through Bonhomme's culvert on its way to Reedy Creek. The court was wrong on both counts. Under existing case law, the mining piles are definitively point sources because they discharge pollutants into Ditch C-1, a water of the United States, through eroded channels that constitute discernible, confined, and discrete conveyances. Additionally, recent EPA rulemaking codifies that Bonhomme cannot be liable for CWA violations in this situation—Maleau's waste piles add arsenic into the Ditch first, so Bonhomme cannot re-add it because it is already in the water. Because the court misinterpreted the nature of the Ditch, it follows that its related point source conclusions are also incorrect. In light of the lower court's incorrect conclusions, Appellant Bonhomme requests that this Court reverse the motion to dismiss and remand his case for further proceedings.

STANDARD OF REVIEW

To withstand a motion to dismiss, a plaintiff need only allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On review of a granted motion to dismiss, this Court accepts the complaint’s well-pleaded allegations as true and reviews the district court’s decision *de novo*. *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012).

ARGUMENT

I. The district court incorrectly dismissed Bonhomme’s claim because Federal law entitles him to bring suit under the Clean Water Act’s citizen suit provision.

Bonhomme’s French nationality is irrelevant to his right to relief under the Clean Water Act. Under the broad citizen suit provision at section 505 of the CWA, any individual may seek judicial enforcement against anyone “alleged to be in violation of [the Act].” 33 U.S.C. § 1365(a)(1) (2006). Indeed, the Supreme Court recognizes “that the obvious purpose of [citizen suit provisions] is to encourage enforcement by so-called ‘private attorneys general.’” *Bennett v. Spear*, 520 U.S. 154, 165 (1997). To that end, Congress opened citizen suit standing “to the full extent permitted under Article III.” *Id.* at 165 (comparing environmental citizen suit provisions to the expansive standing granted by the Civil Rights Act). This expansive grant of standing comports with Congress’s lofty policy goals and fits nicely with the CWA’s other sweeping concepts.

However, the district court contravened Congress when it determined that Bonhomme’s French nationality precluded his suit. It denied itself subject matter jurisdiction to hear the case, thereby improperly restricting the breadth and purpose of the citizen suit provision. It erred for two reasons. First, the United States signed a bilateral treaty with France guaranteeing French citizens the same access to federal courts as U.S. citizens. Second, even absent the treaty, the citizen suit provision’s only jurisdictional restriction is based on harm, not nationality.

A. The Convention of Establishment grants French nationals the same access to courts that United States citizens enjoy.

Under Federal law, United States courts must grant Bonhomme the same rights and privileges as United States citizens. According to the Constitution, “all treaties ... shall be the supreme law of the land” and “bind the United States ... and the courts as well.” U.S. Const. art. VI, cl. 2; *Medellin v. Texas*, 552 U.S. 491, 543 (2008).

In 1959, President Eisenhower negotiated the Convention of Establishment Between the United States of America and France. Nov. 25, 1959, 11 U.S.T. 2398, *attached at App’x A*. The Senate ratified the treaty and it went into effect at the end of 1960. *Id.* It remains in effect. See U.S. Dep’t of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States* 93 (2012), *available at* <http://perma.cc/04ZAZdPZFQu>.

The United States negotiated the Convention to “strengthen[] the ties of peace and friendship” and to “encourag[e] closer economic intercourse” between the two countries. 11 U.S.T. at 2399. The treaty speaks directly to that goal and is dispositive on this issue; Bonhomme *can* bring suit under the Clean Water Act. Article III of the treaty states: “Nationals and companies of either [country] shall be accorded national treatment with respect to access to the courts of justice ... within the territories of the other [country], ... both in pursuit and in defense of their rights.” *Id.* at 2401.

The Convention of Establishment is the supreme law of the land and is self-executing. See *Medellin*, 552 U.S. at 571–72 (listing self-executing treaties). It guarantees French citizens equal access to U.S. courts, yet the district court dismissed Bonhomme’s citizen suit because of his French nationality. Therefore, this Court must reverse the lower court.

B. Even if the treaty did not apply, the Clean Water Act’s plain language, supported by legislative history, grants a cause of action to *anyone* adversely affected by an effluent violation.

The plain language of section 505 is clear: A person’s nationality has no bearing on her ability to bring suit under the Clean Water Act. Here, a plain reading of the entire

citizen suit provision shows that the *only* restriction on who may bring a suit hinges on whether that person suffered an adverse effect. Placing the Act's definition of "citizen" in proper context illustrates Congress's clarity:

(g) Any "person or persons"

that have

(g) "an interest" which is "adversely affected"

may bring

(a) "a civil action on his own behalf."

33 U.S.C. §§ 1365(a), (g). In short, nationality plays no role.

Courts must "give effect to the intent of Congress," and the best way to do that is to follow the "plain and unambiguous meaning" of the statute. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). And when the plain language is clear, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984). Hence, nationality is irrelevant, Congressional intent is clear, and the plain meaning controls.

Presuming that Congress said what it meant and section 505 means what it says, the only possible conclusion is that Bonhomme is a "citizen" for purposes of the Clean Water Act. Because the plain meaning is unambiguous, judicial inquiry is complete. But even if the statute's plain language did not end the inquiry, the district court's improper addition of a United States nationality requirement to the statute fails for two reasons. First, the court added words to the statute and used the wrong definition of "citizen." Second, the court contravened congressional intent.

The district court made its first mistake when it added language to the statute. Without inquiry or justification, the court determined explicitly that the single word "citizen" actually means "citizen of the United States." R. at 8. But, courts may not add, delete, or distort Congress's words because "[a]fter all, Congress expresses its purpose by words." *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). The district court's

modification of the CWA’s language did just that; it added words and thereby distorted the provision’s meaning.

Not only did it add words, but the lower court’s narrow interpretation also ignored the dictionary definition of citizen: “A person who, by either birth or naturalization, is a member of a political community.” Black’s Law Dictionary (9th ed. 2009); *accord* Oxford English Dictionary (2d ed. 1989) (“a member of a state”). Hence, “citizen” is a broad and generic term unless specifically restricted to a certain place. This distinction is precisely why we say that a person is a citizen *of somewhere* when that is what we mean. Bonhomme is indeed a citizen—a citizen of France. If Congress had meant to add “of the United States” as a modifier to “citizen,” it surely would have done so—as it has in many other statutes. *E.g.*, 46 U.S.C. § 12103 (2006) (“An individual who is a citizen *of the United States*”); 18 U.S.C. § 911 (2006) (“... represents himself to be a citizen *of the United States*”) (emphases added).¹

Second, the district court ignored the Clean Water Act’s legislative history. Indeed, the CWA arose in direct response to “an almost total lack of enforcement” under the old state-centric regime. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672, *attached at* App’x B. As a result of that failure, Congress recognized that an “essential element in any control program involving the nation’s waters is *public* participation.” *Id.* at 3738 (emphasis added). Part of that recognition involved allowing individuals to act as so-called private attorneys general. “[I]f the Federal, State, and local agencies fail to exercise their enforcement responsibility, *the public* is provided the right to seek vigorous enforcement” under section 505. *Id.* at 3730 (emphasis added). In fact, the first sentence describing citizen suits states: “*Anyone* may initiate a civil suit against

¹ A strict search for the term “citizen of the United States” returns 1,046 results within West’s United States Code Annotated.

any person who is alleged to be in violation of an effluent limitation.” *Id.* at 3744 (emphasis added).

Anyone. The public. These are the words Congress used to explain the CWA’s citizen suit provision. They are not limiting words; they are not geographical terms. The district court distorted Congress’s intent by relying on a single off-topic case to support the proposition that, when Congress defined “citizen” as “a person or persons,” all it did was expand possible plaintiffs from “individuals” to “various entities.” R. at 8. In so doing, the district court relied on inapposite case law and compared complicated navigability doctrine to the straight-forward concept of citizenship. “Navigable waters” is a complex concept and also a term of art; “citizen” is neither. This Court should reverse and remand.

II. Bonhomme is a real party in interest under Rule 17 because he holds the substantive right to enforce water quality standards under the Clean Water Act.

The fact that Precious Metals International might benefit from Bonhomme’s suit has no bearing on whether Bonhomme is a real party in interest under Federal Rule of Civil Procedure 17. The purpose of the rule is to ensure that the “plaintiff has a significant interest in the particular action” and also “possesses the right to enforce the claim.” *Frommert v. Conkright*, 535 F.3d 111, 120 (2d Cir. 2008); *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973). Therefore, the touchstone real-party inquiry looks at the underlying cause of action: “the ‘real party in interest’ is the one who, under the applicable substantive law, ... is the party entitled to bring suit.” *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir. 1983).

In this case, Bonhomme clearly satisfies the real party requirement and this Court should reverse the district court for two reasons. First, Bonhomme has a significant personal interest in the water quality of Wildman Marsh and the Clean Water Act grants him a substantive cause of action to enforce effluent standards. Second, the district court

dismissed Bonhomme’s case just because a different entity might gain a tertiary benefit through his success, which is not part of the Rule 17 inquiry.

To the first point, Bonhomme alleges that arsenic from Maleau’s land pollutes Reedy Creek and Wildman Marsh. R. at 6. The pollution significantly impairs Bonhomme’s use of the Marsh; he decreased his yearly hunting trips by seventy-five percent as a direct result. *See* r. at 6. These allegations, taken as true, more than satisfy any necessary showing that Bonhomme “has a significant interest in the particular action.” *Conkright*, 535 F.3d at 120. *Cf. Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003) (suffering a “pecuniary loss” makes one a real party in interest); *Wilderness Soc. v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974) (finding a company with financial interests at stake “unquestionably was a major and real party at interest”). Bonhomme’s case also satisfies the other interrelated element of Rule 17—the Clean Water Act’s citizen suit provision grants Bonhomme the substantive right to seek judicial enforcement against polluters that discharge without a permit. Indeed, the CWA specifically authorizes Bonhomme to file “a civil action *on his own behalf*” because he is adversely affected by the arsenic pollution. 33 U.S.C. § 1365(g) (emphasis added).

The second reason this Court must reverse relates to the district court’s flawed preference for one party over another—“PMI rather than Bonhomme is the real party in interest.” R. at 8. This reasoning contains a fatal flaw—the trial court assumed that there can be only *one* real party in interest. However, that assumption finds no support. Being a real party in interest does not exclude others from also being so interested. *Prevor-Mayorsohn Caribbean, Inc. v. P.R. Marine Mgmt., Inc.*, 620 F.2d 1, 4 (1st Cir. 1980) (“it is not necessary that there always be only one real party in interest”). *See also Wilderness Soc.*, 495 F.2d at 1036 (finding that both a private company and the federal government were real parties in interest). Further, other civil procedure rules, such as those governing intervention and joinder, expressly recognize that multiple parties may simultaneously hold an interest in particular litigation. *E.g.*, Fed. R. Civ. P. 18, 19, 24.

Additionally, the district court incorrectly emphasized PMI's potential benefit from the litigation as a reason to bar Bonhomme's suit. R. at 7. Just because "[PMI] is in direct competition with Maleau" does not mean that Bonhomme is not a real party in interest. R. at 7. The fact that another party might benefit is irrelevant to the Rule 17 question. "The real party in interest is ... not necessarily the person who will ultimately benefit from the [suit]." *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990). And that makes sense. In fact, the very nature of a citizen suit expects that others benefit when individuals act as private attorneys general. *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976) (stating that "citizens [are] performing a public service" when they "bring[] legitimate actions under this section").

Even if these reasons did not compel this Court to reverse, Rule 17 itself allows Bonhomme to sue on behalf of PMI. Rule 17 provides a non-exclusive list of people that "may sue in their own names without joining the person for whose benefit the action is brought." Fed. R. Civ. P. 17(a)(1); *Farrell Constr.*, 896 F.2d at 141 ("Rule 17(a)'s list is descriptive, not exclusive"). Among those exceptions, Rule 17 lists "an administrator" at subsection (a)(1)(B). An administrator is a "person who manages or heads a business." Black's Law Dictionary (9th ed. 2009). Because he is the president of the company, Bonhomme can bring a suit that benefits PMI under his own name.

In sum, the CWA is substantive law and its citizen suit provision grants Bonhomme a cause of action. This makes him a de facto real party in interest. The district court improperly dismissed Bonhomme's suit simply because it determined that PMI was a more interested party. This Court should reverse and remand.

III. Both agency regulation and relevant case law establish that Reedy Creek is a "navigable water" under the Clean Water Act.

Considering the facts at bar, Reedy Creek is a "navigable water" within the CWA's reach because of its interstate flow and impacts on interstate commerce. There is no "single definitive test" for determining navigability, and this ultimate determination

“involve[s] questions of law inseparable from the particular facts to which they are applied.” *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940). Under current law, a “navigable water” subject to the Act is one that is navigable-in-fact, crosses state lines, or is tributary to water that is either of the former. *See Rapanos v. United States*, 547 U.S. 715, 742 (2006); U.S. Evtl. Prot. Agency & U.S. Army Corps of Eng’rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* 7, 11 (Apr. 27, 2011) [hereinafter *2011 Guidance*], available at <http://perma.cc/0yfV1i6VbJJ>, attached at App’x C. Here, the district court’s application of law to fact led to a correct finding of navigability because EPA regulation, relevant case law, and the Commerce Clause all compel a finding that the Creek is a “navigable water.”

A. Because Reedy Creek flows across state borders and draws significant revenue from out-of-state hunters, the Creek falls within two regulatory definitions of “waters of the United States.”

Historic use of a water body for commerce and travel is not the sole test to determine “navigable waters.” Under the CWA, regulatory definitions, and agency guidance, Reedy Creek is subject to federal oversight. The CWA defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7) (2006). Although courts traditionally used the “navigable in fact” test² to determine which waters were subject to federal control under the commerce clause, subsequent case law confirms that “the meaning of ‘navigable waters’ [in the CWA] ... is broader than the traditional understanding of the term.” *Rapanos*, 547 U.S. at 73; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (“Congress chose to define the waters covered by the [CWA] broadly ... ‘navigable’ as used in the Act is of limited import.”). Considering the “hopelessly indeterminate” reach of the CWA, *see Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring), EPA promulgated a regulation to clarify

² Navigable in fact are those waters that are “used or are susceptible of being used” as highways for commerce and travel. *Appalachian Elec. Power*, 311 U.S. at 406 n.21.

the Act's jurisdiction. As set forth in Part 122.2, "waters of the United States" includes, (1) all interstate waters and (2) all other waters, including wholly intrastate water bodies, "the degradation or destruction of which" could impact interstate commerce. 40 C.F.R. § 122.2 (2013). The latter category explicitly includes any such waters used by interstate travelers for recreation. *Id.* Reedy Creek falls within both of these categories.

First, Reedy Creek is a water of the United States because it meets the unambiguous "interstate waters" provision. Recent agency guidance defines "interstate waters" as those that "flow across, or form a part of, State boundaries." *2011 Guidance* at 7. Starting in the State of New Union, Reedy Creek flows for approximately fifty miles before it terminates in Wildman Marsh, located in the State of Progress. R. at 5. Because the Reedy begins in one state and crosses into another, it is squarely within the regulatory definition of "interstate waters."

Second, the "use, degradation, or destruction" of Reedy Creek affects interstate commerce and recreation, which subjects it to CWA regulation. 40 C.F.R. § 122.2. Indeed, wholly intrastate waters still fall under CWA jurisdiction if they have an "interstate impact." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979); *see also Utah v. Marsh*, 740 F.2d 799, 802–04 (10th Cir.1984) (holding the wholly intrastate Utah Lake to be a "water of the United States" because it was used to irrigate crops, support a fishery that marketed its fish out-of-state, and offered recreational opportunities). In *Earth Sciences*, the Tenth Circuit held that even though Rito Seco Creek was located entirely within the state of Colorado, it was nonetheless subject to CWA provisions because of the stream's "interstate impact." *Earth Sciences*, 599 F.2d at 375. These interstate impacts included waterborne recreation and the use of Rito Seco for irrigation to grow crops sold in interstate commerce. *Id.*

Considering the similarities between Reedy Creek and Rito Seco Creek, the Reedy falls well within EPA's definition of "waters of the United States." Like Rito Seco Creek, the Reedy supplies the water needed to grow crops that are sold in interstate markets. R.

at 5. Additionally, the Creek and Wildman Marsh are a major destination for local, interstate, and foreign duck hunters. *See r.* at 6. Indeed, out-of-state hunters contribute over \$25 million to the local economy. *R.* at 6. The Reedy has an added connection to interstate commerce beyond those of Rito Seco: it provides water to Bounty Plaza, a service area on a federally-funded interstate highway, which encourages interstate travel. *See r.* at 5.

While the district court recognized that *Earth Sciences* would otherwise control, it stated that the case is no longer good law in the wake of *Rapanos*. *R.* at 10. But, the *Rapanos* Court did not directly address the validity of *Earth Sciences*, nor did it discuss the extent of the impact on commerce required to bring an intrastate water under CWA jurisdiction. Therefore, *Rapanos* did not invalidate *Earth Sciences*. Because Reedy Creek is both an interstate stream and has more interstate impact than Rito Seco Creek, the Reedy is a water of the United States under Part 122.2 and this Court should affirm.

B. In the alternative, Reedy Creek is a water of the United States because it is a tributary of Wildman National Wildlife Refuge.

Even if Reedy Creek was not a “navigable water” in its own right, the fact that the Creek flows into Wildman National Wildlife Refuge puts the Creek within the purview of the CWA. As the district court acknowledges, the plain meaning of “waters of the United States” encompasses waters under federal ownership. *R.* at 10. The government “doubtless has a power over its own property analogous to the police power of the several states.” *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976). Indeed, Congress’s ability to “make all needful rules and regulations respecting ... the property of the United States” is an enumerated constitutional power. U.S. Const. art. IV, § 3, cl. 2. Because the Refuge is federally owned it is a “navigable water” for the purposes of the Act. *R.* at 10.

According to Part 122.2, “waters of the United States” also includes tributaries of covered waters. In the CWA context, “tributary” refers to any watercourse, whether man-made or natural, that “contributes flow to a traditional navigable water or interstate water,

either directly or indirectly” 40 C.F.R. § 122.2; *2011 Guidance* at 11. Reedy Creek terminates in, and empties its flow directly into, Wildman Marsh, which is encompassed within the Reserve. R. at 5. Because the Marsh is federally owned, it is a “navigable water” and Reedy Creek is clearly a tributary to a “water of the United States.” Therefore, the district court correctly determined that the Reedy is a navigable water subject to the CWA.

C. Regulating pollution in Reedy Creek is a permissible exercise of Congress’s Commerce Clause power because the Creek is an interstate waterway with impacts on interstate commerce.

Because Reedy Creek is an interstate water body that draws a large number of waterborne recreators and is a crucial link to providing goods sold in interstate commerce, Congress can regulate it under the Commerce Clause. The Constitution grants specific powers to Congress, one of which is the power “[t]o regulate Commerce with foreign Nations, and among the several States.” U.S. Const. art. I, § 8, cl. 3. Today, the Supreme Court recognizes three broad categories that Congress can regulate pursuant to this power: the use of channels of interstate commerce; the instrumentalities, persons, or things of interstate commerce; and activities that have a significant relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). In essence, Congress has vast regulatory power under the commerce clause. *Id.* at 553.

When Congress enacts laws that regulate channels of interstate commerce—the first prong articulated in *Lopez*—it has the power to protect the *flow* of commerce, not just the economic activity that occurs within the channels. *United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003); *see also Appalachian Elec. Power*, 311 U.S. at 404–05 (“Congress may keep the ‘navigable waters of the United States’ open and free and provide by sanctions against any interference with the country’s water assets.”). Courts also recognize that the ability to regulate the flow of commerce enables Congress to pass laws that keep interstate channels “free from immoral and injurious uses.” *See Deaton*, 332

F.3d at 706 (listing cases in which courts have upheld laws enacted to avoid such injurious uses). The power of the CWA is couched in the first prong of *Lopez* because navigable waters are channels of interstate commerce. *See id.* (“Congress enacted the Clean Water Act under ‘its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.’”) (quoting *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001)).

As established above, Reedy Creek is a navigable water because it flows between two states, which makes it an interstate channel subject to regulation under the first prong of *Lopez*. The Creek is also subject to regulation under the second *Lopez* prong because it affects goods sold in interstate commerce as well as interstate recreation and travel. What’s more, Maleau’s actions degrade this interstate waterway. *See* Issues V–VI, *infra*. Considering Congress’s ability regulate injurious uses of interstate commerce channels, extending CWA jurisdiction over Reedy Creek is a permissible exercise of the commerce clause power. This Court should affirm.

IV. Ditch C-1 is a “Water of the United States” because it is relatively permanent and has a significant nexus with Reedy Creek.

Ditch C-1’s size, flow, and history, taken with relevant case law, regulations, and agency guidance, compel a finding that the Ditch is a navigable water under the CWA, not a point source. The district court incorrectly stated that *Rapanos* definitively stands for the proposition that ditches cannot be “navigable waters” because “ditch” is mentioned in the CWA definition of “point source.” R. at 9 (citing *Rapanos*, 547 U.S. at 735–36, and CWA section 502(14)). *Rapanos* made no such finding. To the contrary, rather than draw definitive lines as to what constitutes a “water of the United States,” the *Rapanos* decision further “mudd[ied] the jurisdictional waters.” *Rapanos*, 547 U.S. at 800 (Stevens, J., dissenting). When analyzed under *Rapanos*, the facts in this case show that Ditch C-1 fits within the statutory definition of “navigable waters.”

“The reach of the Clean Water Act is notoriously unclear,” *Sackett v. EPA*, 132 S. Ct. 1376, 1375 (2012) (Alito, J., concurring), and the Supreme Court has addressed the scope of “navigable waters” subject to the CWA on three occasions. First, in *Riverside Bayview Homes*, the Court upheld the Army Corps’s determination that the CWA covered freshwater wetlands adjacent to navigable and interstate waters and their tributaries. 474 U.S. 121, 139 (1985). Next, in *Solid Waste Agency*, the Supreme Court invalidated the Corps’s “Migratory Bird Rule,” which previously allowed the Corps to extend CWA jurisdiction over any water body, even unconnected, intrastate waters, on the sole basis that it provided migratory bird habitat. 531 U.S. at 172. Most recently, the Court issued its *Rapanos* decision that again addressed whether particular wetlands were within CWA jurisdiction. 547 U.S. at 729. To answer that question, the Court had to determine when a “tributary” is a “water of the United States.” *Id.* at 742. While five justices concurred in judgment, a majority did not agree on a standard for such waters. *See id.* at 758 (Roberts, C.J., concurring).

As described in the following sections, two tests to determine CWA jurisdiction emerged from *Rapanos*: (A) the plurality’s “relatively permanent, standing, or continuously flowing” test; and (B) Justice Kennedy’s “significant nexus” test. *See id.* at 739, 779. Because neither received support from a majority of the justices, *Rapanos* did not establish a definitive standard for determining the reach of the CWA. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position’” that least restricts federal jurisdiction. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation omitted); *United States v. Donovan*, 661 F.3d 174, 180 (3rd Cir. 2011).

In the wake of *Rapanos*, federal courts split on which test reflects the “narrowest grounds.” *Donovan*, 661 F.3d at 180. The Seventh, Ninth, and Eleventh Circuits hold that Justice Kennedy’s “significant nexus” test alone is the measure of CWA jurisdiction. *See United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *N. Cal.*

River Watch v. City of Healdsburg, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Robinson*, 505 F.3d 1208, 1221–22 (11th Cir. 2007). The First, Third, and Fourth Circuits, as well as the federal government, have determined that, if either the plurality test *or* Kennedy’s significant nexus test is met, the water body falls within the CWA regulatory scheme. See *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); *Donovan*, 661 F.3d at 180–84; *Deerfield Plantation Phase II-B Prop. Owners Ass’n v. U.S. Army Corps of Eng’rs*, 501 F. App’x 268 (4th Cir. 2012); *2011 Guidance* at 2. On the other hand, no circuit has found that only the plurality’s “relatively permanent, constantly flowing” test applies.

This Court need not decide which test to adopt because Ditch C-1 is subject to CWA regulation under both: (A) the plurality standard and (B) the substantial nexus test; and also (C) because the CWA’s policy goals contemplate control over waters like Ditch C-1.

A. Ditch C-1 is a “water of the United States” because it is a relatively permanent and continuously flowing body of water.

Despite the fact that Ditch C-1 is a man-made feature, its constant existence over the past 100 years and continuous flow during at least nine months out of every year mean that the Ditch falls under CWA jurisdiction. The plurality test in *Rapanos* holds that only relatively permanent, standing, or continuously flowing bodies of water are “waters of the United States.” 547 U.S. at 739. Further, those waters must be “continuously present, fixed bodies of water as opposed to dry channels through which water occasionally flows,” and, at minimum, exhibit “continuous flow in a permanent channel.” *Id.* at 733. Under this test, the CWA does not extend to watercourses through which water flows “only intermittently or ephemerally.” *Id.* at 739. While Justice Scalia mentions that “ditch” is included in the Act as an example of a point source because the term *implies* intermittence, *id.* at 736, the ultimate determination of Clean Water Act jurisdiction is fact-dependent. *Id.* at 732 n.5; *id.* at 736 n.7.

For instance, a court recently employed this fact-dependent inquiry when it found that a seasonal canal *was* subject to the CWA. *United States v. Vierstra*, 803 F. Supp. 2d 1166 (D. Idaho 2011). In *Vierstra*, Low Line Canal fell under CWA jurisdiction even though it was man-made, lacked an interstate connection, and flowed only seasonally. *Id.* at 1167. The Canal carried water continuously during the six-to-eight month irrigation season. *Id.* at 1169. It discharged into a naturally-occurring stream, which in turn emptied into the Snake River, a traditionally navigable water. *Id.* at 1168–69. On these facts, the court determined that Low Line Canal was properly deemed a “water of the United States” as a non-navigable tributary under Part 122.2, as well as under *Rapanos*’s plurality and significant nexus tests. *Id.* at 1169–72.

As in *Vierstra*, the totality of the facts alleged in this case, taken as true, show that Ditch C-1 is a relatively permanent tributary of Reedy Creek that is subject to the CWA. Not only does Ditch C-1 maintain a continuous flow for a longer period than Low Line Canal—a minimum of nine months versus a maximum of eight—the Ditch is also supplied by a more permanent water source, groundwater. R. at 5. Running water has passed through the Ditch since 1913, and it will continue to do so because restrictive property covenants ensure its existence and maintenance. R. at 5. Furthermore, Ditch C-1 flows directly into Reed Creek, r. at 5, making it a direct tributary of a navigable water as opposed to the more attenuated connection in *Vierstra*. Thus, Ditch C-1 is more clearly a “water of the United States” than Low Line Canal, which also satisfied *Rapanos*’s fact-specific inquiry.

EPA’s position on regulating tributaries under the *Rapanos* plurality test also supports finding CWA jurisdiction over Ditch C-1. To be a tributary, a water body must have a bed, bank, ordinary high water mark, and one of five additional qualities. *2011 Guidance* at 12. Ditch C-1 has defined measurements, r. at 5, which suggests that it meets the first three requirements or, at minimum, requires additional fact-finding. It also exhibits “relatively permanent flowing water,” one of the five additional qualities under the

Guidance. The Ditch is therefore within EPA’s definition of tributary. Furthermore, the Ditch connects directly to Reedy Creek, r. at 5, and is therefore a jurisdictional, non-navigable tributary. *2011 Guidance* at 13.

The *Rapanos* plurality admits that ditches can hold water permanently as well as intermittently, but when they do we call them by another name, such as “moat” or “canal.” *Rapanos*, 547 U.S. at 736 n.7. In light of this language, the characteristics of a particular water body, not the title attached to it, determine whether it falls under the CWA. As Chief Justice Roberts stated, “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis” to determine whether a water body is protected by the CWA. *Id.* at 758 (Roberts, C.J., concurring). Because Ditch C-1 is a tributary to Reedy Creek and is relatively permanent, both in flow and in existence, the Ditch is properly classified as a “water of the United States.”

B. Ditch C-1 is a “water of the United States” because it substantially affects the chemical and biological integrity of Reedy Creek.

The pattern of measured arsenic concentrations in Ditch C-1 and Reedy Creek shows the “significant nexus” between the two and brings the Ditch within the CWA. Drawing on the Supreme Court decisions in *Riverside Bayview Homes* and *Solid Waste Agency*, Justice Kennedy’s jurisdictional test asks if a non-navigable tributary has a “significant nexus” with a traditionally navigable water. *Rapanos*, 547 U.S. at 778–80 (Kennedy, J., concurring). Stated differently, the CWA applies even to non-navigable waters if the non-navigable water “significantly affect[s] the chemical, physical, and biological integrity” of a traditionally navigable water. *Id.* at 780. Under this test, it does not matter if the “significant effect” results from the water’s direct connection to the navigable water or through a tributary system. *Id.*

EPA and the Corps use the significant nexus test to determine jurisdiction over non-navigable tributaries that are not relatively permanent. *2011 Guidance* at 13. The Guidance describes non-navigable tributaries as natural or man-made water bodies with

defined beds and banks that “contribute[] flow to a traditional navigable [] or interstate water, either directly or indirectly by means of other tributaries.” *Id.* at 11. When engaging in the significant nexus analysis, the agencies consider a variety of factors including: flow characteristics, proximity to a traditional navigable water, physical characteristics of the tributary, capacity to carry pollutants, and other hydrological factors the agencies deem relevant. *Id.* at 11. While courts are not bound to adhere to the Guidance, EPA’s interpretations of relevant law are entitled to deference to the extent they have the “power to persuade.” *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 291 (4th Cir. 2011) (applying *Skidmore* deference).

The significant nexus test is also a fact-specific analysis. *See Deerfield Plantation Phase II-B Prop. Owners Ass’n v. U.S. Army Corps of Eng’rs*, 801 F. Supp. 2d 446, 454 (D.S.C. 2011) (applying EPA CWA jurisdictional guidance from 2008 and detailing the facts the Corps relied upon to make its significant nexus determination). In *Deerfield Plantation*, the district court upheld the Corps’s determination that no significant nexus existed between the ditches, swales, and ponds at issue in the case. *Id.* at 465. The structures were designed primarily to retain water and thus had low volume, duration, and frequency of flow. *Id.* The ditches and swales contained significant vegetation and merely “convey[ed] water from ponds and surrounding upland areas during and following storm events and there [was] no evidence of groundwater recharge.” *Id.* at 456. Furthermore, none of these features had any direct or indirect connection to a traditionally navigable water. *Id.*

The facts of this case distinguish it from *Deerfield Plantation*. Unlike the *Deerfield* ditch, Ditch C-1 is primarily supplied with groundwater and receives additional flow from storm events. R. at 5. The Ditch also connects directly to Reedy Creek, a navigable water in its own right. R. at 5. Most importantly, the pattern of arsenic concentrations in Ditch C-1 and Reedy Creek shows that the Ditch has a significant effect on the chemical and biological integrity of the Creek. Arsenic is undetectable in Ditch C-1 until just

below Maleau's property. R. at 6. Similarly, the chemical is only detectable in Reedy Creek at locations downstream from its confluence with the Ditch. R. at 6. The U.S. Fish and Wildlife Service also found arsenic in several Blue-winged Teal in Wildman Marsh. R. at 6. These facts indicate that the Ditch C-1 significantly affects Reedy Creek's "chemical, physical, and biological integrity."

At the pleading stage, a plaintiff need only allege those facts that, accepted as true, state a claim for relief that is plausible on its face. Bonhomme easily met this burden and plausibly alleges a significant nexus between Ditch C-1 and Reedy Creek that would bring the Ditch within the purview of the CWA.

C. Exempting Ditch C-1 from Clean Water Act jurisdiction is contrary to the purpose of the Act.

Both the explicit statutory purpose of the CWA and its legislative history counsel against exempting Ditch C-1 from regulation under the Act. As articulated in Section 101, the objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). This objective is a broad one and takes a "systematic view of the goal of maintaining and improving water quality." *Riverside Bayview Homes*, 474 U.S. at 132.

To realize this goal, Congress understood it would be necessary for the Act to reach the widest range of waters permissible under the Constitution. *See Utah v. Marsh*, 740 F.2d 799, 802 (10th Cir.1984) ("It is generally agreed that Congress, by adopting this definition, intended to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the Constitution, unlimited by traditional concepts of navigability"); *see also* S. Conf. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822, *attached at* App'x B (specifying that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."). Indeed, the Supreme Court has recognized three

times that in order to fulfill its purpose, the CWA must extend to waters that are not navigable in the traditional sense. *See* Issue IV, *supra*. In the words of the district court, “it would be difficult or impossible to prevent pollution of a navigable stream without preventing pollution of its tributaries.” R. at 10. Ditch C-1 is a permanent and consistently flowing tributary with a significant connection to navigable waters and federal property reserved for biological purposes. It is a perfect example of waters not traditionally navigable, but inextricably linked to maintaining the integrity of the nation’s waters.

The overwhelming weight of legal authority militates in favor of finding Ditch C-1 is within the regulatory universe of the Clean Water Act. Both *Rapanos* and subsequent agency guidance establish that Ditch C-1, despite its name, is actually a jurisdictional, non-navigable tributary of Reedy Creek. Furthermore, the same policy considerations that led Congress to enact the CWA compel this Court to recognize jurisdiction over the Ditch. Considering the facts and the law applicable here, the district court was incorrect in concluding that Ditch C-1 is not a “navigable water” under the CWA. This Court should reverse and remand for further proceedings.

V. The piles of mining waste that Maleau deposited on his property are point sources under the Clean Water Act because they have discrete channels that convey pollution into Ditch C-1.

Piles of dirt are not always point sources, but that does not mean that Maleau’s piles of overburden and mine waste *cannot* be a point source. The CWA bans “any addition of any *pollutant to navigable waters* from a *point source*.” 33 U.S.C. § 1362(12)(A) (emphasis added to the three key elements). Arsenic is a pollutant and the Ditch is a navigable water. R. at 8; Issue IV, *supra*. The crux of this issue is the CWA’s definition of “point source” as “any discernible, confined and discrete conveyance” not including discharges from agricultural stormwater and return flows. 33 U.S.C. § 1362(14).

Although the district court determined otherwise, Maleau's unpermitted discharges of arsenic from his property into Ditch C-1 are unlawful under the CWA because they originate from discernible, confined and discrete conveyances. As described below, Bonhomme alleged sufficient facts, taken as true, to make a plausible showing that Maleau's piles of mining waste are point sources that add pollution into Ditch C-1.

Accordingly, this Court should reverse the district court and remand for proceedings consistent with applicable law for two reasons. First, Maleau's piles of mining waste constitute a point source because rainwater carries pollutants from the piles through eroded channels into navigable waters. Second, the district court relied on inapplicable case law that does not affect Bonhomme's argument.

A. Maleau's piles discharge arsenic through discrete channels into navigable waters, violating the Clean Water Act.

An eroded channel counts as a discrete conveyance under the CWA, but Maleau argues otherwise. He asserts that his piles of slag and overburden are not point sources because they do not constitute a "discernible, confined and discrete conveyance." R. at 9 (citing *Consol. Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)). In its decision the district court agreed, stating that none of the CWA's statutory examples "remotely resemble a pile of dirt and stone," while adding that "[p]iles are not normally considered to be conveyances." R. at 9. But this analysis was not rigorous enough. Just because piles of mining waste are not *normally* considered conveyances does not mean they *cannot* be conveyances. See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980).

Under the CWA, a point source is "any discernible, confined and discrete conveyance" such as a channel, conduit, or discrete fissure, and courts liberally construe the definition. 33 U.S.C. § 1362(14); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("a point source ... embrac[es] the broadest possible definition of any identifiable conveyance"). Accordingly, courts have held that the statutory definition

of point source excludes only unchanneled and uncollected surface waters. *Appalachian Power*, 545 F.2d at 1373; accord *Abston*, 620 F.2d at 47. It follows that diffuse surface water becomes a point source when it channels and collects. See *Abston*, 620 F.2d at 45. The waste piles on Maleau's property fall squarely within the statutory and court-interpreted definition. Indeed, courts hold exactly that: piles of mining overburden are point sources when runoff gathers a pollutant and carries it from the piles through gullies or other discrete conveyances created by erosion. *Id.*

In *Abston*, a coal company placed overburden into spoil piles. *Id.* at 43. The piles were highly erodible and rainwater leached acid from them and carried it into an adjacent stream. *Id.* The district court determined that the piles were not a point source because the pollution arose from "natural erosion and rainfall." *Id.* at 44. However, the Fifth Circuit disagreed. It reversed and focused on the "discernible, confined and discrete" language in the definition of a point source. *Id.* at 44. The court made it clear that "[g]ravity flow" is a point source discharge when precipitation erodes "ditches [or] gullies" in the "spoil pile walls." *Id.* at 45. Further, the piles are point sources "even if the miners have done nothing beyond the mere collection of rock and other materials." *Id.* (emphasis added). Accordingly, the court in *Abston* determined that piles of mining waste constitute a point source if they discharge pollutants from "discernible, confined, and discrete conveyance(s)," and are a "component of a mine drainage system." *Id.*

The piles of slag and overburden that Maleau transports to his property fit precisely into the *Abston* court's two-part definition of point source. First, much like the spoil piles in *Abston*, rainwater and gravity eroded channels on and between Maleau's waste piles extend all the way to Ditch C-1. R. at 4. Rainwater flows through these channels and picks up arsenic as it flows into the Ditch. R. at 5. Thus, Maleau's piles constitute a point source because they add arsenic to Ditch C-1 through a discrete conveyance.

Furthermore, Maleau's piles constitute a "mine drainage system" just like the piles in *Abston*. Although the waste in *Abston* was stored on site, the fact that Maleau transported the waste fifty miles from his mine, r. at 7, is a difference without a distinction. It is their configuration, not their location, that makes the piles a mine drainage system. *See Abston*, 620 F.2d at 45. Accordingly, Maleau cannot escape liability for the arsenic pollution simply by transporting his mine waste drainage system from one site to another.

As indicated by the *Abston* court's thorough analysis, the determination of whether or not a waste pile is a conveyance is a fact-specific inquiry. *See Abston*, 620 F.2d at 45. Bonhomme's complaint alleges more than enough facts to satisfy the *Twombly* pleading standard—it claims that Maleau arranged mining waste on his property such that rainwater runoff from eroded channels in the piles discharged arsenic into Ditch C-1. R. at 4–5. Based on Bonhomme's complaint and the *Abston* decision, this Court should remand for proceedings on the merits.

B. The district court used the wrong case law to determine that Maleau's piles do not constitute a point source under the Act.

The holdings in *Consolidation Coal* and *Appalachian Power* do not mean that the piles of slag and overburden on Maleau's property are not point sources under the CWA. In both cases, industrial petitioners sought judicial review of EPA regulations promulgated under the CWA, which is not the issue in this case. *Appalachian Power* stands for the proposition that EPA, through rulemaking, cannot exceed the statutory scope of "point source" intended by Congress. *Appalachian Power*, 545 F.2d at 1373 (upholding industrial petitioners argument that construction runoff regulations exceeded the statutory scope of a point source under the CWA). The holding in *Consolidation Coal*, on the other hand, stands for the proposition that, in the absence of an as-applied challenge, courts cannot determine whether EPA regulations exceed the scope of the statutory definitions. *Consol. Coal Co.*, 604 F.2d at 249–50 (dispensing with industrial

petitioners facial challenge that EPA regulations could be applied to surface runoff outside the statutory definition of a point source).

The district court erroneously relied on these cases as controlling. Unlike the petitioners in *Consolidation Coal* and *Appalachian Power*, Bonhomme does not argue that an expanded regulatory definition of a point source applies to the mining waste piles on Maleau's property. Rather, Bonhomme seeks to enforce the CWA's basic statutory provision banning the discharge of pollutants without a permit. Accordingly, the holdings in *Consolidation Coal* and *Appalachian Power* are not dispositive because they analyze regulations, not the underlying statute. Bonhomme simply argues that Maleau's piles of slag and overburden adjacent to Ditch C-1 fit within the statutory definition of "point source." Therefore, the holdings of *Consolidation Coal* and *Appalachian Power* do not impact Bonhomme's argument.

In sum, the *Abston* rule holds that piles of mining waste constitute a point source when rainwater carries pollutants from the pile through eroded channels into navigable waters. The district court erred when it dismissed this issue because Bonhomme's complaint contained sufficient factual information to support a claim for relief under *Abston*. Finally, even if it could have reached the merits on a motion to dismiss, the district court relied on inapplicable cases that do not affect Bonhomme's arguments. Accordingly, this Court should reverse and remand for proceedings consistent with appropriate law.

VI. Bonhomme did not violate the Clean Water Act when already-polluted water flowed through his property into Reedy Creek.

Even though a culvert can be a point source, Bonhomme's culvert does not add pollutants to a navigable water because the arsenic was already in the water. As identified in Issue V, *supra*, Section 301(a) of the CWA bars "the discharge of any pollutant" without a permit. 33 U.S.C. § 1311(a) (2006). To violate the CWA, Bonhomme must add a pollutant to a navigable water from a point source. 33 U.S.C. § 1362(2). Bonhomme

concedes that culverts *can* be point sources, but his culvert is not because it is simply a part of Ditch C-1. *See* Issue IV, *supra* (showing that the Ditch is a water of the United States). Thus, this issue turns on the term “addition,” which the CWA does not define. *See id.*; *Friends of Everglades v. S. Fla Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009). However, EPA regulations do. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) [hereinafter Water Transfers Rule Preamble] (codified at 40 C.F.R. pt. 122.3(i)), *attached at App’x D*. According to the rule, “addition” to navigable waters under the CWA does not include the transfer of pollutants within the same body of navigable water or between two distinct navigable waters. *Id.*; 40 C.F.R. § 122.3(i).

The district court failed to acknowledge and apply the Water Transfers Rule in its decision to dismiss Bonhomme’s suit. Even in the absence of the Rule, Bonhomme should not face CWA liability based solely on the fact that a culvert under his property carries arsenic from Maleau’s waste piles into Reedy Creek. This Court should reverse the lower court and remand with instructions to apply the Water Transfers Rule because: (A) the Water Transfers Rule is the applicable law; (B) the Rule properly assigns CWA responsibility; and (C) public policy supports assigning responsibility to Maleau.

A. The district court applied the wrong law to determine that transfer of water through Bonhomme’s culvert into Reedy Creek constitutes an unlawful addition of pollutants under the CWA.

Both of the cases that the district court applied do not control here because the Water Transfers Rule superseded them. R. at 9 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004); and *Dague v. Burlington*, 935 F.2d 1343, 13154–55 (2d Cir. 1991)). EPA’s definition of “addition” in the Water Transfers Rule arises from two interrelated theories in CWA jurisprudence: the “outside world” and “unitary waters” theories. *See* Water Transfers Rule Preamble, 73 Fed. Reg. 33,697. This new definition changes the playing field.

Under the outside world theory, an “addition” only occurs the *first* time a point source “introduce[s] the pollutant into navigable water from the outside world.” *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (emphasis added). In *Gorsuch*, the D.C. Circuit grappled with whether pollution flowing *through* a dam constituted an “addition” of pollutants. *Id.* The court determined that addition does not occur when pollution “merely passes ... from one body of navigable water (the reservoir) into another (the downstream river).” *Id.* In other words, “addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world.” *Id.* at 175.

Other courts follow *Gorsuch*’s outside world reasoning. For instance, the Supreme Court explained the theory using a simple analogy: “[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not added soup or anything else to the pot.” *Miccossukee Tribe of Indians*, 541 U.S. at 110 (quotation omitted). Therefore, “addition” only occurs when a point source introduces a pollutant into a navigable water from the outside world.

The second piece of jurisprudence that EPA incorporated into the Water Transfers Rule is the unitary waters theory, which extends the outside world theory. Under it, an addition of pollutants to navigable waters cannot occur when pollutants move from one navigable water body to another. *Friends of Everglades*, 570 F.3d at 1217. Therefore, an addition occurs “only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters.” *Id.* The approach taken by EPA under the Water Transfers Rule makes sense. But for the unitary waters theory, a discrete addition of pollution could give rise to multiple violations as it made its way from source to sea. Rather than requiring a series of permits for a single source of pollution, it is more efficient to require a permit when the pollution first reaches navigable waters—it can be more easily reduced or remediated there.

To be fair, the circuit courts generally disapproved of the unitary waters theory before EPA promulgated the recent Water Transfers Rule. *E.g.*, *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491–93 (2nd Cir. 2001). However, EPA’s promulgation of the Rule in 2008 resolved the disapproval in Bonhomme’s favor. Indeed, *Friends of Everglades* remains the only direct appellate review of the Rule, which it expressly upheld. 570 F.3d at 1228 (“EPA’s regulation adopting the unitary waters theory is a reasonable ... construction of the [statute].”).

The key distinction here is that the earlier courts rejecting the unitary waters theory were reviewing EPA actions *before* any rulemaking took place. *Id.* at 1218. As such, the agency received no *Chevron* deference towards its enforcement actions. *Id.* Now, the agency *has* promulgated a rule and is therefore entitled to *Chevron* deference regarding its interpretation. *Id.* The Water Transfers Rule is now the law of the land. It is supported both by EPA’s expertise in water pollution regulation as well as the common sense notion that pollution should be subject to permitting when it enters navigable waters, not at each transfer between navigable water bodies.

A federal court of appeals has also upheld the Water Transfers Rule. As identified by the Eleventh Circuit, *Chevron* deference applies to the Water Transfers Rule because EPA is the agency charged with granting and enforcing NPDES permits under the CWA, and because the term “addition” in section 1362(2) of the Clean Water Act is ambiguous. *Id.* at 1227 (noting that EPA chose one of the two reasonable interpretations of “addition”). EPA’s construction of “addition” is a reasonable one; it therefore cannot be “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* (citing *Chevron*, 467 U.S. at 844). Accordingly, the Eleventh Circuit upheld the unitary waters theory. *Id.* at 1228. Rather than rely on outdated case law, Bonhomme asks this Court to apply the Water Transfer Rule and determine that the culvert on his property does not constitute an addition of pollutants to navigable waters.

B. Under the Water Transfers Rule, addition of a pollutant can only occur once—Bonhomme cannot be liable for adding arsenic again.

Because Maleau already added arsenic from his piles into the Ditch, Bonhomme cannot re-add it to Reedy Creek through his culvert. This follows from applying both of the theories that form EPA’s definition of “addition” under the Water Transfers Rule. First, the outside world theory dictates that an addition of pollutants can only occur from an outside point source. *Gorsuch*, 693 F.2d at 175; Water Transfers Rule Preamble, 73 Fed. Reg. at 33,701. Second, the unitary waters theory means that an addition cannot occur when pollutants are transferred from one navigable water body into another. *Friends of Everglades*, 570 F.3d at 1217; Water Transfers Rule Preamble, 73 Fed. Reg. at 33,701 (citing EPA’s “long-standing practice of generally not requiring NPDES permits for transfers between [navigable] water bodies”).

As identified in Issue IV, *supra*, Ditch C-1 is a navigable water body because it is a tributary to the Reedy, which is itself navigable. R. at 10. The Water Transfers Rule defines a water transfer as, “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.” 40 C.F.R. § 122.3(i). Thus, under the Rule, addition from a point source to navigable waters only occurs when rainwater flows through the eroded channels in Maleau’s waste piles and into Ditch C-1. Accordingly, the logic of the outside world theory dictates that the addition of arsenic from a point source—the piles of mining waste—into a navigable water body—Ditch C-1—precludes holding Bonhomme liable when the arsenic flows through his culvert into Reedy Creek.

Under the unitary waters theory, Bonhomme cannot add pollutants from Ditch C-1 into Reedy Creek through the culvert because both bodies are navigable. The facts in this case are analogous to the hypothetical situation used by the Eleventh Circuit to explain the unitary waters theory. *Friends of Everglades*, 570 F.3d at 1228. In the hypothetical, two buckets sit side by side. One bucket holds four marbles; the other holds none. A rule

prohibits “any addition of any marbles to buckets by any person.” *Id.* If a person takes two marbles from the first bucket and places them in the second bucket, did they “add” any marbles in violation of the rule? No. *Id.* Under the Water Transfers Rule, there were four marbles in buckets to begin with, and there are still four marbles in buckets after the transfer. No addition of marbles occurred. *Id.*

Just like the marble hypothetical, no addition of pollutants between Ditch C-1 and Reedy Creek occurred in this case. Arsenic already present in the Ditch passively transfers between navigable water bodies when it flows through the culvert into the Reedy. Therefore, under EPA’s interpretation of the Water Transfers Rule, upheld by the Eleventh Circuit in *Friends of Everglades*, enforcement of the CWA must occur on Maleau’s property where his waste piles add arsenic to the Ditch, not at the culvert on Bonhomme’s property where water transfers into Reedy Creek.

C. Public policy also supports regulating the pollution at Maleau’s source piles, not where it transfers from one water of the United States to another.

Public policy and federalism both favor enforcing the CWA at the pollution’s source rather than where Ditch C-1 and the Reedy converge. However, the district court violated both concepts when it held Bonhomme liable for Maleau’s arsenic. First, classic principles of federalism prevent the federal government from interfering with the states’ primary authority to manage water transfers within their own boundaries. Second, general notions of fairness and legislative history favor CWA enforcement where Maleau’s arsenic enters Ditch C-1, not downstream where the Ditch reaches a confluence with Reedy Creek.

To the first point, the Water Transfers Rule exempts water transfer points from permitting, which makes sense under traditional notions of federalism. “Water transfers are an essential component of the nation’s infrastructure for delivering water that users are entitled to receive under *State* law.” Water Transfers Rule Preamble, 73 Fed. Reg. at

33,702 (emphasis added). Congress agrees, acknowledging the importance of water allocation under state water law: “[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 [the CWA].” 33 U.S.C. § 1251. To that end, the power to allocate water to their citizens rests almost exclusively with the states. *See* 33 U.S.C. § 1370(2) (2006). Justice Scalia also articulates the federalism concerns associated with state control over regulation in *Rapanos*, arguing “[w]e ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority.” *Rapanos v. United States*, 547 U.S. 715, 738 (2006). Because the CWA does not contain a “clear and manifest” intent from Congress to invade traditional state spheres of control, EPA cannot rely on the ambiguity of the word “addition” to take regulation of water transfers away from states.

On the second point, general notions of fairness also support the determination that the CWA should be enforced at the piles of mining waste rather than at the culvert leading into Reedy Creek. In 1972 when Congress passed the CWA, it specifically targeted *point source discharges*, not water transfers. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 (“it is essential that discharge of pollutants be controlled at the source”). The Water Transfers Rule Preamble explains why: “Rather than discharg[ing] effluent, water transfers convey one water of the U.S. into another.” 73 Fed. Reg. at 33,702. Essentially, a water transfer just *moves* water; operators of transfer facilities, like Bonhomme and his culvert, cannot control the upstream addition of pollutants in the waters they convey. *Id.* Both Congress’s language and the Water Transfers Rule Preamble recognize that it is more efficient and effective to control water pollution at the source of effluent, rather than at water transfer points occurring miles downstream.

The district court contradicted that principle though, and assigned liability not to the *source* of the arsenic pollution, but to a downstream party that neither actually nor

proximately caused it. Bonhomme’s only so-called fault in this case revolves around his property’s unfortunate geographic location. Regulating the arsenic at its source—Maleau’s waste piles—fits precisely within Congress’s CWA policy choice. Regulating the arsenic at Bonhomme’s culvert does not.

In sum, the transfer of water from Ditch C-1 into Reedy Creek through Bonhomme’s culvert does not violate the CWA. Under the Water Transfers Rule, the term “addition” excludes transfers of water from one body to another. The CWA’s language, as well as its legislative history, support the same conclusion—punishing Bonhomme for Maleau’s pollution is unfair in these circumstances and violates principles of federalism. The district court, however, applied outdated law and ignored the Water Transfers Rule when it determined the opposite. This Court should reverse and remand.

CONCLUSION

For the above reasons, Bonhomme asks this Court to affirm the district court on one issue: Reedy Creek is a “navigable water” under the Clean Water Act. However, the district court erred on the other five issues: Bonhomme’s French nationality does *not* bar his suit; he *is* a real party in interest to the litigation; Ditch C-1 *is also* a water of the United States; Maleau’s waste piles are *point sources*; and Bonhomme’s culvert is *not*. These issues require expansive legal analysis and fact-specific inquiries that the lower court failed to address, making the district court’s grant of Maleau’s motion to dismiss inappropriate. This Court should reverse and remand for further proceedings consistent with the applicable law outlined above.

APPENDIX A

Convention of Establishment

Between the United States of America and France

FRANCE

Establishment

Convention, with protocol and joint declaration, signed at Paris November 25, 1959;

Ratification advised by the Senate of the United States of America August 17, 1960;

Ratified by the President of the United States of America August 29, 1960;

Ratified by the President of the French Republic, President of the Community, October 28, 1960;

Ratifications exchanged at Washington November 21, 1960;

Proclaimed by the President of the United States of America December 8, 1960;

Entered into force December 21, 1960.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a convention of establishment between the United States of America and France, together with a protocol relating thereto, was signed at Paris on November 25, 1959, and a joint declaration relating thereto was initialed at Paris on the same date, the originals of which convention, protocol, and joint declaration, being in the English and French languages, are word for word as follows:

CONVENTION OF ESTABLISHMENT BETWEEN THE UNITED STATES OF AMERICA AND FRANCE

The President of the United States of America and the President of the French Republic, President of the Community, desirous of strengthening the ties of peace and friendship traditionally existing between the two countries and of encouraging closer economic intercourse between their peoples, conscious of the contribution which may be made to these ends by arrangements that provide in each country reciprocal rights and privileges on behalf of nationals and companies of the other country, thus encouraging mutually advantageous investments and mutually beneficial commercial relations, have resolved to conclude a convention of establishment and, for that purpose have appointed as Plenipotentiaries:

The President of the United States of America,

The H o n o r a b l e AMORY HOUGHTON, Ambassador of the United States of America at Paris,

and the President of the French Republic, President of the Community,

M. MAURICE COUVE DE MURVILLE, Minister of Foreign Affairs,

who, having communicated to each other their full powers, found to be in due form, have agreed on the following Articles:

Le Président des Etats-Unis d'Amérique et le Président de la République Française, Président de la Communauté, désireux de renforcer les liens de paix et d'amitié qui existent traditionnellement entre les deux pays, et d'encourager des relations économiques plus étroites entre leurs peuples, conscients de la contribution que peuvent apporter à ces fins des dispositions accordant dans chaque pays des droits et des privilèges réciproques au profit des ressortissants et des sociétés de l'autre pays, favorisant ainsi des investissements profitables pour les deux Hautes Parties Contractantes et des relations commerciales avantageuses pour elles, ont résolu de conclure une convention d'établissement et, à cette fin, ont désigné comme plénipotentiaires:

Le Président des Etats-Unis d'Amérique,

l'Honorable AMORY HOUGHTON, Ambassadeur des Etats Unis d'Amérique à Paris,

et le Président de la République Française, Président de la Communauté,

M. MAURICE COUVE DE MURVILLE, Ministre des Affaires Etrangères,

lesquels, après s'être mutuellement communiqué leurs pleins pouvoirs, reconnus en bonne et due forme, sont convenus des articles suivants:

TIAS 4625

ARTICLE I

Each High Contracting Party shall accord equitable treatment to nationals and companies of the other High Contracting Party, both as to their persons and as to their property, enterprises and other interests, and shall assure them within its territories full legal and judicial protection.

ARTICLE II

1. Nationals of either High Contracting Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other High Contracting Party, to travel therein freely, and to reside therein at places of their choice. They shall in particular be permitted to enter the territories of the other High Contracting Party and to remain therein, for the purpose of:

(a) carrying on trade between the territories of the two High Contracting Parties and engaging in related commercial activities;

(b) developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.

2. Nationals of each High Contracting Party shall enjoy, within the territories of the other High Contracting Party, freedom of conscience, of worship, of information and of the press.

ARTICLE I

Chacune des Hautes Parties Contractantes accorde un traitement équitable aux ressortissants et sociétés de l'autre Haute Partie Contractante, tant en ce qui concerne les personnes que les biens, entreprises et autres intérêts, et leur assure dans ses territoires la pleine protection légale et judiciaire.

ARTICLE II

1. Les ressortissants de chacune des Hautes Parties Contractantes sont, sous réserve de l'application des lois relatives à l'entrée et au séjour des étrangers, autorisés à entrer dans les territoires de l'autre Haute Partie Contractante, à y voyager librement et à y résider dans les lieux de leur choix. Ils sont en particulier autorisés à entrer dans les territoires de l'autre Haute Partie Contractante et à s'y établir, en vue de:

a) se livrer à des opérations commerciales entre les territoires des deux Hautes Parties Contractantes ainsi qu'à des activités commerciales connexes;

b) développer et diriger les opérations d'une entreprise dans laquelle ils ont déjà investi un capital substantiel ou procèdent à un tel investissement.

2. Les ressortissants de chacune des Hautes Parties Contractantes jouissent sur les territoires de l'autre Haute Partie Contractante des libertés de conscience, de culte, d'information et de presse.

3. The provisions of the present Article shall be subject to the right of either High Contracting Party to take measures that are necessary for the maintenance of public order and for the protection of public health, morals, and safety.

ARTICLE III

1. Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to access to the courts of justice as well as to administrative tribunals and agencies, within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. Companies of either High Contracting Party not engaged in activities within the territories of the other High Contracting Party shall enjoy such access therein without any requirement of registration. Nationals of either High Contracting Party shall be accorded the benefits of legal aid within the territories of the other High Contracting Party under the same conditions as its own nationals.

2. Contracts entered into between nationals and companies of either High Contracting Party and nationals and companies of the other High Contracting Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other High

3. Les dispositions du présent article sont subordonnées au droit de chacune des Hautes Parties Contractantes de prendre les mesures nécessaires au maintien de l'ordre public et à la protection de la santé, de la moralité et de la sécurité publiques.

ARTICLE III

1. Les ressortissants et sociétés de chacune des Hautes Parties Contractantes bénéficient du traitement national en ce qui concerne l'accès aux tribunaux judiciaires ainsi qu'aux tribunaux et organismes administratifs situés dans les territoires de l'autre Haute Partie Contractante, à tous les degrés de juridiction, en vue de l'exercice tant actif que passif de leurs droits. Les sociétés de l'une des Hautes Parties Contractantes ne se livrant à aucune activité dans les territoires de l'autre Haute Partie Contractante n'ont pas à s'y faire immatriculer pour bénéficier du même privilège. Les ressortissants de chacune des Hautes Parties Contractantes bénéficient sur les territoires de l'autre Haute Partie Contractante de l'assistance judiciaire dans les mêmes conditions que les nationaux.

2. Les contrats passés entre les ressortissants et sociétés de l'une des Hautes Parties Contractantes et les ressortissants et sociétés de l'autre Haute Partie Contractante, qui prévoient le règlement des litiges par voie d'arbitrage, ne sont pas réputés inapplicables dans les territoires de ladite autre Haute Partie

TIAS 4625

Contracting Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other High Contracting Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either High Contracting Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such High Contracting Party.

ARTICLE IV

1. The lawfully acquired rights and interests of nationals and companies of either High Contracting Party shall not be subjected to impairment, within the territories of the other High Contracting Party, by any measure of a discriminatory character.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall be free from molestation and other unjustifiable measures. Official searches conducted on such premises, when necessary, shall be carried out in conformity

Contractante pour le seul motif que le lieu désigné pour la procédure d'arbitrage est situé en dehors desdits territoires, ou que la nationalité de l'un ou de plusieurs des arbitres n'est pas celle de ladite autre Haute Partie Contractante. Aucune sentence arbitrale, dûment rendue conformément à un contrat de cette nature et qui serait définitive et exécutoire en vertu de la loi du lieu où elle aura été rendue, ne sera réputée nulle et ne sera privée de moyens d'exécution efficaces dans les territoires de chacune des Hautes Parties Contractantes pour le seul motif que le lieu où la sentence a été rendue est situé en dehors desdits territoires ou que la nationalité de l'un ou de plusieurs arbitres n'est pas celle de ladite Haute Partie Contractante.

ARTICLE IV

1. Les droits et intérêts légitimement acquis par les ressortissants et sociétés de l'une des Hautes Parties Contractantes ne seront pas compromis sur les territoires de l'autre Haute Partie Contractante par des mesures de caractère discriminatoire.

2. Les résidences, bureaux, entrepôts, usines et autres locaux des ressortissants et sociétés de l'une des Hautes Parties Contractantes situés dans les territoires de l'autre Haute Partie Contractante seront exempts de violation ou autres mesures injustifiées. Les perquisitions officielles dans lesdits locaux, lorsqu'elles seront nécessaires, seront effectuées conformément

APPENDIX B

Legislative History of the Federal Water Pollution Control Act

Calendar No. 411

92D CONGRESS }
1st Session }

SENATE

} REPORT
No. 92-414

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971

OCTOBER 28, 1971.—Ordered to be printed

Mr. RANDOLPH, from the Committee on Public Works, submitted
the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 2770]

The Committee on Public Works, to which was referred the bill (S. 2770) Federal Water Pollution Control Act Amendments of 1971, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass. An original bill (S. 2770) is reported in lieu of S. 523, S. 1012, S. 1013, S. 1014, S. 1017 and S. 1238 which were considered by the committee.

GENERAL STATEMENT

HISTORY

For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States.

A critical delay of enforcement for interstate water quality results from the water quality standards structure just described. The EPA Administrator may begin action to abate pollution only when:

1. Water quality of interstate waters is reduced below the established standards;
2. Pollution originating in one State is endangering the health or welfare of persons in another State downstream; or
3. The Governor of the State in which the pollution is originating consents to the proposed action.

ADEQUACY OF ENFORCEMENT

The continued use of the 1948 abatement procedure also contributes to delay. The record shows an almost total lack of enforcement. Under this procedure, only one case has reached the courts in more than two decades.

In that case, involving a Midwestern city, more than four years elapsed between initial conference and consent decree. The city later constructed a sewage treatment plant. Within 2 years, the plant was treating only half of the city's sewage. Five million tons of raw sewage were being dumped into the river each day.

Continued use of the 1948 abatement procedure, and the almost total lack of enforcement, encourage governing bodies and officials to search for other, more direct avenues of action against water polluters and water pollution.

One such approach which has been focused on is the use of section 13 of the 1899 Refuse Act, which declares a prohibition over the discharge of any matter into the navigable waters.

While the permit program created in late 1970 under the Refuse Act by the Administrator seeks to establish this direct approach, it is weak in two important respects: It is being applied only to industrial polluters, and authority is divided between two Federal agencies.

Experience with the permit system during the past 10 months suggests that the machinery used to date may be as cumbersome as the 1948 abatement procedure. Estimates of the number of permit applications to be received run as high as 300,000; estimates of the time required to process the applications run as long as four years.

ADEQUACY OF FUNDING

The lack of adequate funding of grants to assist States and localities in constructing sewage treatment plants is causing critical problems.

Of the \$3.4 billion authorized for this purpose by the 1966 legislation, only \$2.2 billion was appropriated. The backlog of projects eligible for Federal payments has reached a total of nearly \$2 billion.

As more States and localities move to take part in the construction program, the need for increased Federal spending is rising rapidly.

Five years ago, the Committee estimated that more than \$20 billion worth of sewage treatment plants would have to be built before 1972 in order to serve the population expected in 1980.

Estimates received by the Commission from the National League of Cities—United States Conference of Mayors during its hearings last

FEDERAL WATER POLLUTION CONTROL ACT
AMENDMENTS OF 1972

SEPTEMBER 28, 1972.—Ordered to be printed

MR. MUSKIE, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 2770]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2770) to amend the Federal Water Pollution Control Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Federal Water Pollution Control Act Amendments of 1972".

Sec. 2. The Federal Water Pollution Control Act is amended to read as follows:

*"TITLE I—RESEARCH AND RELATED
PROGRAMS*

"DECLARATION OF GOALS AND POLICY

"Sec. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

"(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

"(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

“(6) The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) ‘sewage from vessels’ within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.”

(2) The term “navigable waters” has been amended to read as follows:

“(8) The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”

(3) The definition of the term “effluent limitation” contained in paragraph (12) has been amended to eliminate the concept of “schedules and timetables for compliance”, inserting in lieu thereof “schedules of compliance”.

(4) Two new terms have been defined for the purposes of the Act. In paragraph (19) the term “schedule of compliance” has been added, and in paragraph (20) the term “industrial user” has been defined, and these terms read as follows:

“(19) The term ‘schedule of compliance’ means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

“(20) The term ‘industrial user’ means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category ‘Division D—Manufacturing’ and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.”

The conferees omitted the Senate definition of “permit”. It is the conferees’ intent that a permit means any permit or equivalent document or requirement issued to regulate the discharge of pollutants. The conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

WATER POLLUTION CONTROL ADVISORY BOARD

Senate bill

Section 503 restates section 9 of existing law which establishes a Water Pollution Control Advisory Board within the Environmental Protection Agency. The section is modified to allow \$100 per diem for board members while attending conferences or board meetings.

House amendment

Section 503 is essentially the same as the Senate provision.

Conference substitute

Section 503 is the same as the Senate bill and the House amendment.

92D CONGRESS }
1st Session }

SENATE

{ REPORT
No. 92-414

FEDERAL WATER POLLUTION CONTROL ACT
AMENDMENTS OF 1971

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE

TOGETHER WITH

SUPPLEMENTAL VIEWS

TO ACCOMPANY

S. 2770



OCTOBER 28, 1971.—Ordered to be printed

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and maintaining the pristine state is an objective which minimizes the burden to man in maintaining a healthy environment, and which will provide for a stable biosphere that is essential to the well-being of human society.

The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

The Committee has added definitions of the terms territorial seas, contiguous zone, and ocean to describe clearly the jurisdictional limits of the Act, and provide a basis for its relationship to other laws of the United States as well as to international law.

A definition of effluent limitations has been included so that control requirements are not met by narrative statements of obligation, but rather are specific requirements of specificity as to the quantities, rates, and concentration of physical, chemical, biological and other constituents discharged from point sources. It is also made clear that the term effluent limitation includes schedules and time tables of compliance.

The Committee has added a definition of schedules and time-tables of compliance so that it is clear that enforcement of effluent limitations is not withheld until the final date required for achievement.

The Committee has also added a definition of the term discharge to indicate the scope of the control requirements under the Act. Any pollutant added to the navigable waters from any point source or the addition of any pollutant to the contiguous zone or the water of the ocean by outfall or other pipeline is included within the control requirements of Title III or the addition of any pollutant to a publicly owned treatment works by any industrial user.

A definition of toxic substance is provided to assist the Administrator in implementing his authority under section 307 to regulate toxic discharges. The definition provides a benchmark for evaluating those pollutants which in certain concentrations would have a particularly adverse impact on humans as well as other forms of life. It is necessary to evaluate the effect of all forms of such pollutants and consider their persistence, degradation, or interaction with other materials, once in the receiving water.

Disease-causing agents are intended to refer to all pathogens, including viruses, which may produce disease symptoms in any organisms. In addition, any pollutant or agent which lowers an organism's resistance to serious disease should be considered a toxic pollutant.

The following substances were mentioned in relation to potential toxic effects by the President's Council on Environmental Quality (April, 1971) in a report entitled *Toxic Substances*: lead, cadmium, mercury, vanadium, arsenic, molybdenum, antimony, nickel, barium, beryllium, copper, selenium, zinc, nitrotriacetic acid (NTA), ortho-nitrochlorobenzene (ONCB), polychlorinated biphenyls (PCB's), dichlorodiphenyl-trichloroethane (DDT). The Committee expects the

APPENDIX C

Draft Guidance on Identifying Waters Protected by the Clean Water Act

Draft Guidance on Identifying Waters Protected by the Clean Water Act

This draft guidance clarifies how the Environmental Protection Agency (EPA)^{*i} and the U.S. Army Corps of Engineers (the Corps)ⁱⁱ will identify waters protected by the Federal Water Pollution Control Act Amendments of 1972¹ (Clean Water Act or CWA or Act) and implement the Supreme Court's decisions concerning the extent of waters covered by the Act (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*² and *Rapanos v. United States (Rapanos)*³). This document clarifies how the EPA and the Corps understand existing requirements of the CWA and the agencies' implementing regulations in light of *SWANCC* and *Rapanos* and provides guidance to agency field staff in making determinations about whether waters are protected by the CWA.

This draft guidance document is intended to describe for agency field staff the agencies' current understandings; it is not a rule, and hence it is not binding and lacks the force of law. Once finalized, this guidance will supersede existing guidance to field staff issued in 2003 and 2008 on the scope of "waters of the United States" (also "waters of the U.S.") subject to CWA programs.ⁱⁱⁱ Although guidance does not have the force of law, it is frequently used by Federal agencies to explain and clarify their understandings of existing requirements. In this case, the agencies believe that field staff across the country will benefit from new guidance that is informed by lessons learned since 2008 and that reflects the agencies' understandings with respect to CWA jurisdiction, consistent with Supreme Court decisions and existing agency regulations. Each jurisdictional determination, however, will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations, and case law.

After receiving and taking account of public comments on this document, EPA and the Corps expect to finalize it and to undertake rulemaking consistent with the Administrative Procedure Act. This process is expected to start with a proposed rule, to clarify further via regulation the extent of Clean Water Act jurisdiction, consistent with the Court's decisions. EPA and the Corps decided to begin this process with draft, nonbinding guidance in order to clarify their existing understandings while also considering and receiving the benefit of public comments.

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and this guidance will help the agencies implement specific provisions of the Act to achieve this objective.⁴ The CWA has a number of programs designed to protect and restore the Nation's waters. Together, these programs provide effective protection from pollution for waterbodies across the country, including waters that

* To increase clarity of this document, endnotes that primarily provide citations will be indicated with Arabic numerals, and footnotes that provide additional substantive information will be indicated with Roman numerals.

ⁱ EPA Regions will use this guidance to oversee and implement programs under the Clean Water Act, including those under sections 303, 311, 401, 402 and 404, 33 U.S.C. §§ 1313, 1321, 1341, 1342 and 1344. (See endnote 1 for an explanation of the relevant history of the Clean Water Act.)

ⁱⁱ Corps Districts will utilize this guidance to implement Clean Water Act section 404, 33 U.S.C. § 1344.

ⁱⁱⁱ Specifically, this memorandum supersedes the "Joint Memorandum" providing clarifying guidance on *SWANCC*, dated January 15, 2003 (68 Fed. Reg. 1991, 1995), and "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," dated December 2, 2008.

supply drinking water, filter pollutants, provide water for irrigation, and support hunting and fishing, outdoor recreation, and tourism.

The Clean Water Act, however, applies only to waters that are “waters of the United States.” This draft guidance clarifies how EPA and the Corps will identify waters to be protected under the Act consistent with the statute, regulations, Supreme Court caselaw, relevant science related to aquatic ecosystems, and the agencies' field experience. As noted above, this guidance, once finalized, will supersede previously issued guidance on the scope of “waters of the United States” (also “waters of the U.S.”) subject to CWA programs. However, it is not the agencies' intention that previously issued jurisdictional determinations be re-opened as a result of this guidance.

The U.S. Supreme Court has addressed the scope of waters of the United States protected by the CWA in three cases. In *United States v. Riverside Bayview Homes, Inc.* (474 U.S. 121 (1985)), the Supreme Court held that wetlands adjacent to a traditional navigable water were properly considered to be “waters of the United States.” In *SWANCC*, the Court addressed the question of CWA jurisdiction over isolated, non-navigable, intrastate ponds, and concluded that CWA jurisdiction could not be based solely on the presence of migratory birds. In *Rapanos*, the Court addressed CWA protections for wetlands adjacent to non-navigable tributaries, and issued five opinions with no single opinion commanding a majority of the Court. The plurality opinion, authored by Justice Scalia, stated that “waters of the United States” extended beyond traditional navigable waters to include “relatively permanent, standing or flowing bodies of water.” *Id.* at 739. The plurality went on to clarify that relatively permanent waters “do not necessarily exclude” streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought, and seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. The plurality opinion also asserted that only wetlands with a “continuous surface connection” to other jurisdictional waters are considered “adjacent” and protected by the CWA. *Id.* at 742.

Justice Kennedy's concurring opinion took a different approach from Justice Scalia's. Justice Kennedy concluded that “waters of the United States” included wetlands that had a significant nexus to traditional navigable waters, “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’” (*id.* at 780). The four justices who signed on to Justice Stevens' opinion would have upheld jurisdiction under the agencies' existing regulations and stated that they would uphold jurisdiction under either the plurality or Justice Kennedy's opinion (*id.* at 810).

The agencies continue to believe, as expressed in previous guidance, that it is most consistent with the *Rapanos* decision to assert jurisdiction over waters that satisfy either the plurality or the Justice Kennedy standard, since a majority of justices would support jurisdiction under either standard. However, after careful review of these opinions, the agencies concluded that previous guidance did not make full use of the authority provided by the CWA to include waters within the scope of the Act, as interpreted by the Court. This draft guidance provides a more complete discussion of the agencies' interpretation, including of how waters with a “significant nexus” to traditional navigable waters or interstate waters are protected by the CWA.

In addition, this guidance explains the legal basis for coverage of waters by the CWA in cases that were not addressed by the previous guidance (for example, interstate waters).

The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*. However, each jurisdictional determination will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations, and case law.

The agencies understand that decisions concerning whether or not a waterbody is subject to the CWA have consequences for State, tribal, and local governments and for private parties. Consistent with Executive Order 13563, and in particular its emphasis on predictability and certainty, key goals of this draft guidance are to increase clarity and to reduce costs and delays in obtaining CWA permits by reducing the complexity of Corps of Engineers and EPA decisions concerning waters protected by the CWA, thus improving the predictability of the process of identifying waters protected by the Act, and increasing consistency of decisions across the country.

There is only one CWA definition of “waters of the United States.” Thus, this draft guidance, like the earlier guidance it replaces, necessarily will apply to decisions concerning whether a waterbody is subject to any of the programs authorized under the CWA. Although *SWANCC* and *Rapanos* specifically involved section 404 of the CWA and discharges of dredged or fill material, the term “waters of the United States” must be interpreted consistently for all CWA provisions that use the term. These provisions include the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 311 oil spill program,⁵ the water quality standards and total maximum daily load programs under section 303, and the section 401 State water quality certification process. However, while there is only one CWA definition of “waters of the United States,” there may be other statutory factors that define the reach of a particular CWA program or provision.⁶

This draft guidance does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted croplands, or practices for identifying waste treatment systems or prior converted croplands.⁷ It does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal agriculture, forestry and ranching practices.⁸ This guidance also does not address the statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture.⁹

The CWA provisions and supporting regulations described in this document contain legally binding requirements. The agencies emphasize that this guidance does not substitute for those provisions or regulations and is not itself a regulation. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be

based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions regarding particular situations, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law. The use of language such as "recommend," "may," "should" and "can" is intended to describe agency policies and recommendations, while the use of mandatory terminology such as "must" and "required" is intended to describe the agencies' interpretations of controlling requirements under the terms of the CWA, its implementing regulations, and relevant case law.

This draft guidance is divided into eight sections:

- The first two sections address the fundamental classes of waters subject to Clean Water Act jurisdiction: traditional navigable waters (Section 1) and interstate waters (Section 2).
- The next section provides general guidance relating to the “significant nexus” standard described by Justice Kennedy in the *Rapanos* decision (Section 3).
- The next three sections provide guidance on determining whether various types of waters are subject to CWA jurisdiction, including:
 - Tributaries (Section 4);
 - Adjacent wetlands (Section 5); and
 - Other waters (Section 6).
- The next section provides examples of waters that are generally not waters of the United States under the CWA (Section 7).
- The final section provides guidance on the documentation necessary to support decisions concerning whether waters are protected by the CWA (Section 8).

Additional scientific and legal information concerning these topics is provided in an appendix at the end of this document.

Summary of Key Points

Based on the agencies' interpretation of the statute, implementing regulations and relevant caselaw, the following waters are protected by the Clean Water Act:

- Traditional navigable waters;
- Interstate waters;
- Wetlands adjacent to either traditional navigable waters or interstate waters;
- Non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally; and
- Wetlands that directly abut relatively permanent waters.

In addition, the following waters are protected by the Clean Water Act if a fact-specific analysis determines they have a "significant nexus" to a traditional navigable water or interstate water:

- Tributaries to traditional navigable waters or interstate waters;
- Wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters; and
- Waters that fall under the "other waters" category of the regulations. The guidance divides these waters into two categories, those that are physically proximate to other jurisdictional waters and those that are not, and discusses how each category should be evaluated.

The following aquatic areas are generally not protected by the Clean Water Act:

- Wet areas that are not tributaries or open waters and do not meet the agencies' regulatory definition of "wetlands";
- Waters excluded from coverage under the CWA by existing regulations;
- Waters that lack a "significant nexus" where one is required for a water to be protected by the CWA;
- Artificially irrigated areas that would revert to upland should irrigation cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
- Water-filled depressions created incidental to construction activity;
- Groundwater drained through subsurface drainage systems and
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands.

Section 1: Traditional Navigable Waters

EPA and the Corps will continue to assert CWA jurisdiction over “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”¹⁰ These waters are referred to in this guidance as “traditional navigable waters.” The traditional navigable waters include all of the “navigable waters of the United States,” as defined in 33 C.F.R. part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (for example, the Great Salt Lake, Utah, and Lake Minnetonka, Minnesota). Thus, the traditional navigable waters include, but are not limited to, the “navigable waters of the United States” within the meaning of section 10 of the Rivers and Harbors Act of 1899 (also known as “Section 10 waters”).¹¹

For purposes of CWA jurisdiction and this guidance, waters will be considered traditional navigable waters if:

- They are subject to section 9 or 10 of the Rivers and Harbors Act; or
- A federal court has determined that the water body is navigable-in-fact under federal law; or
- They are waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments); or
- They have historically been used for commercial navigation, including commercial waterborne recreation; or
- They are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water to be used in commercial navigation, including commercial recreational navigation (for example, size, depth, and flow velocity^{iv}), and the likelihood of future commercial navigation, including commercial waterborne recreation. A likelihood of future commercial navigation, including commercial waterborne recreation, can be demonstrated by current boating or canoe trips for recreation or other purposes. A determination that a water is susceptible to future commercial navigation, including commercial waterborne recreation, should be supported by evidence.^v

^{iv} While a traditional navigable water need not be capable of supporting navigation at all times, the frequency, volume, and duration of flow are relevant considerations for determining if a waterbody has the physical characteristics suitable for navigation.

^v A trip taken solely for the purpose of demonstrating a waterbody can be navigated would be sufficient. *See, e.g., FPL Energy Marine Hydro L.L.C. v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002).

Section 2: Interstate Waters

EPA and the Corps will assert jurisdiction over all interstate waters, consistent with the agencies' current regulations defining "waters of the United States" to include "interstate waters including interstate wetlands."¹² Interstate waters, defined by the federal water pollution control statutes prior to the CWA as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries," remain jurisdictional waters under the CWA, even if such waters are not traditional navigable waters as described in Section 1 above.¹³ For purposes of this guidance, lakes, ponds, and similar lentic (or still) water features crossing state boundaries are jurisdictional as interstate waters in their entirety. For streams and rivers, including impoundments, field staff should determine the upstream and downstream extent of the stream or river crossing a state boundary that should be considered the "interstate water." One method of determining the extent of a riverine "interstate water" is the use of stream order. Thus, for rivers and streams the "interstate water" would extend upstream and downstream of such boundary for the entire length that the water is of the same stream order.¹⁴

The agencies will analyze tributaries to interstate waters¹⁵ consistent with the treatment of tributaries to traditional navigable waters under Justice Kennedy's standard discussed in Section 4 below. Similarly, the agencies will analyze wetlands adjacent to interstate waters (except wetlands that are adjacent to interstate wetlands)¹⁶ consistent with the treatment of adjacent wetlands under Justice Kennedy's standard discussed in Section 5 below. Finally, EPA and the Corps will analyze other waters relative to an interstate water consistent with Section 6 below.

Section 3: Significant Nexus Analysis

The agencies will assert jurisdiction over waters with a significant nexus to traditional navigable waters or interstate waters in accordance with *SWANCC* and *Rapanos*. Justice Kennedy stated:

"In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."¹⁷

Waters have the requisite significant nexus if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters or interstate waters.^{vi} There is one significant nexus standard for waters of the United States, and this section provides general guidance for determining the presence or absence of a significant nexus. Sections 4, 5 and 6 provide more

^{vi} In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'" 547 U.S. at 779. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters and interstate waters.

specific guidance to field staff for applying the significant nexus standard when determining jurisdiction over:

- tributaries,
- adjacent wetlands, and
- other waters.

To evaluate the presence or absence of a significant nexus, the agencies intend to, as a general matter, consider:

- (1) Waters to be “similarly situated” with waters of the same resource type, specifically (a) tributaries; (b) adjacent wetlands; or (c) other waters that are in close physical proximity to traditional navigable waters, interstate waters, or their jurisdictional tributaries (“proximate other waters”);^{vii}
- (2) Waters to be “in the region” if they fall within the same watershed. For the purposes of this analysis, the watershed is defined by the area draining into the traditional navigable water or interstate water; and
- (3) Waters to have a significant nexus if they alone or in combination with other similarly situated waters in the same watershed have an effect on the chemical, physical, or biological integrity of traditional navigable waters or interstate waters that is more than “speculative or insubstantial.”

Therefore, field staff should first determine whether the water to be evaluated is a tributary, adjacent wetland, or proximate other water under the regulations - waters in the same category should be considered the similarly situated waters.

Next, field staff should determine the watershed, as defined by the area¹⁸ draining into the nearest traditional navigable water or interstate water, and should identify the “similarly situated” waters in that watershed. The logical and scientifically valid “region” for determining whether similarly situated waters have a significant nexus is the watershed that drains to the nearest traditional navigable water or interstate water through a single point of entry. There may be circumstances in which field staff, for efficiency purposes, elect to begin the case-by-case significant nexus analysis utilizing a smaller watershed (for example, in some circumstances, the Hydrologic Unit Code (HUC)-10 “watershed” as identified by the U.S. Geological Survey and the Natural Resources Conservation Service, which are typically between 40,000-250,000 acres in size).¹⁹ Field staff should not, however, utilize an area larger than the watershed that drains to the nearest traditional navigable water or interstate water through a single point of entry. When a smaller watershed provides sufficient science-based justification to establish jurisdiction, field staff need not unnecessarily expend administrative time and resources analyzing the entire single point of entry watershed. However, field staff should not use a watershed smaller than the single point of entry watershed as the basis for a finding of no jurisdiction.

^{vii} For other waters that are not in close physical proximity to traditional navigable waters, interstate waters, or their jurisdictional tributaries, the agencies will apply the significant nexus standard to each of these waters individually, except in cases where there is a compelling scientific basis for treating a group of such waters as similarly situated waters in the same region (see Section 6).

Finally, field staff should determine whether the water they are evaluating, in combination with other similarly situated waters in the watershed, has a significant nexus to the nearest traditional navigable water or interstate water. Functions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of aquatic habitat. A hydrologic connection is not necessary to establish a significant nexus, because in some cases the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water or interstate water, such as retention of flood waters or pollutants that would otherwise flow downstream to the traditional navigable water or interstate water.

Within a single point of entry watershed, over a period of time there will probably be multiple jurisdictional determinations. While field staff will have to make case-specific determinations, they may use information used in previous determinations, and the agencies would generally expect that if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus, because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. However, the documentation for each case should be complete enough to support the specific jurisdictional determination without cross-references to other files, including an explanation of which waters were considered together as similarly situated and in the same region.

Among the most important tasks for field staff is demonstrating that a significant nexus exists between the "similarly situated" waters that are the subject of a case-specific jurisdictional determination and the relevant traditional navigable water or interstate water. Justice Kennedy provides guidance about the nature of the nexus when he concludes that waters are not jurisdictional when their effects on the physical, chemical, or biological integrity of downstream traditional navigable waters are speculative or insubstantial. In the context used by Justice Kennedy, a "significant nexus" includes having a predictable or observable chemical, physical, or biological functional relationship between the similarly situated waters and the traditional navigable water or interstate water. EPA and the Corps should further demonstrate that the similarly situated waters significantly affect the traditional navigable water or interstate water.

Thus, field staff should look for indicators of hydrology, effects on water quality, and physical, chemical, and biological (including ecological) connections or functions when assessing whether a water, alone or in combination with similarly situated waters, has a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of downstream traditional navigable waters or interstate waters. Examples of ways in which hydrology can significantly affect downstream waters include, but are not limited to, transport of water and materials and compounds carried by the water (e.g., suspended materials, dissolved compounds), water retention, as a medium for the movement of aquatic organisms such as fish and invertebrates, and water discharge (e.g., release of retained water to other waters). Effects on the chemical integrity of downstream waters may include the extent to which the waters have the capacity to carry pollutants (for example, petroleum wastes, toxic wastes, and sediment) or flood waters downstream to traditional navigable waters or interstate waters; the extent to which

the waters reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters or interstate waters; and the extent to which the waters perform physical functions related to the maintenance of downstream water quality such as sediment trapping.

Biological functions performed by the waters that may affect downstream traditional navigable waters or interstate waters include the capacity to transfer nutrients and organic carbon to downstream food webs (for example, macroinvertebrates present in headwater streams convert carbon in leaf litter, making it available to species downstream), and the maintenance of habitat that provides spawning areas for species in downstream waters.

Analysis of the above indicators, whether documented for an individual water or based on scientific literature describing functions applicable to the waters in question, along with an analysis of how the described functions affect a traditional navigable water or interstate water will allow field staff to evaluate whether the water alone or in combination with similarly situated waters in the watershed is likely to have a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of a traditional navigable water or interstate water. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (for example, between a tributary and the traditional navigable water). Watershed ecosystems, and their interrelationships, are constructed of component parts that have relevance when considered collectively. Failure to protect the components can undermine the ecosystem in its entirety. Therefore, the agencies have an obligation to evaluate waters in terms of how they interrelate and function as ecosystems rather than as individual units, especially in the context of complex ecosystems where their integrity may be compromised by environmental harms that individually may not be measurably large but collectively are significant.

It is important to clarify that agency field staff, in conducting a significant nexus analysis, are not required to identify or evaluate every similarly situated water located within a particular watershed being assessed. Staff should evaluate as many waters of the same type as is necessary to support and document the presence or absence of a significant nexus for that type of water (e.g., adjacent wetland, tributary or proximate other water). Staff should be confident that their significant nexus determination based on evaluation of a representative subset of adjacent wetlands, tributaries, or proximate other waters in a particular watershed would be fully consistent with a determination based on an evaluation of all waters of the same type in the watershed. Field staff should look at the best available information to identify the similarly situated waters in the point of entry watershed and their effects on downstream traditional navigable waters or interstate waters. In many circumstances, a reliable affirmative jurisdictional determination may be based on consideration of a subset of similarly situated waters, since including additional waters in the analysis would only establish a more significant nexus to the traditional navigable water or interstate water. In general, field staff are not expected to develop new information on similarly situated waters (e.g., the identification or delineation of as yet unmapped wetlands or tributaries). In many cases, scientifically credible (e.g., peer reviewed) literature on the functions and effects of similarly situated waters generally will be sufficient, along with site-specific information for the water for which a determination is being conducted, to support a significant nexus jurisdictional determination. This information should be incorporated into a site-specific explanation of how the waterbody and similarly situated waters in the region significantly affect the physical, chemical, or biological integrity of a traditional navigable or interstate water.

Section 4: Tributaries

EPA and the Corps will assert jurisdiction over tributaries under either the plurality standard or the Kennedy standard, as described below.

For purposes of this guidance, a water may be a tributary if it contributes flow to a traditional navigable water or interstate water, either directly or indirectly by means of other tributaries. A tributary can be a natural, man-altered, or man-made water body. Examples include rivers and streams, as well as lakes and certain wetlands that are part of the tributary system and flow directly or indirectly into traditional navigable waters or interstate waters. A tributary is physically characterized by the presence of a channel with defined bed and bank. The bed of a stream is the bottom of the channel. The lateral constraints (channel margins) are the stream banks. Channels are formed, maintained, and altered by the water and sediment they carry, and the forms they take can vary greatly.

A means of identifying the lateral limits of a tributary, including where there are no contiguous wetlands, is the existence of an ordinary high water mark (OHWM). Corps regulations define OHWM as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”²⁰ In many tributaries, the bed is that part of the channel below the OHWM, and the banks often extend above the OHWM. Channel characteristics depend on variables such as hydrology, lithology, climate, physiography, and gradient,²¹ among others. A tributary continues as far as a channel (i.e., bed and bank) is present. A natural or manmade break (e.g., rock outcrop, underground flow, dam, weir, diversion, or similar break) in the presence of a bed and bank or ordinary high water mark does not establish the upstream limit of a tributary in cases where a bed and bank and an ordinary high water mark can be identified upstream and downstream of the break. Tributaries that have been channelized by being lined with concrete are still considered tributaries for the purposes of this guidance.

Certain types of erosional features, such as gullies and rills, are not tributaries for purposes of this guidance. Gullies²² are relatively deep channels that are ordinarily formed on valley sides and floors where no well-defined channel previously existed. They are commonly found in areas with low-density vegetative cover or with soils that are highly erodible. Rills²³ are formed by overland water flows eroding the soil surface during rain storms. Erosional features that are not tributaries for the purposes of this guidance can also be found in environments where compacted soil and sparse vegetation have increased overland flow significantly. The two main processes that result in the formation of gullies and similar erosional features are downcutting and headcutting, which are forms of longitudinal (incising) erosion. These actions ordinarily result in erosional cuts that are often deeper than they are wide, with very steep banks, often small beds, and typically only carry water during precipitation events. The principal erosional processes that modify streams are also downcutting and headcutting. In streams, however, lateral erosion is also very important. The result is that streams, except on steep slopes or where soils are highly erodible, are characterized by the presence of more defined

bed and banks as compared to typical erosional features that are more deeply incised. Field staff should consider these factors as they distinguish streams and other tributaries that may be subject to Clean Water Act jurisdiction from other types of erosional features.

Non-tidal ditches (including roadside and agricultural ditches) are also not tributaries except where they have a bed, bank, and ordinary high water mark; connect directly or indirectly to a traditional navigable or interstate water; and have one of the following five characteristics:

- natural streams that have been altered (e.g., channelized, straightened or relocated);
- ditches that have been excavated in waters of the U.S., including wetlands;
- ditches that have relatively permanent flowing or standing water;
- ditches that connect two or more jurisdictional waters of the U.S.; or
- ditches that drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water.

If a ditch is considered a tributary, it will be evaluated in the same manner as other tributaries (i.e., plurality standard or Kennedy standard, as appropriate). Note that tidal ditches are by definition waters of the U.S.

Natural and man-made swales are also not tributaries for purposes of this guidance. In certain circumstances, however, ditches or swales include areas that meet the regulatory definition of “wetlands.” Wetland ditches and swales will be evaluated as wetlands under the plurality or Kennedy standard, not as tributaries (unless the ditch itself is considered a tributary for one of the reasons stated above). Ditches and swales are considered wetlands when they meet the applicable criteria in the Corps of Engineers Wetland Delineation Manual or the appropriate regional supplement to that Wetland Delineation Manual.

Even when not jurisdictional waters, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water or interstate water. In addition, these geographic features may function as “point sources” (i.e., “discernible, confined and discrete conveyance[s]” under CWA section 502(14)), such that discharges of pollutants to waters through these features could be subject to other CWA regulations (e.g., CWA section 402).

Tributaries Covered under the *Rapanos* Plurality Standard

EPA and the Corps will assert jurisdiction over “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters.^{viii} Under the plurality standard, relatively permanent waters are jurisdictional without making a significant nexus finding.

^{viii} 547 U.S. at 739. The agencies will not assert jurisdiction over such waters under the plurality standard within the Eleventh Circuit, i.e., waters in the states of Florida, Georgia and Alabama. See *United States v. Robison*, 505 F.3d 1208 (11th Cir.); *reh’g en banc denied*, 521 F.3d 1319 (11th Cir. 2007), *cert. denied*, 129 S. Ct. 627, 630 (2008). Instead the agencies will use the Kennedy standard only.

Under the plurality standard, a non-navigable tributary is jurisdictional when it satisfies the following characteristics:

- (1) The tributary is connected, directly or indirectly through other tributaries, to a downstream traditional navigable water, and
- (2) Flow in the tributary, except for drought years, is at least seasonal.

A central issue to the plurality standard is what constitutes “seasonal flow.” In this context, a water is “seasonal” when it has predictable flow during wet seasons in most years. The time period constituting “seasonal” will vary across the country. Rather than having distinct, rigid boundaries, stream reaches classified as perennial, intermittent, and ephemeral may more accurately be described as dynamic zones within stream networks. The length or extent of these zones may be highly variable and is dictated by multiple factors such as annual precipitation, evapotranspiration, and land- and water-use practices.²⁴ Thus, determination of whether a water meets the plurality standard for relatively permanent should involve determination of the length and timing of seasonal flows in the ecoregion in question.

Tributaries that are not relatively permanent will be evaluated under the Kennedy standard.

Tributaries Covered under the *Rapanos* Kennedy Standard

EPA and Corps regulations define “waters of the United States” to include tributaries to traditional navigable waters and to interstate waters.²⁵ Consistent with the agencies’ interpretation of the CWA, these regulations and the relevant case law, EPA and the Corps expect to assert jurisdiction over all tributaries to traditional navigable waters or interstate waters, provided that the tributary, alone or in combination with other similarly situated tributaries in the watershed, significantly affects the chemical, physical, or biological integrity of traditional navigable waters or interstate waters.

Thus, a tributary is jurisdictional where:

- (1) It is a tributary as defined for purposes of this guidance to a traditional navigable water or an interstate water; and
- (2) The tributary, alone or in combination with other tributaries in the watershed, has a significant nexus with the traditional navigable water or interstate water.

When performing a significant nexus analysis for a tributary, the first step is to determine whether that tributary has a bed and bank and an ordinary high water mark. If the tributary possesses those characteristics, the next step is to determine whether the tributary drains, or is part of a network of tributaries that drain, into a downstream traditional navigable water or interstate water. If it can be demonstrated that the tributary has a bed and bank, and an OHWM, and is part of a tributary system to a traditional navigable water or an interstate water, and, therefore, can transport pollutants, flood waters or other materials to a traditional navigable water or interstate water, then the agencies would generally expect that the tributary, along with the

other tributaries in the watershed (the "similarly situated" waters), can be demonstrated to have a significant nexus with the downstream traditional navigable water or interstate water. This expectation is based on the significant harm that pollutants can have on the physical, chemical, or biological integrity of the downstream traditional navigable water or interstate water.²⁶ The presence of a bed and bank and an OHWM are physical indicators of flow and it is likely that flows through all of the tributaries collectively in a watershed with the above characteristics are sufficient to transport pollutants, or other materials downstream to the traditional navigable water or interstate water in amounts that would significantly affect its chemical, physical or biological integrity.

When considering whether the tributary being evaluated eventually flows to an interstate water or traditional navigable water, field staff should trace the tributary connection using resources such as direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, soil survey data or other appropriate information.

Although the agencies generally expect that tributaries will be found to have a significant nexus with downstream traditional navigable waters or interstate waters, as explained above, it is still important that field staff document such a significant nexus through a site-specific analysis for tributaries that are not relatively permanent. Field staff should document, using available or readily obtainable information wherever possible, the flow characteristics and functions of the tributary or tributaries, and their hydrologic relationship to the nearest downstream traditional navigable water or interstate water. Hydrologic information may include volume, duration, and frequency of flow (if such information is readily available, e.g., through publicly available reports or on-line resources), as well as physical indicators of flow. Field staff may document the flow characteristics of tributaries by using physical indicators of flow, observations of flow considered in the context of local precipitation patterns and recent precipitation events, field reports, local expert statements, and other sources of information. Ordinary high water mark determinations are made by examining recent physical evidence of flow.²⁷ It is not necessary to document actual flow data via stream gages.²⁸ Field staff should also document other functions provided by the tributary, and describe how those functions may significantly affect the physical, chemical, or biological integrity of downstream traditional navigable waters or interstate waters.

Flow characteristics and functions of the tributary or tributaries and their hydrologic relationship to the nearest downstream traditional navigable water or interstate water may include topographic maps, gage data, historic records of water flow, statistical data, personal observations/records, and other relevant information. Consideration may also be given to relevant contextual factors that directly influence the hydrology of tributaries, including the size of the watershed, average annual rainfall, and average annual winter snow pack. The significant nexus evaluation should also discuss the potential for the tributaries to transport pollutants to a traditional navigable water or interstate water. Direct observation of the tributary is not necessary if other available documentation is sufficient to establish the significant nexus.

Examples of other functions provided by tributaries that may significantly affect the physical, chemical, or biological integrity of downstream traditional navigable waters or interstate waters include: distributing sediment²⁹ to maintain stream and riparian habitat; nutrient cycling and removal; providing habitat for amphibians, fish, and other aquatic or semi-aquatic

species living in and near the stream that may use the downstream waters for other portions of their life stages (e.g., spawning areas for recreationally or commercially important species); improving or maintaining biological integrity in downstream waters; and transferring nutrients and organic carbon vital to support downstream food webs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream).³⁰ Disruptions in these biological processes can significantly affect the functional capacity of the entire downstream system.³¹ Tributaries help to maintain base flow in the larger rivers downstream, which is particularly important in times of drought. At the same time, a network of tributaries can regulate the flow of water into downstream waters, moderate low flow and high flow extremes, reduce local and downstream flooding, and prevent excess erosion caused by flooding.³²

Section 5: Adjacent Wetlands

The agencies will assert Clean Water Act jurisdiction over adjacent wetlands that meet either the plurality standard or the Kennedy standard under *Rapanos*.

Wetlands Covered Under the *Rapanos* Plurality Standard

EPA and the Corps will assert jurisdiction over “wetlands with a continuous surface connection to” “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters.^{ix}

The plurality opinion in *Rapanos* created a standard for finding statutory jurisdiction under the CWA for wetlands, which is related to the presence of a physical connection between the wetland and the relatively permanent water to which it is adjacent. Under the plurality standard, wetlands with a continuous surface connection to relatively permanent waters are jurisdictional without the legal obligation to make a significant nexus finding.

Under the plurality standard, an adjacent wetland is jurisdictional when it satisfies the following characteristics:

- (1) The wetland is adjacent to a relatively permanent, non-navigable tributary, that is connected to a downstream traditional navigable water, and
- (2) A continuous surface connection exists between the wetland and a relatively permanent tributary where the wetland directly abuts the water (e.g., they are not separated by uplands, a berm, dike, or similar feature). A “continuous surface connection” does not require the presence of water at all times in the connection between the wetland and the jurisdictional water.

Wetlands Covered Under the *Rapanos* Kennedy Standard

^{ix} 547 U.S. at 739, 742. As noted, the agencies will not assert jurisdiction over such waters under the plurality standard within the Eleventh Circuit, *i.e.*, waters in the states of Florida, Georgia and Alabama. See *United States v. Robison*, *supra*, footnote h.

APPENDIX D

NPDES Water Transfers Rule Preamble

parts 51 and 52. See, 72 FR 72607, December 21, 2007.

EPA is now correcting the entirety of that first full paragraph at 73 FR 23958 by replacing it with the following paragraph:

“The ‘reasonable possibility’ standard identifies, for sources and reviewing authorities, the circumstances under which a major stationary source undergoing a modification that does not trigger major NSR must keep records. EPA’s December 2007 action clarified the meaning of the term ‘reasonable possibility’ through changes to the federal rule language in 40 CFR parts 51 and 52. In the present case, although Alabama’s rules include the term ‘reasonable possibility,’ Alabama’s rules require recordkeeping for facilities for which there is a reasonable possibility as well as those for which there is not. Therefore, Alabama’s SIP revisions are approvable.”

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 4, 2008.

Russell L. Wright, Jr.,

Acting Regional Administrator, Region 4.

[FR Doc. E8–13348 Filed 6–12–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA–HQ–OW–2006–0141; FRL–8579–3]

RIN 2040–AE86

National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing a regulation to clarify that water transfers are not subject to regulation under the National

Pollutant Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements.

This rule is consistent with EPA’s June 7, 2006, proposed rule, which was based on an August 5, 2005, interpretive memorandum entitled “Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers.”

DATES: This final rule is effective on August 12, 2008. For judicial review purposes, this action is considered issued as of 1 p.m. eastern daylight time (e.d.t.) on June 27, 2008, as provided in 40 CFR 23.2. Under section 509(b)(1) of the Clean Water Act, judicial review of the Administrator’s action can only be had by filing a petition for review in the United States Court of Appeals within 120 days after the decision is considered issued for purposes of judicial review.

ADDRESSES: The administrative record is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/DC), EPA West 1301 Constitution Ave., Room 3334, NW., Washington DC 20460. The administrative record is also available via EPA Dockets (Edocket) at <http://www.regulations.gov> under docket number EPA–HQ–OW–2006–0141. The rule and key supporting documents are also electronically available on the Internet at <http://www.epa.gov/npdes/agriculture>.

FOR FURTHER INFORMATION CONTACT: For additional information contact Virginia Garelick, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington,

DC 20460; telephone number: 202–564–2316; fax: 202–564–6384; e-mail address: garelick.virginia@epa.gov.

SUPPLEMENTARY INFORMATION:

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I. General Information

A. Does This Action Apply to Me?

This action applies to those involved in the transfer of waters of the United States. The following table provides a list of standard industrial codes for operations potentially covered under this rule.

TABLE 1.—ENTITIES POTENTIALLY REGULATED BY THIS RULE

Category	NAICS	Examples of potentially affected entities
Resource management parties (includes state departments of fish and wildlife, state departments of pesticide regulation, state environmental agencies, and universities).	924110 Administration of Air and Water Resource and Solid Waste Management Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of water resource programs; the administration and regulation of water pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.

TABLE 1.—ENTITIES POTENTIALLY REGULATED BY THIS RULE—Continued

Category	NAICS	Examples of potentially affected entities
Public Water Supply	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
	237110 Water and Sewer Line and Related Structures Construction.	This category includes entities primarily engaged in the construction of water and sewer lines, mains, pumping stations, treatment plants and storage tanks.
	237990 Other Heavy and Civil Engineering Construction.	This category includes dam Construction and management, flood control structure construction, drainage canal and ditch construction, flood control project construction, and spillway, floodwater, construction.
	221310 Water Supply	This category includes entities engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in 40 CFR 122.3. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OW-2006-0041. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although listed in the index, some information, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Water Docket in the EPA Docket Center, EPA West, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone

number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Web site under the **Federal Register** listings at <http://www.regulations.gov>.

C. Under What Legal Authority Is This Final Rule Issued?

This final rule is issued under the authority of sections 402 and 501 of the Clean Water Act., 33 U.S.C. 1342 and 1361.

D. What Is the Comment Response Document?

EPA received a large number of comments on the proposed rule, including thousands of form letters. EPA evaluated all of the comments submitted and prepared a Comment Response Document containing both the comments received and the Agency's responses to those comments. The Comment Response Document complements and supplements this preamble by providing more detailed explanations of EPA's final action. The Comment Response Document is available at the Water Docket.

II. Background and Definition of Water Transfers

Water transfers occur routinely and in many different contexts across the United States. Typically, water transfers route water through tunnels, channels, and/or natural stream water features, and either pump or passively direct it

for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. Water transfers can be relatively simple, moving a small quantity of water a short distance, or very complex, transporting substantial quantities of water over long distances, across both State and basin boundaries. Water transfers may be of varying complexities and sizes; there may be multiple reservoirs, canals, or pumps over the course of the transfer, or the route may be a more direct connection between the donor and the receiving waterbody. There are thousands of water transfers currently in place in the United States, including sixteen major diversion projects in the western States alone. Examples include the Colorado-Big Thompson Project in Colorado and the Central Valley Project in California.

Water transfers are administered by various federal, State, and local agencies and other entities. The Bureau of Reclamation administers significant transfers in western States to provide approximately 140,000 farmers with irrigation water. With the use of water transfers, the Army Corps of Engineers keeps thousands of acres of agricultural and urban land in southern Florida from flooding in former areas of Everglades wetlands. Many large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins. For example, both the cities of New York and Los Angeles depend on water transfers from distant watersheds to meet their

municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers, and these transfers are an integral component of U.S. infrastructure.

The question of whether or not an NPDES permit is required for water transfers arises because activities that result in the movement of waters of the U.S., such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, typically move pollutants from one waterbody (donor water) to another (receiving water). Although there have been a few isolated instances where entities responsible for water transfers have been issued NPDES permits, Pennsylvania is the only NPDES permitting authority that regularly issues NPDES permits for water transfers. Pennsylvania began issuing permits for water transfers in 1986, in response to a State court decision mandating the issuance of such permits. See *DELAWARE Unlimited v. DER*, 508 A.2d 348 (Pa. Cmwlth, 1986). In addition, some Courts of Appeals have required NPDES permits for specific water transfers associated with the expansion of a ski resort and the supply of drinking water. See, e.g., *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir 2001), *aff'd*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2nd Cir 2006). Otherwise, however, water transfers have not been regulated under section 402 of the Clean Water Act (CWA or the Act).

The Supreme Court recently addressed the issue of whether an NPDES permit is necessary for the mere transfer of water in *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Supreme Court in *Miccosukee* vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from one navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were “meaningfully distinct.”¹ If they were not, an NPDES permit would not be required. The Court declined to resolve the question of whether water transfers require NPDES permits when the waterbodies at issue are meaningfully distinct. The Court noted

¹ At the time of this rulemaking, the District Court has stayed its proceedings until resolution of a similar case in the same District Court, *Friends of the Everglades v. South Florida Water Management District*.

that some legal arguments made by the parties regarding this question had not been raised in the lower court proceedings and noted that these arguments would be open to the parties on remand. *Id.* at 109.

On August 5, 2005, EPA issued a legal memorandum entitled “Agency Interpretation on Applicability of section 402 of the Clean Water Act to Water Transfers” (“interpretive memorandum”). The principal legal question addressed in the interpretive memorandum was whether the movement of pollutants from one water of the U.S. to another by a water transfer is the “addition” of a pollutant potentially subjecting the activity to the permitting requirement under section 402 of the Act. Based on the statute as a whole and consistent with the Agency’s longstanding practice, the interpretive memorandum concluded that Congress generally expected water transfers would be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.

On June 7, 2006, EPA proposed regulations based on the analysis contained in the interpretive memorandum to expressly state that water transfers are not subject to regulation under section 402 of the CWA. The Agency proposed to define water transfers 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.” The Act reserves the ability of States to regulate water transfers under State law and this proposed rulemaking was not intended to interfere with this State prerogative. See CWA section 510.

EPA is issuing a final regulation that is nearly identical to the proposed rule. (Minor changes have been made for clarity.) Through today’s rule, the Agency concludes that water transfers, as defined by the rule, do not require NPDES permits because they do not result in the “addition” of a pollutant. Consistent with the proposed rule, EPA defines water transfers in the following manner: “Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.” In order to constitute a “water transfer” under this rule, and, therefore, be exempt from the requirement to obtain an NPDES permit, the water being conveyed must be a water of the

U.S.² prior to being discharged to the receiving waterbody. If the water that is being conveyed is not a water of the U.S. prior to being discharged to the receiving body, then that activity does not constitute a water transfer under today’s rule. Additionally, the water must be conveyed from one water of the U.S. to another water of the U.S. Conveyances that remain within the same water of the U.S., therefore, do not constitute water transfers under this rule, although movements of water within a single water body are also not subject to NPDES permitting requirements. As the rule makes clear, in order to be a water transfer under the rule, the water must be conveyed without being subjected to an intervening industrial, municipal, or commercial use.

Consider water that is being moved from Reservoir A to Reservoir B in a different watershed. In order to get from Reservoir A to Reservoir B, the water must first be released through a dam. The water then travels down River A, which is considered a water of the U.S. Next, the water is conveyed from River A to River B through a tunnel. Finally, the water travels down River B, also a water of the U.S., and flows into Reservoir B. There are several points in this example where water is conveyed from one body to another, but not all of those points would themselves constitute a “water transfer” because they are not the conveyance of “waters of the United States to another water of the United States.” The first example is the release from Reservoir A to River A. This does not constitute a water transfer under EPA’s definition because the water on both sides of the dam is part of the same water of the U.S.³ The next movement is the release from River A into River B, through a tunnel. This release constitutes a water transfer under the scope of this rule because it conveys water from one water of the U.S. to another water of the U.S. without subjecting the water to an intervening industrial, municipal or

² Waters of the U.S. are defined for purposes of the NPDES program in 40 CFR 122.2 and this rulemaking does not seek to address what is within the scope of that term.

³ It should be noted, however, that this release would still not require an NPDES permit because EPA and the Federal courts have determined that a discharge from a dam does not result in an “addition” of a pollutant unless the dam itself discharges a pollutant such as grease into the water passing through the dam. See *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Fed’n v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988). Cf. *S.D. Warren Co. v. Maine Board of Environmental Protection*, 126 S.Ct. 1843 (2006) (Certification under CWA section 401 may be needed in some instances).

commercial use. Therefore, unless this conveyance itself introduces pollutants into the water being conveyed, the release will not require an NPDES permit under today's rule. River B's subsequent flow into Reservoir B, which is formed by a dam on Reservoir B, does not constitute a water transfer because it is merely movement within the same water of the U.S., and, as discussed above, would not require an NPDES permit for such movement.

The remainder of the preamble to this final rule is organized as follows. Section III discusses the rationale for the final rule based on the language, structure, and legislative history of the Clean Water Act. Section IV summarizes and responds to the major comments received in response to the scope of the proposed rule. Section V reviews statutory provisions and various executive orders.

III. Rationale for the Final Rule

On June 7, 2006, EPA published a proposed rule that would exclude from NPDES permit requirements discharges from water transfers that do not subject the water to an intervening industrial, municipal, or commercial use, so long as pollutants are not introduced by the water transfer activity itself. This proposal, like EPA's August 5, 2005, interpretive memorandum, explained that no one provision of the Act expressly addresses whether water transfers are subject to the NPDES program but described the indicia of Congressional intent that water transfers not be so regulated. Therefore, today's rule appropriately defers to congressional concerns that the statute not unnecessarily burden water quantity management activities and excludes water transfers from the NPDES program. This section will review the legal framework for evaluating EPA's interpretation of the CWA, explain the Agency's interpretation of the CWA, including a brief survey of prior litigation over the relevant statutory terms, and outline the relevant legislative history.

A. Legal Framework

Under what is traditionally viewed as *Chevron* analysis, a court examining the legality of an agency's interpretation of a statute is to first ask whether the statute speaks clearly to the precise question at issue and must give effect to the unambiguously expressed intent of Congress if such unambiguous intent can be discerned. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–843 (*Chevron*); *National Ass. of Homebuilders, et al. v. Defenders of Wildlife, et al.*, 127 S.Ct. 2518, 2534

(2007) (*NAHB*). To the extent that a statute does not speak clearly to the specific issue, the Agency interpretation must be upheld if it is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843; *NAHB*, 127 S.Ct. at 2534. Courts are required to accept an agency's reasonable interpretation of a statute, even if this interpretation differs from what the court believes is the "best" statutory interpretation. *National Cable and Telecommunications Ass'n, et al. v. Brand X, et al.*, 545 U.S. 967, 980 (2005) (*Brand X*).

Deference to an agency interpretation of a statute under *Chevron* is appropriate where Congress has authorized an agency to make rules carrying the force of law, and such authorization is apparent where the agency is empowered to make rules or adjudicate issues or there are other indications of comparable congressional intent. *United States v. Mead Corp.*, 533 U.S. 218 (2001). Congress has expressly authorized EPA to prescribe regulations as are necessary to administer the CWA, and today's rule has been promulgated to address the question whether water transfers require NPDES permits. CWA section 501(a); 33 U.S.C. 1361(a); 71 FR 32887 (June 7, 2006).

As discussed below, EPA has reviewed the language, structure and legislative history of the CWA and concludes that today's rule, which clarifies that NPDES permits are not required for transfers of waters of the United States from one water body to another, is a permissible construction of the statute. Taken as a whole, the statutory language and scheme support the conclusion that permits are not required for water transfers.

B. Statutory Language and Structure

The Clean Water Act prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 402. CWA section 301(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA section 502(12). The legal question addressed by today's rule is whether a water transfer as defined in the new regulation constitutes an "addition" within the meaning of section 502(12).

The term "addition" has been interpreted by courts in a variety of contexts that are relevant here. Several courts of appeals have determined that water flowing through dams and hydroelectric facilities does not constitute an addition of a pollutant under the CWA. Specifically, the Court

of Appeals for the D.C. Circuit agreed with EPA that the term "addition" may reasonably be limited to situations in which "the point source itself physically introduces a pollutant into a water from the outside world." *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (*Gorsuch*) (accepting EPA's view that the requirement for an NPDES permit "is established when the pollutant first enters the navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river).") The Court of Appeals for the Sixth Circuit reached the same conclusion with regard to a hydropower facilities operating on Lake Michigan. *National Wildlife Fed'n v. Consumers Power Co.* 862 F.2d 580, 584 (6th Cir. 1988) (*Consumers Power*) (agreeing with the *Gorsuch* Court's conclusion that EPA's construction of "addition" is a permissible one). Both the *Gorsuch* and *Consumers Power* courts accorded deference to EPA's interpretation of the CWA, and specifically to its interpretation of the term "addition." *Gorsuch*, 693 F.2d at 166–167; *Consumers Power*, 862 F.2d at 584.

Three other Courts of Appeals, however, have concluded that where a water transfer involves distinct waters of the United States, the transfer constitutes an "addition" of pollutants. *Dubois v. U.S. Dept. of Agriculture, et al.*, 102 F.3d 1273, 1298–1300 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491–93 (2nd Cir. 2001) (*Catskill I*); *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), *vacated by Miccosukee*, 541 U.S. at 112.⁴ These three Courts of Appeals construed the term "addition"

⁴ EPA recognizes that the approach adopted by these three courts is at odds with today's rule. None of these three courts, however, viewed the question of statutory interpretation through the lens of *Chevron* deference. *DuBois*, 102 F.3d at 1285, n. 15 (*Chevron* does not apply because the court "was not reviewing an agency's interpretation of the statute that it was directed to enforce."); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82 (2nd Cir. 2006) (*Catskill II*) ("The City concedes that this EPA interpretation is not entitled to *Chevron* deference."); *Catskill I*, 273 F.3d at 490 (Declining to apply *Chevron* deference, but acknowledging that "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate."); *Miccosukee*, 280 F.3d at 1367, n. 4 ("The EPA is no party to this case; we can ascertain no EPA position applicable to [the water transfer at issue] to which to give any deference, much less *Chevron* deference."). Moreover, the approaches adopted by the *Gorsuch* and *Consumers Power* courts is compatible with today's rule.

so as to include transfers of water from one body to another distinct body (*Catskill I*, 273 F.3d at 491 (“EPA’s position * * * is that for there to be an ‘addition,’ a ‘point source must introduce the pollutant into navigable water from the outside world.’ We agree with this view *provided that ‘outside world’ is construed as any place outside the particular water body to which pollutants are introduced.*”) (internal citations omitted, emphasis added); *Catskill II*, 451 F.3d at 82–85) or transfers that cause water to move in a direction it would not ordinarily flow (*DuBois*, 102 F.3d at 1297; *Catskill I*, 273 at 493–94 (explaining *DuBois*); *Miccosukee*, 280 F.3d at 1368–69).

In pending litigation, on the other hand, the United States has taken the position that the Clean Water Act generally does not subject water transfers to the NPDES program:

The statute defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. 1362(12). When the statutory definition of “navigable waters”—*i.e.*, “the waters of the United States,” 33 U.S.C. 1362(7)—is inserted in place of “navigable waters,” the statute provides that NPDES applies only to the “*addition* of any pollutant to the waters of the United States.” Given the broad definition of “pollutant,” transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already *in* “the waters of the United States” before, during, and after the water transfer. Thus, there is no “addition”; nothing is being added “*to*” “the waters of the United States” by virtue of the water transfer, because the pollutant at issue is already part of “the waters of the United States” to begin with. Stated differently, when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as “waters of the United States,” and thus nothing is added to those waters from the outside world.

Brief for the United States in *Friends of the Everglades v. South Florida Water Management Dist.*, No. 07–13829–H (11th Cir.).

The Agency has concluded that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend to subject water transfers to the NPDES program. Interpreting the term “addition” in that context, EPA concludes that water transfers, as defined by today’s rule, do not constitute an “addition” to navigable waters to be regulated under the NPDES program. Instead, Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities.

In interpreting the term “addition” in section 502(12) of the statute, EPA is guided by several principles.

“Addition” is a general term, undefined by the statute. Partly for this reason, the courts have accorded substantial discretion to EPA in interpreting the term in the context of the “dams” cases. *Gorsuch*, 693 F.2d at 175 (finding the statute capable of supporting multiple interpretations, the legislative history unhelpful, and concluding that Congress would have given EPA discretion to define “addition” had it expected the meaning of the term to be disputed); *Consumers Power*, 862 F.2d at 584–85 (agreeing with the analysis in *Gorsuch*). Moreover, several alternative ways of interpreting the term “addition” have been proposed in the context of water transfers. As noted above, EPA’s longstanding position is that an NPDES pollutant is “added” when it is introduced into a water from the “outside world” by a point source. *Gorsuch*, 693 F.2d at 174–175. Under one interpretation, advanced by the 2nd Circuit in *Catskill Mountain*, “the outside world” means anywhere outside the particular waterbody receiving the pollutant, and so a permit in that case was required for movement of pollutants between distinct waterbodies. *Catskill I*, 273 F.3d at 491. EPA does not agree with this understanding of the term “outside world” as evinced by its long-standing practice of generally not requiring NPDES permits for transfers between water bodies, which it has defended against court challenges asserting that such transfers do require such permits. Rather, EPA believes that an addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred.

As noted above, various courts have reached different conclusions in determining when movement of waters of the United States containing pollutants constitutes an “addition” of a pollutant. To resolve the confusion created by these conflicting approaches, the Agency has looked to the statute as a whole for textual and structural indices of Congressional intent on the question whether water transfers that do not themselves introduce new pollutants require an NPDES permit.

Statutory construction principles instruct that the Clean Water Act should be interpreted by analyzing the statute as a whole. *United States v. Boisdore’s Heirs*, 49 U.S. 113, 122 (1850). The Supreme Court has long explained “in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and

policy.” *Id. See also, Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995), *Smith v. United States*, 508 U.S. 223, 233 (1993), *United States Nat’l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). In general, the “whole statute” interpretation analysis means that “a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” Norman J. Singer, *Statutes and Statutory Construction* vol. 2A § 46:05, 154 (6th ed., West Group 2000). As the Second Circuit has explained with regard to the CWA:

Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text, most helpful to our interpretation of the CWA in this case are two rules. First, when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure [quoting *United States v. Dauray*, 215 F.3d 257, 262 (2d Cir. 2000)]. Second, “absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.” *United States v. Turkette*, 452 U.S. 576, 580 (1981).

Natural Res. Def. Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001). *See also*, Singer, vol. 3B § 77:4, at 256–258.

A holistic approach to the text of the CWA is needed here in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation’s waters. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and State and local programs. Looking at the statute as a whole is necessary to ensure that the analysis herein is consonant with Congress’s overall policies and objectives in the management and regulation of the nation’s water resources.

While the statute does not define “addition,” sections 101(g), 102(b), 304(f), and 510(2) provide a strong indication that the term “addition” should be interpreted in accordance with the text of the more specific sections of the statute. In light of Congress’ clearly expressed policy not to unnecessarily interfere with water resource allocation and its discussion of changes in the movement, flow or

circulation of any navigable waters as sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret "addition" as not including the mere transfer of navigable waters.

The specific statutory provisions addressing the management of water resources—coupled with the overall statutory structure—provide textual support for the conclusion that Congress generally did not intend for water transfers to be regulated under section 402. The Act establishes a variety of programs and regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." CWA section 101(b).

Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries, stating:

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

CWA section 101(g). While section 101(g) does not prohibit EPA from taking actions under the CWA that it determines are needed to protect water quality,⁵ it nonetheless establishes in the text of the Act Congress's general direction against unnecessary Federal interference with State allocations of water rights.

Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that, absent a clear Congressional intent to the contrary, it is reasonable to read the

statute as not requiring NPDES permits for water transfers. See *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")

An additional statutory provision, section 510(2), similarly provides:

Except as expressly provided in this Act, nothing in this Act shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Like section 101(g), this provision supports the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation.

Finally, one section of the Act—304(f)—expressly addresses water management activities. Mere mention of an activity in section 304(f) does not mean it is exclusively nonpoint source in nature. See *Miccossukee* 541 U.S. at 106 (noting that section 304(f)(2)(F) does not explicitly exempt nonpoint sources if they also fall within the definition of point source). Nonetheless, section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program. See H.R. Rep. No. 92–911, at 109 (1972), *reprinted in* Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 796 (Comm. Print 1973) ("[t]his section * * * on * * * nonpoint sources is among the most important in the 1972 Amendments") (emphasis added)). This section directed EPA to issue guidelines for identifying and evaluating the nature and extent of *nonpoint* sources of pollution,⁶ as well as processes, procedures and methods to control pollution from, among other things, "changes in the *movement, flow or circulation of any navigable waters* or ground waters, including changes caused by the construction of *dams, levees, channels, causeways, or flow diversion facilities.*" CWA 304(f)(2)(F) (emphasis added).

While section 304(f) does not exclusively address nonpoint sources of pollution, it nonetheless "concerns nonpoint sources" (*Miccossukee*, 541 U.S. at 106) and 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 authorities, rather than the NPDES program. Today's rule accords with the direction to EPA and other federal agencies in section 101(g) to work with State and local agencies to develop "comprehensive solutions" to water pollution problems "in concert with programs for managing water resources."

The text of these sections of the Act together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution. Because the NPDES program focuses on discharges from point sources of pollutants, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution, which is the term used for the nonpoint source program. It is this type of non-point source pollution that may be associated with water transfers.

In several important ways, water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from an industrial, commercial or municipal operation. Rather than discharge effluent, water transfers convey one water of the U.S. into another. Additionally, the operators of water control facilities are generally not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through point and nonpoint sources unassociated with those facilities and beyond control of the project operators. Congress generally intended that pollutants be controlled at the source whenever possible. See S. Rep. No. 92–414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharge of pollutants be controlled at the source").⁷ The pollution from transferred waters is more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, e.g., CWA section 102(b) (reservoir planning); CWA section 208(b)(2)(F) (land use planning to

⁵ *PUD No. 1 of Jefferson County v. Wash. State Dep't. of Ecology*, 511 U.S. 700, 720 (1994) ("Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.").

⁶ Sources not regulated under sections 402 or 404 are generically referred to as "nonpoint sources." See *Consumers Power*, 862 F.2d at 582 ("nonpoint source" is shorthand for and "includes all water quality problems not subject to section 402") (quoting *Gorsuch*, 693 F.2d at 166) (internal quotation marks omitted).

⁷ Recognition of a general intent to control pollutants at the source does not mean that dischargers are responsible only for pollutants that they generate; rather, point sources need only convey pollutants into navigable waters to be subject to the Act. See *Miccossukee* at 105. Municipal separate storm sewer systems, for example, are clearly subject to regulation under the Act. CWA section 402(p).

reduce agricultural nonpoint sources of pollution); CWA section 319 (nonpoint source management programs); and CWA section 401 (state certification of federally licensed projects). Congress acknowledged this when it directed Federal agencies to co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water sources.

The Agency, therefore, concludes that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend to subject water transfers to the NPDES program. Interpreting the term "addition" in that context, EPA concludes that water transfers, as defined by today's rule, do not constitute an "addition" to navigable waters to be regulated under the NPDES program. Rather, Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities.

C. Legislative History

The legislative history of the Clean Water Act also supports the conclusion that Congress generally did not intend to subject water transfers to the NPDES program. First, the legislative history of section 101(g) reveals that "[i]t is the purpose of this [provision] to insure that State [water] allocation systems are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978); see *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 721 (1994).

Notably, the legislative history of the Act discusses water flow management activities in the context of the nonpoint source program only. In discussing section 304(f), the House Committee Report 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.

This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. * * * The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as * * * *natural and manmade changes in the normal flow of surface and ground waters.*

H.R. Rep. No. 92-911, at 109 (1972) (emphasis added).

In the legislative history of section 208 of the Act, the House Committee report noted that in some States, water resource management agencies allocating stream flows are required to consider water quality impacts. The Report stated:

[I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system.

H.R. Rep. No. 92-911, at 96 (1972).

Thus, Congress recognized that the new section 402 permitting program was not the only viable approach for addressing water quality issues associated with State water resource management. The legislative history makes clear that Congress generally did not intend a wholesale transfer of responsibility for water quality away from water resource agencies to the NPDES authority. Rather, Congress encouraged States to obtain approval of authority to administer the NPDES program under section 402(b) so that the NPDES program could work in concert with water resource agencies' oversight of water management activities to ensure a "balanced management control system." *Id.*

In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress generally did not intend to subject water transfers to the NPDES program. Water transfers are an integral part of water resource management; they embody how States and resource agencies manage the nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out. EPA's conclusion that the NPDES program does not apply to water transfers respects Congressional intent, comports with the structure of the Clean Water Act, and gives meaning to sections 101(g) and 304(f) of the Act.

Based on these reasons, today's rule is within EPA's authority and consistent with the CWA.

IV. Public Comment

EPA received many comments from the public and a number of states stating

that the Agency does not have authority to exclude from the requirement to obtain NPDES permits, a specific class of dischargers (in this case, water transfers). These commenters were concerned that the proposed rule could jeopardize the NPDES and water quality standards (WQS) programs. In particular, they feared that point source regulation of discharges from impoundments used to settle mining wastes might fall outside the scope of section 402 if the proposed rule were finalized. In response to these comments, the Agency believes that impoundments used to settle mining process water or waste water would generally constitute "waste treatment systems" designed to meet the requirements of the CWA and would be excluded from the definition of "waters of the United States." See 40 CFR 122.2 (definition of "Waters of the United States"). The addition of pollutants from a waste treatment system to a water of the United States triggers the permitting requirement, and today's rule therefore does not affect the permitting of such facilities.

Some commenters argued that the proposed rule is inconsistent with section 404 of the CWA (permits for dredged or fill material). They stated that dredged material is listed as a pollutant under section 502 of the CWA and that the proposed rule implies that dredged material never requires a permit unless the dredged material originates from a waterbody that is not a water of the U.S. EPA believes that today's final rule will not have an effect on the 404 program. The statutory definition of "pollutant" includes "dredged spoil," which by its very nature comes from a waterbody. 33 U.S.C. 1362(6); 40 CFR 232.2; *United States v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006); *United States v. Deaton*, 209 F.3d 331, 335-336 (4th Cir. 2000); *Borden Ranch Partnership v. United States*, 261 F.3d 810, 814 (9th Cir. 2001). Because Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in CWA section 301, today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit. 33 U.S.C. 1344.

As explained above, EPA disagrees that Congress generally intended water transfers to obtain NPDES permits. EPA believes that this action will add clarity to an area in which judicial decisions have created uncertainty, and for reasons previously described in section III of this preamble, concludes that Congress generally intended to leave the

oversight of water transfers to authorities other than the NPDES program. Congress made clear that the CWA is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries. Specific statutory provisions in the CWA addressing the management of water resources denote that Congress generally did not intend for water transfers to be regulated under section 402 of the CWA. Rather, sections 101(b), 208, and 304(f), in particular, establish a variety of programs and regulatory initiatives that more appropriately address water transfers. EPA's conclusion that the NPDES program does not apply to water transfers respects Congressional intent and comports with the structure of the CWA.

Definition of a Water Transfer

In the proposed rule, EPA specifically requested comment on whether the proposed definition of a water transfer properly achieves the Agency's objective. Many commenters supported the Agency's proposed definition, either generally or explicitly. On the other hand, some commenters found the proposed definition too narrow and suggested that the Agency defer to state law. Others found the definition overly broad and suggested that it may encompass too many activities. These concerns, among others, are addressed in the following discussions.

In response to the comment suggesting that the proposed definition of a water transfer is too narrow and should also include transfers between waterbodies defined as waters of the State, even where they do not constitute waters of the United States under the CWA, EPA believes that making such a change would not be appropriate because the NPDES program only applies to waters of the U.S. The same commenter also suggested that EPA defer to state law in defining a water transfer. In response, the Agency finds that a definition applicable nationwide is important to provide consistency in the application of this rule. However, nothing in this rule precludes a State, under State law, from regulating water transfers that are not subject to section 402 of the Clean Water Act. States may not exclude from NPDES permit requirements sources that are point sources under Federal law, including those that do not meet the definition of a water transfer in today's rule. For example, a point source that subjects waters of the United States to an intervening industrial, municipal or commercial use could not be exempted

from NPDES permitting requirements under State law.

This rule expressly states that "discharges from a water transfer" are not subject to NPDES permitting. The Agency defines a water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." A water transfer is an engineered activity that diverts a water of the U.S. to a second water of the U.S. Thus, commenters who read the natural convergence of two rivers as being a water transfer are incorrect, though such natural convergences also do not require NPDES permits.

Some commenters sought clarification of certain elements of the term "water transfer" while others suggested changes they believed would either clarify or improve the scope of the term. Commenters suggested that EPA change the use of the term "activity" to either "occasion," "instance," or "occurrence," such that the definition would read: "water transfer means an instance in which waters of the U.S. are conveyed * * *." The commenters' concern is that the term "activities" narrows the rule to only human directed or controlled events rather than any instance in which water supplies are moved. The Agency disagrees that the change is necessary. By "activity," the Agency means any system of pumping stations, canals, aqueducts, tunnels, pipes, or other such conveyances constructed to transport water from one water of the U.S. to another water of the U.S. Such a system may consist of a single tunnel or pumping station or it may require the use of multiple facilities along the course of the transfer to reach the second water of the U.S.

Intervening Industrial, Municipal, or Commercial Use

A discharge of a pollutant associated with a water transfer resulting from an intervening commercial, municipal, or industrial use, or otherwise introduced to the water by a water transfer facility itself would require an NPDES permit as any discharge of a pollutant from a point source into a water of the U.S. would. The most frequent comment on the proposed definition was that the phrase "intervening industrial, municipal, or commercial use" was unclear or overbroad.⁸ EPA disagrees

⁸EPA's discussion of intervening uses is not intended to address or exclude any other activity that is currently subject to NPDES permitting. For example, this rule does not affect EPA's longstanding position that, if water is withdrawn from waters of the U.S. for an intervening industrial, municipal or commercial use, the

that this phrase is unclear or overbroad, and provides clarification and examples of intervening uses below.

For example, if the water is withdrawn to be used as cooling water, drinking water, irrigation, or any other use such that it is no longer a water of the U.S. before being returned to a water of the U.S., the water has been subjected to an intervening use.⁹ In contrast, a water pumping station, pipe, canal, or other structure used solely to facilitate the transfer of the water is not an intervening use.

The reintroduction of the intake water and associated pollutants from an intervening use through a point source is an "addition" and has long been subject to NPDES permitting requirements. *See, e.g.*, 40 CFR 122.2 (definition of process wastewater); 40 CFR 125.80 through 125.89 (regulation of cooling towers); 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR Part 132, Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Moreover, a discharge from a waste treatment system, for example, to a water of the United States, would not constitute a water transfer and would require an NPDES permit. *See* 40 CFR 122.2. In these situations, the reintroduction of water and that water's associated pollutants physically introduces pollutants from the outside world and, therefore, is an "addition" subject to NPDES permitting requirements. The fact that some of the pollutants in the discharge from an intervening use may have been present in the source water does not remove the need for a permit, although, under some circumstances, permittees may receive "credit" in their effluent limitations for such pollutants. *See* 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR Part 132, Appendix F, Procedure 5-

reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. Nor does this rule change EPA's position, upheld by the Supreme Court in *Miccossukee*, that the definition of "discharge of a pollutant" in the CWA includes coverage of point sources that do not themselves generate pollutants. The Supreme Court stated, "A point source is, by definition, a 'discernible, confined, and discrete conveyance' section 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' Section 1362(7)." *Miccossukee*, 541 U.S. at 105.

⁹Note that return flows from irrigated agriculture are exempt from the requirement to obtain a NPDES permit under both the Act itself and 40 CFR 122.3. Today's rule does not affect that exemption.

D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes).

Similarly, an NPDES permit is normally required if a facility withdraws water from a water of the U.S., removes preexisting pollutants to purify the water, and then discharges the removed pollutants (perhaps in concentrated form) back into the water of the U.S. while retaining the purified water for use in the facility. An example of this situation is a drinking water treatment facility which withdraws water from streams, rivers, and lakes. The withdrawn water typically contains suspended solids, which are removed to make the water potable. The removed solids are a waste material from the treatment process and, if discharged into waters of the U.S., are subject to NPDES permitting requirements, even though that waste material originated in the withdrawn water. *See, e.g., In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 2000 WL 1664964 (EPA Env'tl. App. Bd. Nov. 1, 2000) (rejecting, on procedural grounds, challenges to NPDES permits for two drinking water treatment plants that draw raw water from the Arizona Canal, remove suspended solids to purify the water, and discharge the solids back into the Canal); *Final NPDES General Permits for Water Treatment Facility Discharges in the State of Massachusetts and New Hampshire*, 65 FR 69,000 (2000) (NPDES permits for discharges of process wastewaters from drinking water treatment plants).

The Clean Water Act also clearly imposes permitting requirements on publicly owned treatment works, and large and medium municipal separate storm sewer systems. *See* CWA sections 402(a), 402(p)(1)–(4). Congress amended the Clean Water Act in 1987 specifically to add new section 402(p) to better regulate stormwater discharges from point sources. Water Quality Act of 1987, Public Law 100–4, 101 Stat. 7 (1987). Again, this interpretation regarding water transfers does not affect EPA's longstanding regulation of such discharges. These examples are mentioned to illustrate what is meant by "intervening industrial, municipal, or commercial use," and are situations not associated with water transfers.

Hydroelectric Operations

Some commenters, including State agencies with hydroelectric resources, utilities, and water districts expressed concern that if hydroelectric operations incidental to a water transfer were considered an intervening use, the water transfer would be disqualified from the

exemption. Utilities often take advantage of the change in elevation over the course of a water transfer by installing hydroelectric facilities. The California State Water Resources Control Board highlighted in their comment that the Central Valley Project includes eleven power plants and that the State Water Project, the Los Angeles Aqueduct, and the All American Canal also contain hydroelectric power plants.

Today's rule does not affect the longstanding position of EPA and the Courts that hydroelectric dams do not generally require NPDES permits. *See Gorsuch*, 693 F.2d 156; *Consumers Power* 862 F.2d 580. EPA agrees that the transfers described in California are excluded from NPDES permitting requirements unless, as discussed below, the hydroelectric facility itself introduces a pollutant such as grease into the water passing through the dam.

When Water Transfers Introduce Pollutants

Comments were also submitted regarding pollutants that were added by the water transfer. Commenters expressed concern that water transfers may have significant impacts on the environment, including (1) the introduction of invasive species, toxic blue-green algae, chemical pollutants, and excess nutrients; (2) increased turbidity; and (3) alteration of habitat (e.g., warm water into cold water or salt water into fresh water). In response to these comments, EPA notes that today's rule does not interfere with any of the states' rights or authorities to regulate the movement of waters within their borders. Rather, this rule merely clarifies that NPDES permits are not required for water transfers. States currently have the ability to address potential in-stream and/or downstream effects of water transfers through their WQS and TMDL programs. Nothing in today's rule affects the ability for states to establish WQS appropriate to individual waterbodies or waterbody segments.

The final rule, consistent with the proposed rule, would require NPDES permits for "pollutants introduced by the water transfer activity itself to the water being transferred." Water transfers should be able to be operated and maintained in a manner that ensures they do not themselves add pollutants to the water being transferred. However, where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required. *Consumers Power*, 862 F.2d at 588; *Gorsuch*, 693 F.2d at 165, n. 22.

In those instances where a water transfer facility does itself introduce pollutants into the water being transferred, the scope of the required NPDES permit would only be for those added pollutants. Such a permit would not require the water transfer facility to address pollutants that may have been in the donor waterbody and are being transferred.¹⁰ Furthermore, EPA expects these additions will probably be rare. EPA considers the likelihood of such additions to be similar to the frequency of additions of leaks of oil from the turbines at hydroelectric dams. In a review of the NPDES permits issued to dams, EPA was able to identify only a minimal number of permits issued to address this concern.

Pollutants Incidental to Water Transfers

Many utilities and water districts commented that it was unclear whether naturally occurring changes to the water would require a permit. For example, as water moves through dams or sits in reservoirs along the transfer, chemical and physical factors such as water temperature, pH, BOD, and dissolved oxygen may change. The Agency views these changes the same way it views changes to water quality caused by water moving through dams (*National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)); they do not constitute an "addition" of pollutant subject to the permitting requirements of section 402 of the Act.

EPA would also like to make clear that this rule does not change the Agency's position regarding the application of pesticides directly to waters of the United States. *See* 71 FR 68483; 40 CFR 122.3(h). Ditches and canals are commonly treated with pesticides to control pest species such

¹⁰ Because water transfers simply change the flow, direction or circulation of navigable waters, they would not themselves cause the waters being moved to lose their status as waters of the United States. *See Consumers Power*, 862 F.2d at 589. Hence, pollutants moved from the donor water into the receiving water, which are contained in navigable waters throughout the transfer, would not be "added" by the facility and would therefore not be subject to NPDES permitting requirements. This differs from a situation in which, for example, an industrial facility takes in water for the purpose of cooling some part of the facility itself. In such cases, the water used for cooling loses its status as a water of the United States when subjected to an intervening industrial use and, therefore, is subject to NPDES permit requirements for all the pollutants it contains when it is discharged back into a navigable water, generally including those that were in the source water originally. *See Consumers Power*, 862 F.2d at 589. Likewise, discharges from a concentrated aquatic animal production facility, such as excess food provided to animals in net pens (e.g., food that was added to water but not eaten by the fish) would require a NPDES permit because the uneaten, waste food would be considered an "addition" of a pollutant from the facility.

as algae to facilitate flow, and today's rule has no effect on the exclusion provided to such activities from NPDES permit requirements set forth in 40 CFR.122.3(h).

Designation Authority

In the preamble to the proposed water transfers rule, EPA solicited public comment on an option that would provide an additional provision allowing the NPDES authority to designate particular water transfers as subject to NPDES permit requirements on a case-by-case basis. EPA received nearly sixty comments from states, municipalities, environmental groups, water districts, industry and others regarding EPA's consideration of this "designation authority" approach. Comments addressing EPA's discussion of such designation authority were mixed regarding their opposition to, or agreement with, this approach. The following paragraphs provide additional details regarding comments the Agency received on this option.

Commenters who opposed the designation option generally believed that this provision would be legally unsupported and practically unworkable. The most frequently cited reason for opposing this approach was a belief that the Clean Water Act provides no authority to regulate water transfers on a case-by-case basis. Other commenters were concerned that designating some water transfers, but not others, as subject to NPDES permit requirements would result in states treating water transfers in an inconsistent manner. Several commenters stated that the existence of an impairment is not an appropriate or relevant test for determining whether or not an activity should be subject to the NPDES program. Some commenters also stated that EPA already has regulations in place with regard to use impairments, at 40 CFR 131.10, which afford flexibility in responding to unique factual circumstances where uses may be impacted by pollutants not subject to NPDES permitting under section 402.

Other commenters supported inclusion of the designation authority provision in the final rule. Some of these commenters thought this approach would be helpful in instances where the transfer involves interstate waters because NPDES permits would provide a tool to protect receiving water quality—especially in situations in which water quality standards differed in the two relevant states. In addition, several states indicated that being allowed the option of designating water transfers as requiring an NPDES permit on a case-by-case basis was important to

them and cited the following three reasons for supporting this approach: (1) The designation option is consistent with Congress's general direction against unnecessary federal interference with state allocation of water rights and states' flexibility on handling water transfers; (2) states would be unable to require NPDES permits for water transfers on a case-by-case basis in the absence of the designation option; and (3) some water transfers should be considered discharges of pollutants, so it is important to retain NPDES authority in these cases.

Some commenters suggested additional programs and authorities that states can use as an alternative to NPDES permitting such as the 401 water quality certification program or a memorandum of understanding or agreement.

After considering these comments, EPA has decided not to include a mechanism in 123.3 for the permitting authority to designate water transfers on a case-by-case basis as needing an NPDES permit. This conclusion is consistent with EPA's interpretation of the CWA as not subjecting water transfers to the permitting requirements of section 402. Moreover, as discussed elsewhere in this preamble, states currently have the ability to address potential in-stream and/or downstream effects of water transfers through their WQS and TMDL programs and pursuant to state authorities preserved by section 510, and today's final rule does not have an effect on these state programs and authorities.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden because this final rule generally excludes water transfers from requiring an NPDES permit. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR 122.21 and 123.25 under the provisions of the Paperwork Reduction

Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2040-0086, EPA ICR number 0226.18.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant adverse economic impact on a substantial number of small entities. Because EPA is simply codifying the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of one water of the