

14-1823

Consolidated Cases 14-1909, 14-1991, 14-1997, 14-2003

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendants-Appellants-Cross Appellees,

(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF AMICI CURIAE LEON G. BILLINGS, TOM JORLING, JEFFREY G. MILLER,
ROBERT W. ADLER, WILLIAM ANDREEN, HARRISON C. DUNNING, MARK SQUILLACE,
& SANDRA B. ZELLMER SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE OF
THE DISTRICT COURT**

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**Application for admission pending*

THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., WATERKEEPER ALLIANCE, INC., TROUT UNLIMITED, INC., ENVIRONMENT FLORIDA, STATE OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON, NATIONAL WILDLIFE FEDERATION, ENVIRONMENT AMERICA, ENVIRONMENT NEW HAMPSHIRE, ENVIRONMENT RHODE ISLAND,

Plaintiffs-Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

Consolidated Plaintiff-Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, SIERRA CLUB,

Intervenor Plaintiffs-Appellees,

v.

STATE OF COLORADO, STATE OF NEW MEXICO, STATE OF ALASKA, ARIZONA, ARIZONA DEPARTMENT OF WATER RESOURCES, STATE OF IDAHO, STATE OF NEBRASKA, STATE OF NORTH DAKOTA, STATE OF NEVADA, STATE OF TEXAS, STATE OF UTAH, STATE OF WYOMING, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL UTAH WATER CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER, by and through its BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION, CITY OF BOULDER [COLORADO], CTY OF AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT, IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION, SALK LAKE & SANDY [UTAH] METROPOLITAN WATER DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER AUTHORITY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS, acting by and through its enterprise COLORADO SPRINGS UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS, CITY OF NEW YORK,

Intervenor Defendants-Appellants-Cross Appellees,

NORTHERN COLORADO WATER CONSERVANCY DISTRICT,

Intervenor Defendant,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Intervenor Defendant-Appellant-Cross Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTERESTS OF AMICI	1
INTRODUCTION.....	1
ARGUMENT.....	3
I. THE PLAIN AND UNAMIBIGUOUS LANGUAGE OF THE CLEAN WATER ACT COMPELS THE CONCLUSION THAT TRANSFERS OF POLLUTED WATERS BETWEEN DISTINCT WATER BODIES CONSITUTE THE “ADDITION” OF POLLUTANTS.....	5
A. The Ordinary Meaning of “Addition” Includes the Conveyance of Pollutants from One Water Body to Another Via a Point Source....	5
B. EPA Conflates and Confuses the Concepts of “Addition” and “Navigable Waters.”.....	7
II. THE PURPOSE, STRUCTURE, AND LEGISLATIVE HISTORY OF THE CLEAN WATER ACT CONFIRM CONGRESSIONAL INTENT TO REGULATE “ANY ADDITION” OF POLLUTANTS TO WATERS OF THE UNITED STATES.....	9
A. The Water Transfers Rule Would Frustrate the Act’s Central Purpose and Design to Restore and Maintain the Ecological Health of the Nation’s Waters.....	9
B. EPA Is Not Free to Expand the Limited Number of Exclusions Narrowly Crafted by Congress.....	12
C. Legislative History Confirms that the Statute Means What It Says...	15
D. Historical Context Affirms the Broadly Remedial Purposes Congress Sought to Achieve through the NPDES Permit Program....	17

III. APPLICATION OF THE ACT ACCORDING TO ITS PLAIN TERMS WILL NEITHER INFRINGE ON STATE SOVEREIGNTY NOR LEAD TO ANOMALOUS RESULTS.....	19
A. EPA’s “Holistic” Interpretation Does Not Hold Water.....	20
B. Congress Has Already Struck the Balance Between the Goals of Protecting Water Quality and Respecting State Authority over Water Quantity.....	24
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)	
APPENDIX	

TABLE OF AUTHORITIES

Federal Statutes

The Federal Water Pollution Control Act (Clean Water Act)

§ 101

33 U.S.C. § 1251(a).....	10
33 U.S.C. § 1251(a)(1).....	2
33 U.S.C. § 1251(a)(2).....	2
33 U.S.C. § 1251(g).....	20

§ 102

33 U.S.C. § 1252(b).....	22
--------------------------	----

§ 301

33 U.S.C. § 1311(a).....	1
33 U.S.C. § 1311(b)(1)(C).....	10, 11, 16

§ 302

33 U.S.C. § 1312(b)(2)(A).....	25
--------------------------------	----

§ 303

33 U.S.C. § 1313.....	10
33 U.S.C. § 1313(d).....	10

§ 304

33 U.S.C. § 1314(f).....	22
--------------------------	----

§ 402

33 U.S.C. § 1342(l)(1).....12, 14

§ 404

33 U.S.C. § 1344.....11-12

§ 502

33 U.S.C. § 1362(7).....2

33 U.S.C. § 1362(12).....2

33 U.S.C. § 1362(14).....12, 14, 15

33 U.S.C. § 1362(17).....25

§ 510

33 U.S.C. § 1370(2).....20

Clean Water Act of 1977, Pub. L. No. 95-217, § 33(b), 91 Stat. 1566 (1977).....14

S. Rep. No. 92-414, 1971 WL 11307 (1971).....16

Federal Rules

Fed. R. App. P. 29(a).....1

Cases

Adirondack Med. Ctr. v. Sebelius, 740 F.3d 692 (D.C. Cir. 2014).....12

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).....17

Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York,
273 F.3d 481 (2d Cir. 2001).....4, 7, 16, 23, 26

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451 F.3d 77 (2d Cir. 2006).....7, 21, 22, 23, 24, 25

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)...3, 4

City of Milwaukee v. Illinois, 451 U.S. 304 (1981).....16, 17

Conn. Nat’l Bank v. Germain, 503 U.S. 249 (1992).....15

Davis v. Mich. Dep’t of Treasury, 489 U.S. 803 (1989).....9

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Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.,
No. 02-80309Civ, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006),
rev’d in part sub nominee by 570 F.3d 1210 (11th Cir. 2009).....26

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In Re Ionosphere Clubs, Inc. v. Air Line Pilots Ass’n, Int’l,
922 F.2d 984 (2d Cir. 1990)..... 15

Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.,
133 S. Ct. 710 (2013).....4, 5-6, 23

N. Plains Res. Council v. Fidelity Exploration & Dev. Co.,
325 F.3d 1155 (9th Cir. 2003).....14, 26

Nw. Env’tl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008).....14

Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).....9

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Perrin v. United States, 444 U.S. 37 (1979).....5

PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology,
511 U.S. 700 (1994).....20, 21

Robinson v. Shell Oil Co., 519 U.S. 337 (1997).....5, 9

S.D. Warren Co. v. Me. Bd. of Env'tl. Prot., 547 U.S. 370 (2006).....5, 23

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,
541 U.S. 95 (2004).....4, 8, 21, 22, 23, 24, 25

Shapiro v. United States, 335 U.S. 1 (1948).....9-10

Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).....5

United States v. Brown, 333 U.S. 18 (1948).....19-20

United States v. Katz, 271 U.S. 354 (1926).....20

United States v. Pub. Utils. Comm'n of Ca., 345 U.S. 295 (1953).....15

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).....18, 19

Univ. of Tex. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).....9

Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001).....4

Federal Regulations & Administrative Materials

33 C.F.R. § 323.2(c).....12

33 C.F.R. § 328.3.....8

40 C.F.R. § 122.2.....8

40 C.F.R. § 122.4(a).....10

40 C.F.R. § 122.4(d).....10

40 C.F.R. § 122.4(i).....10

40 C.F.R. § 122.28.....24-25

40 C.F.R. § 122.44(d).....10, 11

40 C.F.R. § 122.47.....25

40 C.F.R. § 123.25.....24-25

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Definition of “Waters of the United States” under the Clean Water Act,
79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).....8

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Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the “Addition” Element of the Clean Water Act Offense*, 44 *Envtl. L. Rep News & Analysis* 10770 (2014).....6, 7, 8, 25

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INTERESTS OF AMICI

Amici Leon G. Billings, Tom Jorling, Jeffrey G. Miller, Robert W. Adler, William Andreen, Harrison C. Dunning, Mark Squillace, and Sandra B. Zellmer submit this brief in support of Plaintiffs-Appellees and urge this Court to invalidate the water transfers rule under *Chevron* Step I.¹ Amici are law professors, scholars, former agency officials, and public policy leaders with a long history of expertise in clean water law. They include original authors of the Clean Water Act and some of those charged with its early implementation. The Appendix to this brief contains Amici's individual biographical information.

INTRODUCTION

In 1972, in response to the gross pollution of the nation's waterways, Congress drew a bright line declaring that, except in compliance with specified provisions, "the discharge of any pollutant by any person shall be unlawful." § 301, 33 U.S.C. § 1311(a). No longer was there a "right to pollute." No longer was "dilution the solution to pollution." No longer would rivers and lakes be used as waste disposal receptacles. No longer would rivers catch fire; raw sewage pour into harbors and lakes; oil spills coat ocean beaches; or massive fish kills be a

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than amici curiae or their counsel, contributed money that was intended to fund preparing or submitting this brief. Amici's source of authority to file this brief is Fed. R. App. P. 29(a). Amici have obtained consent of all parties for the filing of this brief.

routine occurrence. Waters would once again be “fishable and swimmable.” *See id.* § 101, § 1251(a)(2). Discharges would be strictly regulated and eliminated by 1985 (wishful thinking as it turned out). *See id.* § 1251(a)(1).

Congress left no doubt about what it intended to regulate under this program. It emphatically defined the term “discharge of a pollutant” to mean “**any** addition of **any** pollutant to navigable waters from **any** point source.” § 502, 33 U.S.C. § 1362(12) (emphases added).² Congress made no exceptions in the 1972 legislation. All point sources were to be covered. No more pollution havens. No more races to the bottom. *See* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 *Hastings L.J.* 271, 284-85 (1997). Nevertheless, decades later, the United States Environmental Protection Agency (EPA) contends that this unequivocal language contains a hidden ambiguity that allows it to reinterpret Congress’ intent regarding the scope of the Clean Water Act’s (CWA’s or Act’s) regulatory mechanism—the National Pollutant Discharge Elimination System (NPDES) permitting program. In sum, EPA argues that Congress *sub silentio* meant to exclude the movement of polluted water from one water body to another from the CWA’s otherwise blanket prohibition on unpermitted discharges.

² The term “navigable waters” is further defined as “the waters of the United States, including the territorial seas.” § 502, 33 U.S.C. § 1362(7).

EPA's interpretation is untenable. Though the District Court invalidated the water transfers rule under a *Chevron* Step II analysis, *Amici* believe that EPA's interpretation cannot survive a threshold analysis under *Chevron* Step I. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). EPA's conclusion—that water transfers “do not result in the ‘addition’ of a pollutant,” Water Transfers Rule, 73 Fed. Reg. 33,697-01, 33,699 (June 13, 2008)—defies common sense and is contrary to clear congressional intent.

ARGUMENT

The Supreme Court in *Chevron* declared that “[i]f the intent of Congress is clear, that is the end of the matter,” for “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842-43. If the court finds that Congress “had an intention on the precise question at issue,” then “that intention is the law and must be given effect,” and the court must “reject administrative constructions which are contrary to clear congressional intent.” *Id.* at 843 n.9 (citing cases).

The first inquiry under a *Chevron* Step I analysis, then, is whether Congress has spoken to the precise question at issue. How that question is framed goes a long way to answering it. As an initial matter, it is important to state what is not at issue here. There is no dispute that a permit is required when pollutants are initially discharged from a point source to waters of the United States. Nor is there

any dispute that no “addition” occurs where water simply flows from one portion of a water body to another. *See Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 713 (2013). The dispute arises over whether there is an “addition” when the transfer is between two “meaningfully distinct” water bodies. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004). Or as this Court put it, when soup is being ladled from one pot into another. *See Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (*Catskill I*).

The second part of a *Chevron* Step I analysis is whether the language Congress has chosen creates ambiguity or leaves a “gap” for the agency to fill. *Chevron*, 467 U.S. at 843-44. In determining ambiguity, the court employs “traditional tools of statutory construction” in order to ascertain congressional intent. *Id.* at 843 n.9. As explained below, the CWA leaves no room for ambiguity on the question of whether a permit is required for the transfer of polluted waters between two distinct water bodies. EPA’s contrary interpretation stretches the statutory text beyond the breaking point and is akin to discovering an “elephant in a mousehole.” *See Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

I. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE CLEAN WATER ACT COMPELS THE CONCLUSION THAT TRANSFERS OF POLLUTED WATERS BETWEEN DISTINCT WATER BODIES CONSTITUTE THE “ADDITION” OF POLLUTANTS.

A. The Ordinary Meaning of “Addition” Includes the Conveyance of Pollutants from One Water Body to Another Via a Point Source.

The first step in statutory construction is to read the statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“[the] first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning”). Congress did not define the term “addition” in the CWA. In such cases, a “fundamental canon of statutory construction” is that words should be interpreted according to their “ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979); *see S.D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 376 (2006) (construing “discharge” in “accordance with its ordinary or natural meaning” where “it is neither defined in the statute nor a term of art”) (citation omitted). To derive this meaning, courts often consult authoritative dictionaries. *See, e.g., id.* at 376 (consulting Webster’s New International Dictionary); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002-03 (2012) (conducting survey of dictionaries).

Here, the word “add” has an uncomplicated ordinary meaning. It means “to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate.” *Los Angeles Cnty.*

Flood Control., 133 S. Ct. at 713 (quoting Webster’s Third New International Dictionary 24 (2002)); see Oxford University Press, *Oxford Dictionaries*, http://www.oxforddictionaries.com/us/definition/american_english/addition (last visited December 27, 2014) (“addition” means “the action or process of adding something to something else”). Water transfers obviously “add something to something else.” They also “join or unite” pollutants in one water body with those in another. In either case pollutants are added that were not there before. In some cases, the transfer may introduce pollutants that are excessive or entirely new, with potentially serious consequences for the physical, chemical, and biological integrity of the receiving waters—for example introducing saltwater into a pristine aquifer serving as a municipal water supply, or invasive species into the Great Lakes. Simple logic dictates that, “but for” the transfer, the pollutants would not have reached the receiving waters. See Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the “Addition” Element of the Clean Water Act Offense*, 44 *Envtl. L. Rep News & Analysis* 10770, 10771-72 (2014).³

³ Professor Miller’s article provides a thorough, knowledgeable analysis of why EPA’s water transfers rule is inconsistent with the Clean Water Act. It concludes that EPA should “withdraw the rule” and that, if it “fails to do so, courts should reject [EPA’s] theories” and “overturn the rule.” 44 *Envtl. L. Rep News & Analysis* at 10803. The article also provides an exceedingly workable concept of “addition” that is consistent with both the CWA and court precedents: “‘addition’ means ‘the act of a person adding a pollutant to navigable waters from a point source, when that pollutant would not otherwise be in those navigable waters.’” *Id.* at 10773.

Additionally, this Court has twice ruled before that the “ordinary meaning of the word ‘addition’” precludes the theory that “movement of water from one discrete water body to another [is not] an addition even if it involve[s] a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants.” *Catskill I*, 273 F.3d at 489, 493 (agreeing with plaintiffs that city’s water transfer qualified as “an ‘addition’ under the plain meaning of that word”). In 2006, the Court reiterated: “[i]t is the meaning of the word ‘addition’ upon which the outcome of *Catskills I* turned and which has not changed.” *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006) (*Catskill II*). It still has not.

B. EPA Conflates and Confuses the Concepts of “Addition” and “Navigable Waters.”

As pointed out by Professor Miller, a prominent scholar on the Clean Water Act, EPA appears to be playing a “shell game” with the water transfers rule. *See* 44 *Envtl. L. Rep. News & Analysis* at 10784-85. Ostensibly the rule purports to interpret the term “addition.” However, the plain meaning of the word cannot support the interpretation that EPA wants to give it. So EPA adds the further gloss that an “addition” must not only come from the “outside world,” but also from “outside the waters being transferred.” 73 *Fed. Reg.* at 33,701. This means that, once a pollutant enters *any* navigable waters (or, “waters of the United States”), it may be transferred freely among *all* navigable waters no matter how distinct the

waters may be, or how severe the impacts on water quality. In other words, EPA argues that there is only one “soup pot” and it includes all of the waters of the United States.

One of the problems with this gambit is that the term “waters of the United States” is defined in a separate rule (codified at 33 C.F.R. § 328.3 and 40 C.F.R. § 122.2) that is currently undergoing a proposed revision. *See* Definition of “Waters of the United States” under the Clean Water Act, 79 Fed. Reg. 22,188-01 (proposed Apr. 21, 2014). The water transfers rule does not purport to redefine “navigable waters” or “waters of the United States” and, tellingly, the proposed revisions to the definition of “waters of the United States” do not adopt the unitary waters theory, perhaps because the Supreme Court in *Miccosukee* cast such serious doubt on the viability of the theory. *See* 541 U.S. at 106-12; Part III.A, *infra*.

All of this adds to the general confusion surrounding EPA’s convoluted attempts to re-interpret the straightforward statutory word “addition.” To quote Professor Miller, “if EPA has to play shell games to keep water transfers from requiring permits, the whole enterprise is dubious.” 44 *Envtl. L. Rep. News & Analysis* at 10785.

II. THE PURPOSE, STRUCTURE, AND LEGISLATIVE HISTORY OF THE CLEAN WATER ACT CONFIRM CONGRESSIONAL INTENT TO REGULATE “ANY ADDITION” OF POLLUTANTS TO WATERS OF THE UNITED STATES.

A. The Water Transfers Rule Would Frustrate the Act’s Central Purpose and Design to Restore and Maintain the Ecological Health of the Nation’s Waters.

Under *Chevron* Step I, “a reviewing court should not confine itself to examining a particular statutory provision in isolation.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quotation marks and citation omitted). It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989). A particular statutory reading should be consistent with the design and structure of the statute as a whole. *See Univ. of Tex. Sw. Med. Ctr. v Nassar*, 133 S. Ct. 2517, 2529 (2013) (“Just as Congress’ choice of words is presumed to be deliberate, so too are its structural choices.”). Thus, “[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” *Home Builders*, 551 U.S. at 666 (quotation marks and citation omitted); *see Shell Oil*, 519 U.S. at 341 (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”). Among other things, “context” includes a statute’s purpose. *See Shapiro v. United States*,

335 U.S. 1, 31 (1948) (applying the “well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen”).

The singular objective of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” § 101, 33 U.S.C. § 1251(a). Allowing persons to discharge pollutants from one water body into another without limitation is hardly consistent with this purpose. Additionally, one of the Act’s central mechanisms for controlling water pollution would be frustrated if EPA’s interpretation of “addition” were accepted. The CWA requires states to develop water quality standards (WQS) for waters within their borders, as well as plans for meeting those standards. § 303, 33 U.S.C. § 1313 (“[w]ater quality standards and implementation plans”). These WQS are water-body, and even water body-segment, specific. *See, e.g.*, 40 C.F.R. § 130.3 (“A water quality standard . . . defines the water quality goals of a water-body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.”). They are essential in developing water quality-based effluent limitations (WQBELs) in permits as well as clean-up plans for impaired waters which are also water-body specific. *See* §§ 301, 303, 33 U.S.C. §§ 1311(b)(1)(C), 1313(d); 40 C.F.R. §§ 122.4(a), (d), (i), 122.44(d). In sum, the

WQS program is a crucial component of the CWA and is designed to protect specific uses of specific waters through the application of specific water quality criteria. *See* EPA, Water Quality Standards for Surface Waters, <http://water.epa.gov/scitech/swguidance/standards/index.cfm> (last visited Dec. 27, 2014) (“Water Quality Standards are the foundation of the water quality-based pollution control program mandated by the Clean Water Act.”).

EPA’s theory of “addition” is incurably inconsistent with this water body-specific approach to controlling water pollution. A WQS can only be applied in the specific context of the receiving water to which a discharge occurs. *See, e.g.*, 40 C.F.R. § 122.44(d). But EPA’s interpretation would obliterate the differences between water quality standards and beneficial uses of donor waters and receiving waters in plain contradiction of Congress’ direction that NPDES permits must contain WQBELs where necessary to maintain WQS in distinct water bodies. *See* § 301, 33 U.S.C. § 1311(b)(1)(C).

Other provisions of the CWA similarly show that Congress designed a permitting program to protect water bodies at the points where pollutants are discharged, whether or not those pollutants originate in waters of the United States. For instance, the Act’s section 404 permitting program explicitly applies to pollutants that originate in waters of the United States. *See* § 404, 33 U.S.C.

§ 1344 (“[p]ermits for dredged or fill material”); 33 C.F.R. § 323.2(c) (defining “dredged material” as material that is “excavated or dredged *from waters of the United States*”) (emphasis added). Further, the definition of “point source” includes the very mechanisms for inter-basin transfers: “pipe, ditch, channel, tunnel, conduit” *See* § 502, 33 U.S.C. § 1362(14).

B. EPA Is Not Free to Expand the Limited Number of Exclusions Narrowly Crafted by Congress.

The maxim *expressio unius est exclusio alterius* applies here. *See Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 696 (D.C. Cir. 2014) (“the expression of one is the exclusion of others”). Congress knows how to exempt discharges from the NPDES program and has done so in very limited circumstances. Most relevant here is the exemption for irrigation return flows in § 402(l), which provides that EPA “shall not require a permit,” nor shall it “directly or indirectly, require any State to require such a permit” for “discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1); *see* § 502, 33 U.S.C. § 1362(14) (exempting irrigation return flows from definition of “point source”). This exemption was added in 1977 in response to a 1975 EPA General Counsel Opinion concluding that irrigation return flows plainly amounted to point sources under the statute’s plain meaning. *See In re Riverside Irrigation Dist., Ltd.*, EPA Off. Gen. Counsel, Opinion No. 21, 1975 WL 23864, at *1-4 (June 27, 1975). What is most striking about this 1975 formal

ruling is that the EPA General Counsel rejected the construction of the Clean Water Act that EPA has now adopted in the water transfers rule. One of the arguments raised in the 1975 proceeding by those claiming that the NPDES permit requirement did not apply to irrigation return flows into navigable waters was that the irrigation ditch could itself be considered a navigable water, and therefore it could not be considered a point source that discharged into another navigable water. *Id.* at 4.

The EPA General Counsel, however, squarely rejected that contention, finding that “to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary.” *Id.* As the General Counsel stressed, “what is prohibited by section 301 is ‘*any addition of any pollutant to navigable waters from any point source.*’” *Id.* (emphasis in original). Specifically, the Office of General Counsel concluded:

[E]ven should the finder of fact determine that any *given* irrigation ditch is a navigable water, it would still be permissible as a point source where it discharges into another navigable water body, provided that the other point source criteria are also present.

Id.

Obviously EPA has had a change of heart and now argues the opposite of the position taken by the General Counsel in 1975. In any event, the broader point here is that even when Congress was presented with the opportunity in the 1977

amendments to reject the General Counsel's 1975 Opinion and adopt a broad exemption for all discharges from one water body into another, it did not do so and instead fashioned a narrow exemption for "return flows from irrigated agriculture." *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 33(b), 91 Stat. 1566 (1977); §§ 402, 502, 33 U.S.C. §§ 1342(l), 1362(14). Thus, EPA is not entitled to create its own, more all-encompassing exemption.

Relatedly, numerous courts have ruled that EPA may not exempt whole categories of point sources from regulation under the NPDES program. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) ("The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of s 402."); *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003) ("Only Congress may amend the CWA to create exemptions from regulation."); *Nw. Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1021-22 (9th Cir. 2008) (noting that EPA may not "exempt certain categories of discharges from the permitting requirement" and concluding that "Congress expressed 'a plain . . . intent to require permits in any situation of pollution from point sources'" (citation omitted).

In the absence of clear and manifest intent on the part of Congress to exempt discharges from "confined and discrete conveyance[s]," *see* § 502, 33 U.S.C.

§ 1362(14), that indisputably add pollutants to receiving waters, this Court should reject EPA's attempt to bootstrap an exemption into the statute by inventing an ambiguity that does not exist.

C. Legislative History Confirms that the Statute Means What It Says.

As Justice Stevens has admonished, legislative history should only be consulted if it may “shed some light on the issue.” John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. Pa. L. Rev. 1373, 1381 (1992). Various types of legislative history may be relevant, including “a measure's history during the enactment process,” 2A Sutherland Statutory Construction § 48:4 (7th ed. 2014), and committee reports, *In Re Ionosphere Clubs, Inc. v. Air Line Pilots Ass'n, Int'l*, 922 F.2d 984, 990 (2d Cir. 1990). However, courts typically do not resort to legislative history unless “the language and purpose of the questioned statute” are not already clear. *See United States v. Pub. Utils. Comm'n of Ca.*, 345 U.S. 295, 315 (1953). Therefore, in this instance—where the language and purpose of the CWA are already clear—the only reason to consult the CWA's legislative history is to confirm the plain meaning of the text—i.e., to show that “a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Though there is no legislative history on the term “addition,” *Catskill I*, 273 F.3d at 493, just a few examples from the legislative record suffice to show that Congress meant exactly what it said. When the bill that would become the CWA came before the House Committee on Public Works in 1971, its permit requirements were strengthened to include not only technology-based limitations (TBELs), but also water quality-based limits in case the TBELs proved insufficient to protect the “stream standards” (or WQS) of particular water bodies. *See generally* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II* (Andreen *Part II*), 22 *Stan. Envtl. L.J.* 215, 270, 275-77 (2003). In this way, section 301(b)(1)(C) was born. *See id.*; 33 U.S.C. § 1311(b)(1)(C) (requiring NPDES permits to contain “any more stringent limitation, including those necessary to meet water quality standards”). This makes it clear that Congress intended to protect individual water bodies from point source discharges regardless of origin.

On the Senate side, the report of the Environment and Public Works Committee declared: “The major purpose of this legislation is to establish a comprehensive long-range policy for the *elimination* of water pollution.” S. Rep. No. 92-414, 1971 WL 11307, at *3758 (1971) (emphasis added); *see City of Milwaukee v. Illinois*, 451 U.S. 304, 317-18 (1981) (citing statements of numerous legislators regarding comprehensiveness of Act). The Committee had explained

that “there can be no doubt that the most effective control mechanism for point sources of discharge is one which will provide for the establishment of conditions of effluent control for *each source of discharge*.” *Id.* at 3738 (emphasis added). As the *Milwaukee* Court put it: “*Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.*” 451 U.S. at 318 (emphasis in original; footnote omitted).

D. Historical Context Affirms the Broadly Remedial Purposes Congress Sought to Achieve through the NPDES Permit Program.

A statute’s contemporary context may also shed light on what Congress had in mind. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-703 (1979) (applying contemporary legal context in 1972 enactment of Title IX). Further, a statute “is not to be confined to the ‘particular application[s] . . . contemplated by the legislators’” especially where the statute employs “broad terms to fulfill the . . . statutory goal.” *Diamond v. Chakrabarty*, 447 U.S. 303, 315-16 (1980) (citations omitted).

The Clean Water Act was revolutionary. It culminated more than a century of failed attempts to curb water pollution problems—from unsanitary sewage conditions and unfettered discharges of human wastes into waterways that fed outbreaks of yellow fever, typhoid, and cholera, to post-World War II industrial pollution that was dumped untreated into the nation’s waterways. *See generally*

William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I (Andreen Part I)*, 22 Stan. Envtl. L.J. 145 (2003). The American public was increasingly unhappy with feckless state and local measures that had failed to address threats not only to drinking water purity, but also to recreational uses of waterways. *See id.* at 189-99. President Eisenhower’s Surgeon General had described American rivers as “a national disgrace.” *Andreen Part II*, 22 Stan. Envtl. L.J. at 241. So, Congress responded with “a dramatically different approach, one that was informed by prior experience, not limited by it—an approach to regulation which eschewed short-term answers in favor of long-term, comprehensive strategies.” *Andreen Part I*, 22 Stan. Envtl. L.J. at 200.

Nothing less than this complete overhaul of federal water pollution control laws was needed, and it led to the adoption of the CWA’s comprehensive and ambitious program intended to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”—an objective that “incorporated a broad, systemic view of the goal of maintaining and improving water quality.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (citations omitted). Because water flows through wetlands, headwaters, streams, rivers, lakes, and estuaries without regard to political boundaries, Congress

understood that keeping the nation's waters clean requires broad federal protection. *See id.* at 132-33.

The primary feature of the Act, of course, was to develop “a permit system through which precise requirements would be set for individual dischargers.” *Andreen Part I*, 22 Stan. Envtl. L.J. at 158. This concept was not unique, but “its extension to all point source discharges, be they existing, new, municipal, or industrial,” was. *Id.* at 159. The authors of the CWA sought to establish a program that would stand the test of time and that would address the concern that “agencies had been too lethargic at times, too cozy with the regulated community and too stubbornly committed to pragmatic cooperation.” *Id.* at 159.

In short, the CWA was a firm response to decades of ineffectual pollution control at the state and local levels, increasingly contaminated waterways across the country, and mounting public pressure for a solution to each of these problems. Requiring permits for transfers of polluted water is not only consistent with this approach, but essential to achieving the goals Congress set.

III. APPLICATION OF THE ACT ACCORDING TO ITS PLAIN TERMS WILL NEITHER INFRINGE ON STATE SOVEREIGNTY NOR LEAD TO ANOMALOUS RESULTS.

Courts are understandably concerned about avoiding absurd results when construing statutory language. *See United States v. Brown*, 333 U.S. 18, 27 (1948) (noting that “[n]o rule of construction necessitates our acceptance of an

interpretation resulting in patently absurd consequences”). An “absurd result” is one that does not align with a statute’s purpose. *See Haggard Co. v. Helvering*, 308 U.S. 389, 394 (1940) (“All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.”); *United States v. Katz*, 271 U.S. 354, 357 (1926) (“All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose.”).

In this case, the best way to avoid absurd results is to apply the statute as written and reject EPA’s belated efforts to rewrite it.

A. EPA’s “Holistic” Interpretation Does Not Hold Water.

EPA cites a hodge-podge of statutory provisions and policy statements that it believes evince a congressional decision that regulating water transfers under the NPDES program would “unnecessarily interfere” with state primacy in the allocation of water resources. *See* 73 Fed. Reg. at 33,701. However, the provisions that EPA cites are unpersuasive in isolation, and even more so in the context of the Act as a whole. First, as noted by the Supreme Court, sections 101(g) and 510(2) “give the States authority to allocate water rights.” *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 720 (1994). However,

the Court was careful to explain that this means that they “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.” *Id.* at 720 (emphasis added). In fact, the Court in *PUD No.1* specifically held that a state may impose stream flow conditions as part of water quality requirements under section 401 of the Act. *Id.* at 723; *see Miccosukee*, 541 U.S. at 108 (noting that, though section 101(g) might suggest that permitting should not “raise the costs of water distribution prohibitively,” it may be that “such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs”). Put differently, the fact that states may regulate water allocation within their borders does not mean that water allocations are exempt from the permitting requirements of the Act. *See Catskill II*, 451 F.3d at 84 (“The power of states to allocate *quantities* of water within their borders is not inconsistent with federal regulation of water *quality*.”) (emphases in original).

Second, contrary to EPA’s use of it, section 304(f) does not exempt water transfers from permitting requirements. *See Miccosukee*, 541 U.S. at 106 (“We note, however, that § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the ‘point source’

definition.”). Rather, consistent with the *Miccossukee* Court’s reading, § 304(f) simply directs EPA to develop “processes, procedures, and methods” to control pollution from “changes in the movement, flow, or circulation” of navigable waters where those activities do not otherwise fall under the CWA’s permitting provisions. *See* 33 U.S.C. § 1314(f). Where a water transfer adds a pollutant from one waterway to another through a point source, the activity *does* fall under the CWA’s permitting provisions and § 304 is inapplicable. *See Catskill II*, 451 F.3d at 84 (rejecting EPA argument that § 304(f) evinces Congressional intent that water transfers be “exempt from permit requirements that apply to point sources”).

Similarly, nothing in section 102(b) exempts water transfers from permitting requirements or otherwise suggests that water transfers are not subject to the Act. Rather, the section directs federal agencies to consider water storage and release as a means of streamflow control, and provides that a license for a hydroelectric power project that includes “storage for the regulation of streamflow for the purpose of water quality control” must be based on a recommendation by the EPA. § 102, 33 U.S.C. § 1252(b). The section does not address water transfers or the “addition” of pollutants at all—only storage and release relating to streamflow.

Finally, both this Court and the Supreme Court have already rejected EPA’s unitary waters theory as a basis for inferring a legislative intent to categorically

exempt water transfers from the NPDES permit program. This Court deemed EPA's theory unpersuasive, *Catskill II*, 451 F.3d at 83 n.5, and proclaimed that "[n]o one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the 'same,' such that 'addition' of one to the other is a logical impossibility," *Catskill I*, 273 F.3d at 492. The *Miccosukee* Court, in addition to raising serious doubts about the unitary waters theory, remanded for fact-finding on whether two water bodies were "meaningfully distinct." *Miccosukee*, 541 U.S. at 106-09, 112. If they were not, no permit would be needed. *Id.* at 112. If they were, an addition would exist and a permit *would* be needed—otherwise a remand would have been unnecessary. *See Catskill II*, 451 F.3d at 83 ("This remand would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers."); *Los Angeles Cnty. Flood Control*, 133 S. Ct. at 713 ("In *Miccosukee* . . . [w]e held that th[e] water transfer would count as a discharge of pollutants under the CWA only if the canal and the reservoir were 'meaningfully distinct water bodies.'") (citation omitted); *S.D. Warren*, 547 U.S. at 381 ("*Miccosukee* was . . . concerned . . . with whether an 'addition' had been made . . . as required by the definition of the phrase 'discharge of a pollutant'"). EPA's interpretation of the Act cannot be reconciled with these decisions or with the Act itself.

B. Congress Has Already Struck the Balance Between the Goals of Protecting Water Quality and Respecting State Authority over Water Quantity.

The Clean Water Act is a model of cooperative federalism. *See generally* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envtl. L.J. 179, 187-89 (2005). Congress sought to create a strong federal-state partnership that recognized the traditional role of the states in managing both water quantity and water quality, but one that also recognized the need for a national permit program to control pollution coming from a vast array of point sources. As this Court previously explained, “the flexibility built into the CWA and the NPDES permit scheme . . . will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either.” *Catskill II*, 451 F.3d at 85; *see also* Brief of Amici Commonwealth of Pa. Dep’t of Envtl. Prot. in Support of Respondents, 2003 WL 22793537, at *11-19, *Miccosukee*, 541 U.S. 95 (explaining importance and history of NPDES permitting for inter-basin transfers in Pennsylvania and firmly refuting claim that such permitting will “wreak havoc”).

The CWA contains many flexible provisions to avoid whatever “absurd results” EPA imagines. *See* 73 Fed. Reg. at 33,701 (citing “absurd results” canon). For example, EPA regulations encourage the use of general permits allowing states to permit multiple discharges under one set of limitations. *See* 40 C.F.R.

§§ 122.28, 123.25 (noted with approval by the Supreme Court in *Miccosukee*, 541 U.S. at 108). States also have flexibility to include schedules of compliance, which allow additional time for permittees to come into compliance. § 502, 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47. Finally, § 302 allows EPA to modify water quality-based limits where there is “no reasonable relationship” between the economic and social costs and the benefits of compliance with WQBELs. 33 U.S.C. § 1312(b)(2)(A).

Moreover, as already mentioned, irrigation return flows—which constitute the largest category of water transfers in the country, 44 *Envtl. L. Rep. News & Analysis* at 10785-86—are exempt from the permit requirement: another indication that Congress itself struck the balance and did not leave any gaps for EPA to fill. Nor are water withdrawals regulated. Thus, any fear “that federal regulation of interbasin water transfers will lead to the termination of those transfers in contravention of the rights explicitly reserved to the states” is “alarmist and unwarranted.” *See Catskill II*, 451 F.3d at 86.⁴

In contrast, EPA’s interpretation *would* lead to absurd results. If water transfers do not require permits, New York City can discharge sediment-laden

⁴ It is telling that EPA has failed to provide any evidence that regulation of interbasin transfers has in fact led to any “absurd results.” The cases that have been decided to date, including earlier decisions by this Court, have all involved regulation to protect water quality and have not been shown to interfere in any fundamental way with water rights or the allocation of water quantity.

water from a turbid reservoir into an otherwise pristine trout stream without any pollution-control measures. *See Catskill I*, 273 F.3d at 484-85. “Massive quantities of water” containing “color, nitrogen, phosphorus, total suspended solids, high biological demand, dissolved solids (including dissolved organics), low quantities of dissolved oxygen, and un-ionized ammonia” can be pumped from contaminated canals into Lake Okeechobee without any pollution-control measures. *See Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309Civ, 2006 WL 3635465, at *14 (S.D. Fla. Dec. 11, 2006), *rev’d in part sub nomine* by 570 F.3d 1210 (11th Cir. 2009). One could “pipe the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes.” *N. Plains Res. Council*, 325 F.3d at 1163. Or, “water naturally laced with sulfur could be freely discharged into receiving water used for drinking water simply because the sulfur was not added to the discharged water.” *Id.* However, “[s]uch an argument cannot sensibly be credited,” *id.*, and it should not be credited here.

CONCLUSION

For the foregoing reasons, the Clean Water Act unambiguously applies to discharges of pollutants from water body into another. Amici urge the Court to

affirm the District Court decision on the basis that EPA's water transfers rule fails under *Chevron* Step I.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

- 1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6403 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
- 2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Laura B. Murphy

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Dated: December 29, 2014

APPENDIX - BIOGRAPHIES OF AMICI

Leon G. Billings has had a 50-year career in politics and public policy. As the first staff director of the United States Senate Environment Subcommittee, and Administrative Assistant to Senator Edmund S. Muskie, he was the principal author of the Clean Air Act of 1970 and the Clean Water Act of 1972, as well as amendments to both laws between 1967 and 1977. From 1991 through 2003, he was a member of the Maryland House of Delegates. He is President of Leon G. Billings, LLC, which advises clients on environmental and conservation policy and politics, and is also an Adjunct Professor in the School of International and Public Affairs at Columbia University.

Tom Jorling served as Minority Counsel to the United States Senate Committee on Public Works between 1968 and 1977. In that capacity, he assisted in drafting the Clean Air Act of 1970 and the Federal Water Pollution Control Act Amendments of 1972 with his colleague Leon G. Billings. From 1977 to 1979 he served as Assistant Administrator for Water and Hazardous Waste at the United States Environmental Protection Agency with responsibility for the implementation of the Clean Water Act, the Safe Drinking Water Act, and other federal laws. He also served as Commissioner of the New York State Department of Environmental Conservation and Vice President of Environmental Affairs for

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Jeffrey G. Miller is Professor of Law Emeritus at Pace University School of Law. He is the author of *Introduction to Environmental Law: Cases and Materials on Water Pollution Control* (with Ann Powers & Nancy Long Elder) (Environmental Law Institute 2008); *The Law of Hazardous Waste Disposal and Remediation* (with Craig Johnston) (American Casebook Series 2d ed. 2005); and *Plain Meaning, Precedent, and Metaphysics: Interpreting the “Addition” Element of the Clean Water Act Offense*, 44 *Envtl. L. Rep News & Analysis* 10770 (2014). Through the 70’s and 80’s he held a number of positions with the Environmental Protection Agency and ultimately served as Assistant Administrator of Enforcement and Compliance. He has lectured, taught, and consulted on environmental law throughout the country and in half a dozen foreign countries.

Robert W. Adler is the James I. Farr Presidential Chair in Law and Dean of the College of Law, University of Utah. He is the author of *Modern Water Law: Private Property, Public Rights, and Environmental Protections* (Foundation Press 2013); *Environmental Law: A Conceptual and Pragmatic Approach* (with David R Driesen & Kirsten Engel) (2d ed. Wolters Kluwer 2011); and *The Clean Water Act Twenty Years Later* (Island Press 1993). As a scholar, Professor Adler urges a broader, more holistic approach to the restoration and protection of aquatic and

other ecosystems than is used in traditional environmental laws alone, which focus on discrete kinds of environmental harm. Between 1990 and 1994 he served as Chair of the National Clean Water Network.

William Andreen is the Edgar L. Clarkson Professor of Law at the University of Alabama School of Law. He is also Director of the Joint Summer School Project with the Australian National University. He is a nationally recognized expert on the Clean Water Act and has published many articles tracing the history and current status of the law including *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I*, 22 Stan. Envtl. L.J. 145-200 (2003); *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 Stan. Envtl. L.J. 215-294 (2003); *Water Quality Today: Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537-593 (2004) (reprinted in 36 Land Use & Env't L. Rev. 543-614 (2005)); and *The Clean Water Act: A Blueprint for Reform* (co-authored) (Center for Progressive Reform 2008).

Harrison C. Dunning is Professor of Law Emeritus at the University of California, Davis School of Law. Professor Dunning is a leading expert on natural resources law and water law. He is author of the public rights portion of the leading national treatise on water law, *Waters and Water Rights*, and he has written numerous articles on water law, particularly with regard to the public trust

doctrine. He is a member of the board of directors of the Water Education Foundation and the Bay Institute of San Francisco. He is the 2014 recipient of the “Defender of the Trust” Award presented by the Mono Lake Committee for his seminal contributions to the jurisprudence of the public trust doctrine in California.

Mark Squillace joined the Colorado law faculty in 2005. He served as the Director of the law school’s Natural Resources Law Center from 2005 until 2013. Before joining the Colorado law faculty, Professor Squillace taught at the University of Toledo College of Law where he was appointed the Charles Fornoff Professor of Law and Values, and at the University of Wyoming College of Law where he served a three-year term as the Winston S. Howard Professor of Law. He is a former Fulbright scholar and the author or co-author of numerous articles and books on natural resources and environmental law. His work focuses on natural resources and environmental law and policy with a focus on water law, environmental decision-making, public lands, and the environmental impacts from fossil fuel development. In 2000, Professor Squillace took a leave from law teaching to serve as Special Assistant to the Solicitor at the United States Department of the Interior where he worked directly with the Secretary of the Interior, Bruce Babbitt, on a variety of legal and policy issues.

Sandra B. Zellmer is the Robert B. Daugherty Professor of Law at the University of Nebraska. She also serves on the Steering Committee for the

University's Global Water for Food Institute. Professor Zellmer is a co-author and principal editor of a casebook, *Natural Resources Law*, published by Thomson/West Publishing (with Professors Laitos & Wood) (2d edition 2012). She has published dozens of book chapters and articles, and was awarded "Best Paper" by the American Bar Association (ABA) for her work on "Missouri River Mud: Clean Water and Endangered Species," which she presented at the ABA's Annual Water Law Conference in 2011. She also served as a committee member on the National Academy of Sciences National Research Council Committee on Missouri River Recovery.