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## ARTICLES

# Plain Meaning, Precedent, and Metaphysics: Interpreting the “Addition” Element of the Clean Water Act Offense

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## Summary

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The Clean Water Act (CWA) prohibits addition of any pollutant to navigable waters from any point source by any person without a permit. Surprisingly, the first element of this prohibition, “addition,” remains undefined. It has been interpreted broadly by regulators and judges to expand the prohibition to such an extent that it threatens to capture innocent people. EPA in particular has confused “addition” with “navigable waters” to such an extent that it threatens to eviscerate half of the CWA’s regulatory strategies and programs: water quality standards and the §404 program protecting wetlands. This Article examines the interpretation of “addition” within the CWA. It suggests a definition that would not unduly expand the provision nor emasculate EPA regulatory programs. It rejects EPA’s unitary water theory in favor of a more workable solution.

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This Article examines the meaning of the simple word “addition” in the first element of the Clean Water Act (CWA)<sup>1</sup> prohibition against any addition of any pollutant to navigable waters from any point source by any person, unless in compliance with a permit. Neither the U.S. Congress nor the U.S. Environmental Protection Agency (EPA) has defined “addition” in this context. EPA and the courts have interpreted the element broadly to expand the offense. Some of their broad interpretations threaten to make felons of innocent persons owning a particular class of point sources: those conveying pollutants added by others to navigable waters. EPA’s conflation of “addition” with “navigable waters,” including its theory that all navigable waters are one entity, threatens to eviscerate half of the CWA’s regulatory strategies and programs: water quality standards, one of the CWA’s two grand strategies for pollution control; and §404, one of the CWA’s two permit programs for assuring water quality. The Article examines administrative and judicial interpretations of “addition” as an element of the CWA. It suggests a definition that fits all appropriate fact situations, while avoiding both threats to innocent point source owners and to the viability of the water quality standards and wetlands protection programs. It rejects the need for and legality of EPA’s theory of unitary navigable water, EPA’s water transfer rule based on that theory, and much of EPA’s “outside world” theory of “addition.”

## I. No Statutory Definition

Section §301(1) prohibits “the discharge of any pollutant by any person,”<sup>2</sup> unless in compliance with several listed sections. The listed sections authorize the issuance of two types of CWA permits<sup>3</sup> and specify their substantive requirements. Section 502(12) defines “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.”<sup>4</sup> In sum, the subsection

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1. Clean Water Act (CWA), 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. 33 U.S.C. §1311(1).
3. Permits issued pursuant to §402, 33 U.S.C. §1342, regulate water pollution; permits issued pursuant to §404, 33 U.S.C. §1344, regulate filling wetlands.
4. 33 U.S.C. §1362(12). Because the term defined in §502(12), “discharge of a pollutant,” is not exactly the same as the term used in §301(a), “the discharge of any pollutant,” the definition in §502(12) arguably does not apply to the phrase used in §301(a). However, courts routinely refer to §502(12) as defining “discharge of a pollutant” in §301(a), without noting the difference. (Emphasis added throughout.) See, e.g., *Committee to Save Mokelumne River v. East Bay Mun. Dist.*, 13 F.3d 305, 307, 24 ELR 20225 (9th Cir. 1993); *Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 2013

prohibits: (1) any addition (2) of any pollutant (3) to navigable waters (4) from any point source (5) by any person,<sup>5</sup> except in compliance with a CWA permit. Justice Ruth Bader Ginsburg has called this the “core command” of the CWA.<sup>6</sup>

This Article, the first in a series of five, examines how EPA and the courts have interpreted the prohibitory clause “addition”—a common noun form of a verb with no statutory definition—from 1972 to 2013.<sup>7</sup> It seeks to provide a definitive analysis of the term “addition”; and to explore the methods that EPA and courts have used to interpret the element.

Together, the five articles examine how EPA and the courts have interpreted the initial four jurisdictional elements of the water pollution control offense. Single articles examine each of the first four elements and a fifth article explores differences in the techniques courts have used to interpret them. The natures of the key words in these elements are very different: (1) “addition,” a common noun form of a verb with no statutory definition; (2) “pollutant,” a common noun with a statutory definition meaning or excluding specific substances or classes of substances, some of the included substances not fitting the common understanding of “pollutant;” (3) “navigable waters,” a traditional Commerce Clause jurisdictional phrase with a

short statutory definition having nothing to do with waterborne transportation; and (4) “point source,” an artificial construct with a statutory definition, followed by lists of examples and exclusions. The key word in the final element, “person,” is defined in the normal legal sense and has led to virtually no litigation, although it has great importance. Disputes over the interpretations of the first four statutory terms have produced a steady stream of reported decisions since the initial implementation of the statute. Even after four decades, many of these issues are unresolved and new issues continue to surface.

“Addition,” the noun form of the verb “to add,” is the action noun in the offense. Because offenses are actions, “addition” is the central element in the offense. This is more easily seen by rearranging the offense as a sentence: A person illegally adds pollutants to navigable water from a point source, unless he is in compliance with a permit. “Person” is the subject of the sentence, “adds” is the verb, and “pollutant” is the object. The rest of the sentence is a series of prepositional phrases: “to navigable water,” “from a point source,” “in compliance,” and “with a permit.” All of these prepositional phrases are adverbial phrases, modifying “adds.” The last phrase, a defense rather than an element of the offense, is a compound phrase, but is still an adverbial prepositional phrase modifying “adds.”

It is important to keep the centrality of “addition” in mind when addressing the disputes considered in the Article. Many of the defendants in these disputes raised “the passive point source” defense. They argued that their point sources added no pollutants to water, but merely conveyed already polluted water to downstream navigable water. The point sources were wholly passive, adding nothing that was not in the water already, and the defendants owning the point sources therefore did not violate the statute. This argument subtly rearranges the structure of the offense, making “point source” rather than “person” the subject of the sentence. It would make the sentence read: A point source illegally adds pollutants to navigable water by any person except in compliance with a permit. That, of course, makes no sense. The offense, like all other offenses, prohibits human conduct and activity, not point source conduct and activity.

Typical CWA cases involve industries or municipalities adding their pollutants to navigable waters through their own point sources (usually outfall pipes) from their own operations. The §402 permit program is designed with these cases in mind. Atypical cases involve persons adding their pollutants to navigable waters through point sources owned or operated by others. The statute explicitly deals with many but not all of these atypical cases. For instance, the pretreatment program in §307(b) controls industrial discharges of pollutants into municipal sewers leading to

WL 3779166 (E.D. La.); *United States v. Bailey*, 516 F. Supp. 2d 998 (D. Minn. 2007); *Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292, 1295, 5 ELR 20039 (N.D. Cal. 1974), *rev'd in part & modified in part on other grounds*, *Sierra Club v. Leslie Salt Co.*, 412 F. Supp. 1096, 6 ELR 20363 (N.D. Cal. 1976), *aff'd*, *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 8 ELR 20480 (9th Cir. 1978).

5. “By any person” is not included in the §502(12) definition. It is the last of the elements because it follows “discharge of a pollutant” in §301(a). There is little controversy about the interpretation of “person” as defined in §502(5). The element is important because it confines violations of the CWA to the consequences of human activities. Of course, it is difficult to conceive of a civil or criminal offense without a human action.
6. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 298 (2009). The author has called it elsewhere “the basic prohibition” of the CWA. See JEFFREY G. MILLER ET AL., INTRODUCTION TO ENVIRONMENTAL LAW: CASES AND MATERIALS ON WATER POLLUTION CONTROL 141 (2008).
7. The other elements in the clause are similarly worthy of individual analysis, although space constraints preclude discussion of them in this Article. Briefly, “pollutant” is a common noun with a statutory definition meaning or excluding specific substances or classes of substances, some of the included substances not fitting the common understanding of “pollutant.” 33 U.S.C. §1362(6). “Navigable waters” is a traditional Commerce Clause (U.S. Const. Art. I, §8, cl. (3)) jurisdictional phrase with a short statutory definition having nothing to do with waterborne transportation. 33 U.S.C. §1362(7). The touchstone of “navigable water” for Commerce Clause jurisdictional purposes is use in waterborne navigation. See *The Daniel Ball*, 77 U.S. 557 (1870). “Point source” is an artificial construct with a statutory definition, followed by lists of examples and exclusions. 33 U.S.C. §1362(14). The key word in the final element, “person,” is defined in the normal legal sense (33 U.S.C. §1362(5)) and has led to virtually no litigation, although it has great importance. Disputes over the interpretations of the first four statutory terms have produced a steady stream of reported decisions since the initial implementation of the statute. Even after four decades, many of these issues are unresolved and new issues continue to surface.

municipal treatment systems, from which they are added to navigable waters municipal outfalls, a large part of this atypical universe. These “indirect” industrial dischargers are not required to have §402 permits,<sup>8</sup> but are directly regulated by technology-based effluent limitations for toxic pollutants and other limitations designed to prevent interference with the municipal treatment systems into which they are discharged or from passing through those systems untreated. The municipal treatment systems’ subsequent addition of the indirect industrial dischargers’ treated pollutants to navigable waters is regulated by §402 permits issued to the municipalities, because the municipal systems are designed and intended to collect, treat, and discharge these industrial wastes. Similarly, both municipal and industrial stormwater systems are required under §402(p) to have permits. That is not remarkable: But for the municipal street and storm sewer systems, polluted stormwater would not be discharged to nearby streams; and but for the industrial operations, polluted stormwater would not be discharged to nearby streams.

However, there is an entirely different category of these atypical cases, in which the pollutants passing through point sources have no other relationship with the point sources or their owners. The following hypothetical illustrates these cases. Water from a spring on A’s property flows into a river adjoining that property. A maintains a farm road bordering the river. Because land at the intersection of the spring flow and the river becomes muddy and obstructs the passage of vehicles, A installs a culvert for the spring flow to the river, and elevates the farm road to pass over the culvert. Unknown to A, B is upset with C, his former girlfriend, and her family because she will no longer see him. C and her family live on the river, just downstream from A’s property, and use it as their water supply. In revenge for C’s renunciation of him, B pours several buckets of a deadly poison into the spring water just before it passes through the culvert, so that the poison enters the river through the culvert, flows into C’s water supply, and kills C and her family. Who would the prosecutor charge with homicide, A or B? Of course, she would charge B because B is the actor intending and acting to cause the deaths. Would the prosecutor charge A, because of the role that his culvert played in the action? Of course not. She would not charge A because he did not act toward C and his culvert was not a but-for cause of the deaths. If A had never installed the culvert and B had poured poison in the spring flow, the same deaths would have occurred.

In the above hypothetical, who would the prosecutor charge with the crime of water pollution, A or B? Should she charge A, because A owned and operated the point source from which the pollutants flowed into the river and the owner or operator of a point source may add pollutants to rivers from a point source only in compliance

with a CWA permit? No, because A did not act toward the river with regard to the pollutants and was not a but-for cause of their entry into the river. If A had never installed the culvert and B had poured pollutants into the spring, the same pollutants would have entered the river. A would have had no reason to know he should apply for a CWA permit to add pollutants to the river. On the other hand, B acted toward the river with regard to the pollutants, B was the but-for cause of the pollutants entering the river, and B had every reason to know that he should apply for a CWA permit to add pollutants to the river. B, not A or A’s point source, is the “any person” who violated CWA §301(a); B added pollutants to the river from a point source. (Of course, if A installed the culvert knowing that B’s poison would enter the river more quickly and more completely, A would be complicit with B’s offenses.<sup>9</sup>)

Courts, including the U.S. Supreme Court,<sup>10</sup> have generally rejected the “passive point source” owner defense, but only in cases in which the point source owner was not truly passive and without considering the above hypothetical or situations like it. Many decisions interpret “addition” broadly enough to convict the culvert owner in the above hypothetical, even though treating him as a §301(a) violator makes no sense and may even raise constitutional issues.<sup>11</sup> The point source owner in the hypothetical, however, is defended by recognizing that under §301(a), a person must act to add pollutants to navigable water from a point source. In the typical cases and most of the atypical cases, the point source owners are not really passive, they act to add pollutants to water where the pollutants would not otherwise be; but for their actions, the pollutants would not be in the water.<sup>12</sup> In our hypothetical, however, A is a purely passive point source owner and is not a but-for cause of adding poison to the river. If the culvert had not existed, the poisons would still have entered the river and killed C and her family. B is the only but-for cause of the pollutants entering the river and the resulting deaths, and B added pollutants to navigable water from a point source, even if he did not own the point source.

9. Violations of the CWA are criminal felonies if they are knowing, criminal misdemeanors if they are negligent, and may be civil offenses with no fault. §309(c), 33 U.S.C. §1319.

10. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105, 34 ELR 20021 (2004), the Court held that the passive point source defense was “untenable.”

11. *United States v. Apollo Energies, Inc.* 611 F.3d 679 (10th Cir. 2010), in which the court treated lack of causation and of mens rea as raising similar constitutional issues. See also the helpful note by Alex Arensberg, *Are Migratory Birds Extending Environmental Criminal Liability*, 38 *ECOLOGICAL L.Q.* 427 (2011). Because §309(c) requires mens rea for criminal offenses and A in our hypothetical has no level of mens rea, the constitutionality of criminal prosecution for a CWA offense without causation is unlikely to be an issue. However, because civil liability under §309(a) or (b) is strict liability, requiring no mens rea, a civil prosecution against A for violating §301(c) without an act by A causing the violation is possible.

12. In *South Florida Water Management District*, 541 U.S. 95, for instance, the defendant pumped polluted donor water into unpolluted receiving water and hence was a but-for cause of adding pollutants to the receiving water. If the defendant had not acted, the pollutants would not have reached the receiving water.

8. See 40 C.F.R. §122.2, which defines “discharge of a pollutant” not to include additions from “indirect sources,” which it, in turn, defines as sources adding nondomestic waste to municipal sewage treatment plants.

In the absence of a statutory or regulatory definition of “addition” or controlling precedent, courts “are left to construe it ‘in accordance with its ordinary or natural meaning.’”<sup>13</sup> Indeed, courts interpreting “addition” in the CWA use plain meaning and precedent more frequently than other interpretive devices.<sup>14</sup> To determine the plain meaning of a word, courts may consult a dictionary,<sup>15</sup> although there is no unanimity which dictionary is preferred.<sup>16</sup> A dictionary definition particularly helpful to understanding “addition” in §301(a) is “the act . . . of adding something to something else,”<sup>17</sup> which can be restated as “the act of adding something (A) to something else (B),” when (A) would not otherwise be in (B).” In the context of §301(a), it would read: “the act of adding A (any pollutant) to B (navigable waters) from a point source,” when A (that pollutant) would not otherwise be in B (those navigable waters).”

The working hypothesis of this Article is that “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.” Because the author’s definition of “addition” focuses on addition by a person rather than by a point source, it is possible for a point source to convey pollutants to navigable water without adding them to it. This formulation of the definition still covers most passive point source situations, but does not include the passive owner in our hypothetical. This formulation emphasizes the causal concept inherent in the definition; addition does not happen spontaneously, something must cause it.<sup>18</sup> It also incorporates part of what will be discussed below as part of EPA’s “outside world”

theory of “addition.”<sup>19</sup> This definition should yield appropriate results in the decisions examined below. EPA and the courts should adopt it.

## II. Legislative and Administrative Definitions of “Addition”

CWA §502, the general definitional section of the statute, does not define “addition,” the statute does not define it elsewhere, and there is no legislative history directly suggesting its meaning. Congress used “addition” in the CWA only in §§301(a) and 502(12),<sup>20</sup> except in the irrelevant phrase “in addition to” or a variant.<sup>21</sup> This should make interpretation of “addition” easy in most cases, because there is no congressional interference with the ordinary meaning of this straightforward, almost mathematical concept.<sup>22</sup> And as we will see below, some cases are easy. On the other hand, with no indication of what Congress had in mind by using “addition,” beyond the word itself and the purpose of the statute to control water pollution, some “addition” decisions may not be easy. Indeed, some are difficult, with courts almost resorting to metaphysics.<sup>23</sup>

The general definitional section of EPA’s §402 regulations, 40 C.F.R. §122.2, does not define “addition” either. EPA’s few attempts to clarify the meaning of “addition” have only muddled the waters. In its initial attempt in *National*

(11th Cir. 2002), *aff’d on other grounds*, South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 34 ELR 20021 (2004).

19. As discussed below in the Article, the Supreme Court rejected the remainder of EPA’s “outside world” theory in *Miccosukee*. See 541 U.S. at 105.

20. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2005); *Catskill Mountain Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001).

21. For example, §212(2)(B), 33 U.S.C. §1292(2)(B), “In addition to the definition contained in subparagraph (A) of this paragraph, ‘treatment works’ means . . .” Section 319(a)(1)(A), 33 U.S.C. §1329(A)(1)(A), also provides that “without additional action to control nonpoint sources . . .” (Emphases added.)

22. The length to which Congress sometimes goes to interfere with straightforward scientific concepts is illustrated by its definition of “solid wastes” as “solid, liquid, semisolid or contained gaseous material” in the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011. See RCRA §1004(27), 42 U.S.C. §6903(27).

23. For instance, consider the idea that soil and vegetation withdrawn from a wetland in a landclearing operation are metamorphosed into pollutants the instant they are returned to the same wetland and that the pollutant is added to the wetland because no pollutant was there before, even though the same soil and vegetation were in the same wetland before and after the operation. *Borden Ranch v. U.S. Army Corps of Eng’rs*, 261 F.3d 810, 814, 32 ELR 20011 (9th Cir. 2001); *United States v. Deaton*, 209 F.3d 331, 335-36, 30 ELR 20508 (4th Cir. 2000). Consider also the bizarre idea that all the disparate bodies of navigable water in the country are one and therefore channeling a heavily polluted navigable water into a pristine navigable water adds no pollutants to the pristine water because the polluted water and the pristine water are the same navigable water. *Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). Equally metaphysical is the notion that water withdrawn with live fish from navigable water, run through a power plant to generate energy, and returned as fish puree to the same navigable water body adds nothing to the navigable water because it never lost its status as navigable water, while water withdrawn from same navigable water to cool the same power plant and returned hot to the same navigable water body adds heat and fish puree to the navigable water because the water lost its status as navigable water during its journey through the generator. *National Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 589, 19 ELR 20235 (6th Cir. 1988).

13. *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 376 (2006), quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

14. The author’s research has found that courts used each of the precedent and plain-meaning canons of construction in 49 of the 61 decisions interpreting “addition,” or 80%. Courts employed the next most commonly used canons in only 19 decisions. Although courts predominantly used plain meaning to interpret “addition” until 1983, after that date, they used plain meaning and precedent almost equally.

15. See WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 275 (1987) (identifying one of the Chief Justice William Rehnquist Court’s canons of statutory construction as “follow dictionary definitions of terms unless Congress has provided a specific definition,” and noting that the dictionary should be “of the era in which the statute was enacted.” See also ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 415-24 (2012), for a detailed discussion of the nuances of using dictionaries in determining the “plain meaning” of statutes.

16. According to Justice Antonin Scalia and Bryan Garner, *supra* note 15, only a “scholarly” or “weighty” dictionary will do, and they list several dictionaries from different eras as possibilities. See SCALIA & GARNER at 415-24. They also suggest using a dictionary contemporary with the use of the word being interpreted, the year 1972 in the case of the CWA, or later because dictionaries’ definitions usually trail actual usage. *Id.* at 419.

17. See Oxford English Dictionary Online. Courts have consulted other dictionaries. For instance, in *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1143 (10th Cir. 2005), the court referred to the definition of “addition” in *Webster’s New International Dictionary* (2002): “the act or process of adding.” In *Friends of the Everglades v. South Fla. Water Mgmt. Dist.*, 2006 WL 3635465 (S.D. Fla. 2006), the court referred to the definition in *Webster’s 3rd International Dictionary Unabridged* (1993): “joining of one thing to another.” See also *S.D. Warren Co.*, 547 U.S. at 376, in which the Court looked to the dictionary definition of “discharge” in *Webster’s New International Dictionary* at 742 (2d ed. 1954).

18. The Eleventh Circuit recognized this in *Miccosukee Tribe of Indians of Fla. v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368-69, 32 ELR 20475

*Wildlife Federation v. Gorsuch*,<sup>24</sup> EPA asserted that “addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world.”<sup>25</sup> In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the petitioner did not introduce pollutants into water, but pumped an already polluted water body into a less-polluted water body. The petitioner argued from EPA’s “outside world” theory that §402 permits are required only “‘when a pollutant originates from a point source,’ and not when pollutants originating elsewhere merely pass through the point source.”<sup>26</sup> The Supreme Court decisively rejected this argument. “A point source need not be the original source of the pollutant: it need only convey the pollutant to navigable water.”<sup>27</sup> In doing so, however, the Court interpreted “point source” rather than “addition.” This Article addresses the “outside world” concept in several contexts in detail below, rejects it in part, and questions the usefulness of the remainder.

EPA’s second attempt to clarify “addition” was in a policy and later in the preambles to a proposed and final rule exempting water transfers from the requirement of obtaining §402 permits. While the rule does not mention “addition,” the preambles state that EPA’s interpretation of “addition” is the basis of the rule. However, on close reading of the preambles, they did not define “addition,” but instead interpreted the statute as a whole or interpreted “addition” in conjunction with “navigable waters” to mean all navigable waters as a unitary national entity, rather than individual navigable water bodies as singular entities. The Article addresses the policy and the rule in detail below and concludes they are erroneous interpretations of the CWA.

### III. Judicial and Administrative Interpretations of “Addition”

As with most statutory interpretation, the meaning of “addition” is uncontroversial in most cases. It is usually fairly clear whether a person is adding pollutants to navigable water. You can often see a factory discharging discolored or foaming water into a river, visually adding pollutants. Indeed, most industrial and municipal dischargers admit they are adding pollutants to navigable water, by applying for CWA permits to do so. With that in mind, it is no surprise that the “addition” element is not contested in many litigated cases.<sup>28</sup> Even in decisions in which the “addition” element is challenged, courts often summarily hold that an addition has taken place.<sup>29</sup>

Most of these cases fall into three broad categories. The first, and most numerous, are situations in which point

source owner defendants claim they are not liable because other persons add pollutants to water upstream from the point sources, and the pollutants merely flow through the defendants’ passive point sources. The second, and least numerous, are situations in which the additions are directly or indirectly to or from the air. The final category consists of §404 cases involving additions in the process of clearing wetlands.

#### A. Passive Point Sources

Before examining the patterns in which defendants may raise the passive point source defense, it is useful initially to develop the concept of the discharge of pollutants and its supporting vocabulary. A point source, for instance a pipe, has two ends, one into which water enters and another from which water is discharged. Water entering the pipe is withdrawn from donor water and is referred to as influent. Water discharged from the pipe flows through the point source into the receiving water and is referred to as effluent. The donor water may be non-navigable (for instance, storm-water runoff, isolated waters, or groundwater) or navigable (the same navigable water body as the receiving water or a different navigable water body). Passive point source owner or operator defendants argue that they are liable only for pollutants they add to water and that they are not liable for pollutants added by other persons to donor water before it reaches the defendants’ passive point sources. They argue that those others are the but-for causes of adding the pollutants to the receiving water; without the addition of pollutants *by others* to the donor water, pollutants would not enter the receiving navigable water. A significant flaw in this argument is that there may be more than one but-for cause of a violation.

Causation is an element of negligence and nuisance, the common-law precedents of basic pollution control legislation, including the CWA.<sup>30</sup> It might be assumed that causation has no place in pollution control legislation, because it creates strict liability offenses.<sup>31</sup> But strict liability at common law means liability without fault or intent, not liability without cause.<sup>32</sup>

The U.S. Court of Appeals for the Eleventh Circuit rejected the passive point source defense in *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*,<sup>33</sup> based on lack of but-for causation. In *Miccosukee*, plaintiffs challenged the transfer through pumps and pipes of a polluted navigable donor water into a less-polluted navigable receiving water without a §402 permit. Defendants argued they did not add the pollutants to the less-polluted receiving water because others added them

24. 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982).

25. 693 F.2d at 175.

26. 541 U.S. 95, 104, 34 ELR 20021 (2004).

27. 541 U.S. at 105.

28. The author’s research has found that 61 decisions interpret “addition,” 68 interpret “pollutant,” 75 interpret “point source,” and 138 interpret “navigable waters.” Many of the decisions interpret more than one element.

29. In 14 of the 61 decisions considered in this Article, courts decided “addition” was or was not satisfied based solely on a recitation of either plain meaning or precedent.

30. MILLER, *supra* note 6, at 11-48.

31. The CWA’s civil offenses are strict liability; they have no mens rea component. See §309(a) & (b); *American Canoe Ass’n v. Murphy Farms*, 412 F.3d 536, 540 (4th Cir. 2005). The CWA criminal offenses, however, are not strict liability; the misdemeanor offense requires negligence, and the felony offense requires knowledge. See §309(c).

32. DAN B. DOBBS ET AL., *THE LAW OF TORTS* 959-61 (2011).

33. 570 F.3d 1364 (11th Cir. 2002).

earlier to the more-polluted donor navigable water. The court concluded:

When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water but for the change in flow caused by the point source, an addition of pollutants from a point source occurs.<sup>34</sup>

In other words, the point source owner defendant in this case was not truly passive.

On appeal from the Eleventh Circuit's decision, the Supreme Court unanimously<sup>35</sup> held that the passive point source defense in that case was "untenable," putting the defense to rest, at least under the fact pattern at issue in the case. However, the Court did not base its holding on interpreting "addition," as the Eleventh Circuit had, but on interpreting "point source," for the definition of that element "makes it plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters."<sup>36</sup> The definition of point source is a "discernible, confined and discrete conveyance." (Emphasis added.) The Court's failure to address causation was not a rejection of causation's role in "addition," because the Court simply did not address the meaning of "addition." The Eleventh Circuit's and Supreme Court's *Miccosukee* decisions will be discussed in greater detail below.

Owners of point sources accused of violating the CWA have raised the passive owner defense when others initially introduced pollutants into donor water subsequently flowing through defendants' point sources into navigable receiving water.<sup>37</sup> These cases involved many fact patterns,

including runoff from abandoned mining operations, other surface runoff, dam-induced changes in water quality, water recirculated in industrial activity, and transfers of water between watersheds. The analyses in these cases by EPA and the courts,<sup>38</sup> however, fall into three other categories based on whether the pollutants: (1) are recirculated within the same navigable water; (2) originate in non-navigable stormwater runoff; or (3) are transferred from one navigable water to another navigable water. Decisions within these categories sometimes conflate the analysis of two elements, "addition" and "navigable waters." They also routinely neglect to determine whether the defendants are truly "passive" point source owners or whether they act in some way to add pollutants to navigable water.

## I. Additions From Circulated or Recirculated Water

In the decisions analyzed here, defendants withdrew polluted navigable donor water, used it, and then discharged it through a point source to the same navigable receiving water from which the donor water was diverted prior to use. If the defendants did no more, under both EPA's "outside world" theory and our suggested definition of "addition," no permit is necessary.

### a. Net/Gross Rule

At the outset of the implementation of the §402 permit program, EPA confronted the issue that many dischargers of polluted effluent withdrew polluted influent from and discharged polluted effluent to the same water body; some of the pollutants in their effluents were already in the influent donor water when they withdrew it. The dischargers were passive point source owners for pollutants already in their influent water: other polluters or nature itself initially introduced the pollutants to the donor water and therefore were the but-for causes of the defendants' point sources adding those pollutants to the receiving water.

Thus, the question: Did the statute require point source owners or operators to treat pollutants that other persons or

34. *Id.* at 1368-69. Courts commonly use but-for analysis to determine causation for tort purposes. See *DOBBS ET AL.*, *supra* note 32 at §168. The defendant's action is the cause-in-fact of a harm if, but for the defendant's conduct, the harm would not have occurred. This necessarily requires a comparison with what would have occurred if the defendant had not acted. *Id.* at §§168-69. Of course, it is possible to have two defendants whose actions both are but-for causes of a harm. *Id.* at §171. A but-for analysis of the passive point source owner and the person adding pollutants to the donor water will come to different results depending on the facts. If the pollutant added to the donor water would have entered the receiving water without the point source, the owner or operator of the point source is not the but-for cause of the addition and is not liable, at least not under a but-for causation analysis. In either case, the person adding pollutants to the donor water is a but-for cause of the addition of the pollutants to navigable water from the point source, regardless of the liability of the owner or operator of the point source.

35. Although Justice Scalia dissented in part, he concurred with the majority on the passive point source issue. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112-13, 34 ELR 20021 (2004).

36. *Miccosukee*, 541 U.S. at 105. The Court's second conclusion is that Congress clearly intended that sewage treatment plants (publically owned treatment works or POTWs) require §402 permits; POTWs "treat and discharge pollutants added to water by others."

37. Such cases arose under the Refuse Act, the predecessor of the CWA's §402 program, and early in the enforcement of the CWA. In *United States v. Granite State Packing Co.*, 470 F.2d 303, 3 ELR 20074 (1st Cir. 1972), the industrial defendant was liable under the Refuse Act for discharging its waste into water that subsequently flowed through a municipally owned culvert to navigable water. And in an early case under the CWA, *United*

*States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976), the industrial defendant was liable under the CWA for the discharge of its waste into a municipally owned storm sewer that subsequently flowed through a point source into navigable water. In both cases, the enforcement target was the person initially adding pollutants to donor water, not the passive point source owner. The results were not unexpected; similar results would have occurred under negligence and nuisance law, the common-law antecedents of modern pollution control statutes. See, e.g., *Springer v. Jos. Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975), in which Schlitz discharged brewing waste into a municipal sewage treatment plant, causing the plant to discharge untreated waste into a river, injuring a downstream landowner's property. The court held that Schlitz could be liable in negligence if in the exercise of reasonable care it could have anticipated that the treatment plant could not adequately treat the brewery waste. We do not know enough facts in these cases to determine whether the point source owner was also a but-for cause of adding pollutants to the receiving water, i.e., whether it discharged donor water into receiving water that the donor water would not otherwise have entered.

38. Courts in these cases typically deferred to one degree or another to EPA's interpretation.

nature itself caused to be in the donor water before the dischargers first withdrew influent from it, used the influent, and then discharged it back to the same receiving water? The point source owners were not the but-for causes of the pollutants from the influent; the same pollutants would be in the receiving water if the point source never existed.<sup>39</sup> Industries challenged technology-based effluent standards because they perceived EPA would apply them in permits to require treatment of all pollutants in an industry's discharge, including pollutants present in the water before the industry withdrew it for use.<sup>40</sup> Before courts dealt with the issue, EPA proposed and thereafter adopted a regulation allowing permit applicants to seek credit toward meeting their permits' effluent limitations for pollutants already in their influents, the so-called net/gross regulation.<sup>41</sup> It should be noted that EPA's rule applies only when the "intake water is drawn from the same body of water into which the discharge is made," excluding water transfers later authorized by EPA's water transfer rule.<sup>42</sup>

The net/gross rule is consistent with EPA's concept that "addition" must come from the "outside world." When an industry withdraws donor water from a navigable water body and returns it after use to the same navigable receiving water, the pollutants already in the donor water prior to the industrial use (1) already have been added to the donor water by others or by nature and (2) are from the same world as the receiving water, not from the "outside world." But the rule also flows from the causal aspect of "addition" developed in this Article. If the industrial point source owner had never withdrawn, used, and discharged the water or had never even existed, the same pollutants would still be in the same receiving water above and below the location of the same point source. Under the Eleventh Circuit's analysis in *Miccossukee*, the point source owner in this situation would not be liable because the point source is not a but-for cause of adding these returned pollutants to the navigable water. Although the Supreme Court did not discuss causation in *Miccossukee*, its holding is consistent with the Eleventh Circuit's reasoning. A counterargu-

ment might be that when the industry withdraws influent water, the water loses its navigable character, so that when the industry later discharges its effluent with the pollutants originally in the donor water to the navigable receiving water, the pollutants are newly added to navigable water.<sup>43</sup> This counterargument, however, is strained, while the main argument is straightforward.

EPA's net/gross regulation allows the permit writer to grant credits toward a permit's effluent limitations for the types and amounts of pollutants in an industry's intake water as long as it discharges those pollutants back to the same navigable water from which it withdrew them. Under the suggested definition of "addition," the industry did not add the pollutants to navigable water; they were already in the same navigable water and would have been in it if the point source had not existed.<sup>44</sup> The point source owner was simply not the but-for cause of the pollutants' presence in navigable water. Requiring an industry to treat such pollutants would be beyond EPA's statutory authority because the industry did not add the pollutants to the navigable water.

## b. Dams and Recirculation

A variant of the net/gross fact pattern arose when environmental advocates challenged EPA's failure to include dams in the §402 permit program and later challenged a pump-storage hydroelectric project for discharging pollutants without a permit.<sup>45</sup> As in the net/gross effluent guidelines challenges, dams and the pump-storage project withdrew donor water from navigable water and discharged it to the same navigable receiving water after use, thus recirculating the water. And as in the net/gross challenges, the substances discharged were in the donor water in some form to begin with and hence the point sources were arguably not the but-for causes of the pollutants being in the receiving water. But in these cases, the point source owners were not truly passive as to the pollutants: the owners' use of

39. The issue is more complicated in some circumstances. Industries often require clean water for their processes. For instance, the paper industry needs color-free water to make white paper and commonly treats the water it withdraws to remove color before using the water in making paper. EPA uses another example in the preamble to its water transfer rule, stating that a drinking water treatment facility that removes solids from river water before delivering the water for consumer use would require a §402 permit before returning the solids to the river. 73 Fed. Reg. 33697, 33705 (June 13, 2008). In both of these examples, the water treatment process adds chemicals to the water to remove the unwanted materials from it, i.e., adding alum to remove solids by flocculation. The materials removed from the water are thus mixed with new pollutants and cannot be returned to the water without adding the new pollutants that were not originally in the water. Even with net/gross credits, dischargers must treat the new pollutants.

40. Query whether the issue was ripe for review in the effluent guidelines, which were neutral on the issue. The issue only arose if and when EPA actually applied the effluent guidelines in permits in the manner feared by industry.

41. 40 C.F.R. §122.45(g). "Gross," of course, represents all of the pollutants in the effluent; "net" represents only those pollutants first introduced to water by the discharger.

42. 40 C.F.R. §122.45(g)(4). EPA may waive this restriction if no degradation of the receiving water will result. The restriction is inconsistent with EPA's treatment of water transfers, as will be discussed later in the Article.

43. See, e.g., *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 589, 19 ELR 20235 (6th Cir. 1988). A similar metaphysical argument has been made in §404 cases: dredging removes soil and vegetation from wetlands, that material becomes dredged spoil when removed from the wetland, and dredged spoil is a pollutant. Therefore, when some of the removed material is replaced in the same wetlands, the defendant added a pollutant for the first time and a §404 permit is required, even though the same material was in the wetland before and after the defendant's actions. See *United States v. Deaton*, 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000).

44. That is not entirely true on a molecule-by-molecule basis. The industry cannot isolate the molecules of a pollutant in its intake water and simply transfer them to the discharge water without treatment. Those molecules mix with the molecules of the same pollutant added by the point source's operation and both are subject to whatever pollution-control technology the industry uses. The net/gross credit works by allowing the point source to subtract from total number of molecules of the pollutant its treatment must remove the number of the molecules already in its intake water. Its treatment will remove some intake molecules and some operation molecules and it will discharge some intake molecules and some operation molecules. Since the molecules are fungible, as long as both sets of molecules are treated effectively, the receiving water will not know the difference.

45. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982) (the dams case); *Consumers Power Co.*, 862 F.2d 580 (the pump-storage project case).

the water changed the character of the pollutants in environmentally detrimental manners. The changes the owners made in the pollutants were not merely metaphorical, but were observable, physical changes.

In *Gorsuch*,<sup>46</sup> environmental advocates challenged EPA's failure to regulate discharges from dams in the §402 permit program. They contended that dams were point sources that added dam-induced pollutants into downstream waters. The issue of whether dams are point sources was not argued; EPA admitted that under some circumstances, dams are point sources.<sup>47</sup> The pollutants identified by plaintiffs included low dissolved oxygen (DO) caused by impoundments,<sup>48</sup> high DO caused by water cascading over dam spillways,<sup>49</sup> temperature changes caused by impoundments,<sup>50</sup> suspended solids caused by algae growth in impoundments,<sup>51</sup> and similar material. The court held that what the petitioner characterized as pollutants were not pollutants, but merely changes in water quality.<sup>52</sup> This will be discussed further in the Article on "pollutant."<sup>53</sup> In the alternative, the court held that if the materials were pollutants, the dams did not add pollutants to the downstream water.

The National Wildlife Federation (NWF) argued that dams created the impoundments, that pollutants were formed in and because of the impoundments, and that the dam then added the pollutants from the impoundments to the waters below. This amounts to arguing that dams are the but-for causes of the pollutant in their ultimate

form. EPA argued for the first time that "addition from a point source occurs only if the point source itself physically introduces a pollutant into the water from the outside world."<sup>54</sup> Because most dam-caused pollutants were already in the reservoir water in some form before they flowed over or through the dam, EPA argued those pollutants were not added to downstream waters by the dam, but merely flowed over or through the dam.

The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit found that nothing in the statute's wording, structure, or legislative history directly addressed the "addition" issue. It concluded that because both NWF's and EPA's interpretations were reasonable, it was bound to defer to EPA's interpretation of the statute to a degree that would later become known as *Chevron* deference.<sup>55</sup> EPA's interpretation, however, was enunciated only in its litigation position in that and earlier cases and therefore was not entitled to what would come to be a *Chevron* level of deference.<sup>56</sup> Courts later rejected the D.C. Circuit's excessive deference, appropriate only if EPA's interpretation had been "adopted in a rulemaking or other formal proceeding,"<sup>57</sup> which it was not.

In *National Wildlife Federation v. Consumers Power Co.*,<sup>58</sup> the environmental group sued a pump-storage project for withdrawing water containing live fish from Lake Michigan; pumping it to a hilltop reservoir at night; releasing it during the day to run by gravity through a turbine to generate both electricity and coincidentally fish puree; and ultimately discharging it with fish puree, fish parts, and some surviving fish back into Lake Michigan. Because electricity is cheaper at night, when the company used it to pump water uphill, and more expensive during the day, when the company generated it by letting the water flow downhill through the turbine by force of gravity, the operation was profitable, producing energy when it was most needed and therefore most expensive.<sup>59</sup>

Acknowledging that the dead fish parts were pollutants, the outfall pipe was a point source, and Lake Michigan was navigable water, the U.S. Court of Appeals for the Sixth Circuit held that the defendant did not violate the CWA because it did not add pollutants to Lake Michigan: The fish parts were not from the "outside world," but instead originated as whole fish in Lake Michigan waters. The key to the court's reasoning was its proposition that the "water passing through the . . . facility never loses its status as water of the United States"<sup>60</sup> or, in the words of the district court, "the Lake water does not lose its status as navigable water simply because it is removed from the Lake, and

46. 693 F.2d 156.

47. 693 F.2d at 165.

48. Fish need high dissolved oxygen (DO). DO diminishes in quiescent water in an impoundment, particularly in deeper water. See *Gorsuch*, 693 F.2d at 161-62.

49. Too much DO, i.e., super saturation, can cause trauma in fish associated with oxygen bubbles in the blood stream. *Gorsuch*, 693 F.2d at 164.

50. Shallow impoundments with high surface-to-volume ratios tend to raise water temperatures, particularly at the surface. Deep impoundments with low surface-to-volume ratios tend to lower temperatures, particularly in deeper levels. Different aquatic species thrive at different temperature levels: trout, for instance, like lower temperatures and bass like higher temperatures. Higher temperatures also promote algae growth. See *Gorsuch*, 693 F.2d at 163.

51. *Gorsuch*, 693 F.2d at 164.

52. *Id.* at 171-74.

53. In an earlier, little-cited district court decision to the contrary, *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 8 ELR 20757 (D.S.C. 1978), environmental groups sued to halt the construction of one dam and the continued operations of two other dams because they discharged pollutants without §402 permits. Plaintiffs argued that water entering the impoundments behind the dams was or would be high in DO and low in metallic substances, whereas water released by the dams was or would be low in DO and high in metallic substances, both changes were caused by the impoundments behind the dams and both were detrimental to fish. The court agreed, "[h]igh quality water . . . will enter the facility . . . and low quality water . . . will be discharged. Thus the release of the water changed because of the impoundment constitutes the 'addition' of pollutants into a navigable water." 457 F. Supp. at 126. At least as to the change from high to low DO, the court was wrong; DO is depleted by, not added in, the reservoir. The court responded that low DO is pollution as defined in §502(19) and that "no reasonable purpose would be served by admitting pollution while denying the existence of a pollutant." While the argument has intuitive appeal, it ignores the fact that §301(a) makes it illegal to add unpermitted pollutants, not to create pollution, and that Congress decoupled "pollutant" and "pollution" in the CWA. At least under these sections, pollutants need not cause pollution. EPA was not a party to this case, and it does not appear that its "outside world" gloss of "addition" was before the court.

54. *Gorsuch*, 693 F.2d at 175.

55. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 857, 14 ELR 20507 (1984).

56. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

57. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.2d 481, 490 (2d Cir. 2001).

58. 862 F.2d 580, 19 ELR 20235 (6th Cir. 1988).

59. This explains why the operation was profitable, even though it requires more energy to pump water uphill than it generates by flowing downhill through the turbine.

60. *Consumers Power*, 862 F.2d at 589.

since the fish never leave the Lake, they cannot be added to it from the outside world.”<sup>61</sup> Although there was Supreme Court precedent (in another context) for the first part of this proposition, the court cited no authority for it.<sup>62</sup> It took pains to explain that in normal industrial use, including industrial cooling, water loses its status as navigable somewhere between the industry’s withdrawal of influent from the donor water, the industry’s use of the water in the industrial process, and the industry’s discharge of the effluent back into the same receiving water.<sup>63</sup> If not, of course, the CWA would prevent little or no pollution. Thus, under the court’s analysis, when a power company withdraws water from Lake Michigan to turn a turbine, the water remains navigable while it is used and returned to the lake, but if the same or a different power company withdraws the same water from the same lake to cool a turbine, even the same turbine, the water is no longer navigable when it is returned to the same lake. EPA reiterated this distinction in the preamble to its water transfer rule.<sup>64</sup> Neither the court nor EPA cited authority or explained the rationale for this difference. Despite revisiting the analysis annually for decades, this author is unable to explain it either, except as a results-oriented distinction or administrative and judicial metaphysics.<sup>65</sup>

The probable reason the court did not cite Supreme Court precedent for its proposition that the water the defendant diverted for power generation did not lose its status as water of the United States was that the precedent did not support the court’s distinction between the status of water diverted for power generation and water diverted for other industrial uses. The court did not need this unexplained and probably unexplainable distinction to support its ruling, however. It could, for instance, have held the defendant’s pump storage operation did not require a §402 permit because the change from live to dead fish occasioned by the defendant’s operation was a change in water condition, not the addition of a new pollutant, relying on *Gorsuch*.

61. *Id.* at 589, citing *National Wildlife Fed’n v. Consumers Power Co.*, 657 F. Supp. 989, 1008, 17 ELR 20801 (W.D. Mich. 1987).

62. “[T]hat the running water in a great navigable stream is capable of private ownership is unconceivable.” *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913); cited with approval in *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379, n.5 (2006) (stating “nor can we agree that one can denationalize waters by exerting private control over them”). Both decisions involved water diverted to generate electric power. Neither, however, considered the particular type of diversion or the issue discussed here.

63. *Consumers Power*, 862 F.2d at 589.

64. 73 Fed. Reg. 33697, 33704 (June 13, 2008).

65. There are some differences. In the cooling-water situation, the power plant adds heat to the water in the pipes, while in the electricity-generation situation the plant does not add fish. But this difference relates to the “addition” element, not the “navigable waters” element. It does not explain why the water in the plant is non-navigable in the first case but navigable in the second. In the cooling-water situation, §316(b) requires that the location, design, construction, and capacity of cooling water intake structures minimize adverse effects on the environment, while it requires no such location, design, construction, or capacity requirement for non-cooling water intake structures. But again, this has nothing to do with whether these waters are navigable. Another possible distinction is that in *Consumers Power*, the water is used to generate electricity, while in the other cases, it is used for industrial purposes. But generation of electricity is an industrial process.

As in the net/gross situation, these point source owners and operators appear not to have added pollutants from their influents to the navigable receiving waters, because the donor water and the receiving water were the same body of navigable water and the pollutants were already in the donor water when the industry withdrew it. At the same time, they differed from the passive dischargers in the net/gross situation, for these point sources were not truly passive; they manipulated material or characteristics already in the influent water to make them different and more harmful to the aquatic biota when discharged to the receiving waters. But for their actions, the point sources would not have created, discharged, or added to navigable water fish parts, low DO, or higher concentrations of suspended solids; those substances would not otherwise be in the navigable receiving water. Whether there is an addition under either the suggested definition of “addition” or EPA’s “outside world” theory, therefore, depends on whether the pollutants already in the donor water are the same pollutants that the point sources added to the receiving waters and whether they are pollutants at all, rather than water conditions. That is determined by the meaning of “pollutant” rather than by the meaning of “addition.”

### c. EPA’s “Outside World” Theory of Addition

EPA’s theory that addition “occurs only if the point source itself physically introduces a pollutant into the water from the outside world” first surfaced in the early 1980s as EPA’s litigation position in *Gorsuch*.<sup>66</sup> Although EPA cited no statutory or other basis for it, the theory sounds logical. The “outside world” is such a nicely turned phrase that it lodges in our minds, a good example of a legal meme.<sup>67</sup> It is no surprise that the theory is frequently cited and seldom questioned. Like many nicely turned phrases, however, it is more pleasing than precise.

Examined closely, the theory incorporates two ideas. First, the point source in question must itself introduce the pollutant into water. Second, the pollutant must originate from the “outside world.” The first idea, that the point source itself must introduce the pollutant into “the water,” conflates the “addition” and “point source” elements of the CWA offense. Moreover, the Supreme Court rejected it in *Miccousukee* as contrary to the statute’s definition of “point source” as a conveyance: “[A] point source need not be the original source of the pollutant: it need only convey the pollutant to navigable water.”<sup>68</sup> Significantly, the United States agreed with the Court.<sup>69</sup> The mining

66. 693 F.2d 156, 175, 13 ELR 20015 (D.C. Cir. 1982).

67. Memes are contagious phrases, tunes, and other ideas that leap into our minds and propagate by leaping from them into the minds of others. The author explored “navigable water” as a meme in Jeffrey G. Miller, *Evolutionary Statutory Interpretation: Mr. Justice Scalia Meets Darwin*, 20 PACE L. REV. 409, 419-20 (2000).

68. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105, 34 ELR 20021 (2004).

69. *Id.* at 105-06.

waste decisions, discussed below, also implicitly reject the first concept.

The second idea is also ambiguous. What does EPA's phrase "into the water from the outside world" mean? It is not clear what "the water" in EPA's phrase refers to. Is it the donor water, the receiving water, either, any navigable water or any water? The world outside "the water" will be different depending on which "water" is considered. In any event, could it make sense for the addition to be from the "inside world?" On the other hand, if the origin of the pollutant in an "addition" is inherently from the "outside world," the phrase adds nothing to the definition of "addition." No doubt EPA could develop this concept to be a meaningful part of a full definition of "addition," but EPA has not attempted to define the word.

Moreover, the "outside world" idea plays havoc with the CWA's second permit program, §404, which protects the loss of wetlands from unregulated filling. Most of the reported §404 decisions involve landclearing activities to prepare wetlands for agricultural or other uses, activities in which soil and organic material is moved from one location to another in a wetland. It is not apparent how this material is from the world outside the wetland. EPA side-steps the issue by observing that Congress defined "pollutant" to include "dredged spoil," knowing that it was removed from water, thereby sanctioning the application of §404 to wetlands landclearing cases. While this establishes one of the four elements of the offense, "pollutant," it does not establish the other three, including "addition." If "addition" includes the "outside world" concept, it is difficult to square it with most §404 cases, unless "outside world" applies to §402 cases, but not to §404 cases, which EPA has not argued and which would be contrary to the canon of statutory construction that words be interpreted the same throughout a statute, unless the statute explicitly indicates otherwise. The incompatibility of EPA's "outside world" theory of "addition" and §404 is explored in greater detail below.

EPA's "outside world" theory of "addition" is ambiguous, unhelpful, inconsistent with §404, and contrary to the Supreme Court's ruling in *Miccosukee*. Yet, as discussed below, EPA has continued to use it, as if *Miccosukee* had never been decided. It is time that EPA either abandons the theory or builds it to promulgate a complete definition of "addition." If EPA does not act in one of these manners, courts should recognize that the theory is without merit.

## 2. Additions From Stormwater Runoff

Although there was considerable skirmishing at the outset of the CWA's implementation over whether surface stormwater runoff was subject to the §402 permit program, Congress ended much of the contention by amending the CWA in 1987 to include §402(p). In that subsection, Congress directed EPA to issue or deny permits "for discharges composed entirely of stormwater" that are either "associ-

ated with industrial activity" or discharged from "municipal separate storm sewer system[s]."<sup>70</sup> EPA's implementing regulations included an amendment to its definition of "discharge of a pollutant," specifying that the "definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man."<sup>71</sup> And in its stormwater regulations, it defined "discharge associated with industrial activity" to mean "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."<sup>72</sup>

The "composed entirely of stormwater" wording of §402(p) is curious. If there were no pollutants in the stormwater, there would be no reason to regulate the discharges. Indeed, if there were no pollutants in the stormwater, adding it to navigable water from point sources would not violate the prohibition of §301(a). If the point source owner could prove the water from these sources carried no pollutants, it would require no permit. EPA's reference to "additions of pollutants . . . from stormwater runoff" in its definition of "discharge of a pollutant" acknowledges this.

The most commonly litigated fact pattern in decisions on "addition" of pollutants from stormwater contamination involves mining operations, often inactive mining operations. For example, in *American Mining Congress v. U.S. EPA*, the plaintiff broadly challenged EPA's interpretation of the statutory phrase "discharge associated with industrial activity" in §402(p) as it applied to inactive mining operations.<sup>73</sup> The plaintiff argued that because there is no "activity" at an inactive mine, EPA's definition exceeded its statutory authority. The U.S. Court of Appeals for the Ninth Circuit found that EPA's reliance on "associated with" in the statutory phrase "associated with industrial activity" was reasonable, however, since nothing in that statutory phrase required temporal concurrence between the mining activity and the polluted stormwater discharge.<sup>74</sup> Finding no legislative history and nothing in the statute to the contrary, the court deferred to EPA's interpretation.

Courts have universally rejected the passive owner defense when raised by owners and operators of point sources discharging pollutants in stormwater runoff from past, present, or neighboring mining operations. In these situations, courts have held that "addition" does not require the owner or operator of the point

70. Municipal separate storm sewers carry only stormwater, not sewage, while municipal combined sewers carry both stormwater and sewage.

71. 40 C.F.R. §122.2.

72. 40 C.F.R. §122.26(b)(14).

73. 965 F.2d 759, 22 ELR 21135 (9th Cir. 1992).

74. *Id.* at 764. A similar attempt to require temporal concurrence between "addition" and the polluting activity was rejected in *National Cotton Council of America v. EPA*, 553 F.3d 927, 39 ELR 20006 (6th Cir. 2009).

source to generate,<sup>75</sup> cause,<sup>76</sup> create,<sup>77</sup> or be the source<sup>78</sup> or origin<sup>79</sup> of the pollutant, but requires only that the point source convey the pollutant to navigable water. These decisions are entirely consistent with the Supreme Court's holding in *Miccousukee* that the passive owner defense is "untenable."<sup>80</sup>

The most thorough analysis of the issue regarding mining wastes is in *Sierra Club v. El Paso Gold Mines, Inc.*<sup>81</sup> There, the U.S. Court of Appeals for the Tenth Circuit noted that in the definition of "discharge of a pollutant" in §502(12), Congress modified "addition" with "any," suggesting an expansive reading of "addition," and that "viewed as a whole . . . the liability and permitting sections of the Act focus on the point of discharge, not the underlying conduct that led to the discharge."<sup>82</sup> It also notes that the CWA "refers to the obligations of the 'owners and operators' of a point source, suggesting that [they] . . . are responsible for a functional point source"<sup>83</sup> and that EPA's regulations "focus . . . on ownership of the point source, not the discharge-causing conduct."<sup>84</sup> EPA defines "owner or operator" as the regulated "facility or activity" and defines "facility or activity" as a "point source" or any other [regulated] facility or activity.<sup>85</sup> The decision also cited relevant precedent from the Ninth Circuit,<sup>86</sup> as well as EPA's stormwater runoff regulations,<sup>87</sup> to which it gave deference. Other mining decisions have rejected arguments that addition required intentional conduct<sup>88</sup> or a greater

presence of pollutants after installation of the point source than before,<sup>89</sup> and that addition could not be of pollutants already on the streambed or in the stream banks.<sup>90</sup>

A few passive point source decisions have involved the collection and channeling of non-mining-related stormwater runoff.<sup>91</sup> They reached the same conclusions as the mining-related stormwater runoff cases, for the same reasons, especially the explicit coverage of stormwater runoff by Congress<sup>92</sup> and EPA's corresponding regulations.<sup>93</sup>

The mining waste decisions implicitly reject the first concept in EPA's "outside world" gloss on "addition." They held, as did the Supreme Court in *Miccousukee*, that point sources added pollutants to navigable water, even though the point sources did not introduce the pollutants into water in the first instance. Are the decisions consistent with the more-developed concept of "adding a pollutant to navigable waters from a point source when that pollutant would not otherwise be in those navigable waters?" Did the point sources cause the pollutants to be present in the receiving water? We can not be sure, because the courts did not undertake the factual analyses necessary to address those questions. It is probable that without the channeling systems and their associated point sources, some of the same pollutants in the same runoff from the same mining operations would have made their way by force of gravity to the same receiving waters. The point sources would not be but-for causes of adding these pollutants to these navigable waters; the pollutants would have made their way into these navigable receiving waters without the point sources. Of course, absent channeling systems and associated point sources, it is also probable that some of the same pollutants in the same runoff from the same mining operations would have percolated into the ground, evaporated into the atmosphere, or reached another surface water. The point sources would be but-for causes of adding these pollutants to these navigable receiving waters; these pollutants would not have made their way into these navigable receiving waters without the point sources.

In many of these cases, the owners of the point sources existed and were available as defendants, while the persons responsible for the mining waste in the runoff passing through defendants' point sources no longer existed. Thus, if anyone was responsible for violating the CWA, it had to be the point source owners. Perhaps, in their zeal

75. *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 900, 41 ELR 20109 (9th Cir. 2011), *aff'd*, *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council*, 133 S. Ct. 710, 43 ELR 20004 (2013).
76. *West Virginia Highlands Conservancy, Inc. v. Huffman*, 624 F.3d 159, 167-68, 40 ELR 20014 (4th Cir. 2010).
77. *Catskill Mountain Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001).
78. *Miccousukee Tribe of Indians of Fla. v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 n.6, 32 ELR 20475 (11th Cir. 2002).
79. *United States v. Law*, 979 F.2d 977, 979, 23 ELR 20466 (4th Cir. 1992).
80. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 34 ELR 20021 (2004).
81. 421 F.3d 1133 (10th Cir. 2005). See also the district court opinion, 2002 WL 33932715 (D. Colo. Nov. 15, 2002), which covered much of the same ground.
82. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d at 1143, *citing* §§301(e), 402(a)(1), and 101(a)(3), 33 U.S.C. §§1311(e), 1342(a)(1), and 1251(a)(3). This is perhaps somewhat simplistic, as illustrated by industrial discharges into municipal sewerage systems. The municipalities must secure §402 permits for their discharges of treated effluent into navigable water, and the industries are not required to secure §402 permits for their discharges into the municipal sewerage system; the industries are indirect discharges to the navigable water, 40 C.F.R. §122.3(b). But the industries are required to treat their wastes before discharging them to the municipal sewerage system to meet pretreatment requirements established under §307(b) and are civilly and criminally liable for not doing so under §309(a) & (c).
83. 421 F.3d at 1143-44, *citing* §§301(g)(2) and 308(a), 33 U.S.C. §§1311(a)(2) and 1318(a)(2).
84. 421 F.3d at 1144, *citing* 40 C.F.R. §122.2 (definition of "addition of any pollutant") and §122.26(b)(14)(iii).
85. 40 C.F.R. §122.2.
86. *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993); *American Mining Cong. v. EPA*, 965 F.2d 759, 22 ELR 21135 (9th Cir. 1992); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 26 ELR 20639 (D. Mont. 1995).
87. 40 C.F.R. §122.26(b)(14)(iii) (active and inactive mining operations require stormwater runoff permits under §402(p)).
88. *United States v. Earth Sci., Inc.*, 599 F.2d 368, 9 ELR 20542 (10th Cir. 1979). Section §309(c) requires negligent conduct for misdemeanors and

knowing conduct for felonies, and knowing conduct means knowledge of facts, not law.

89. *Committee to Save Mokelumne River*, 13 F.3d 305.
90. *Rybachek v. U.S. Envtl. Prot. Agency*, 904 F.2d 1276, 20 ELR 20973 (9th Cir. 1990).
91. *Natural Res. Def. Council v. County of Los Angeles*, 673 F.3d 880, 41 ELR 20109 (9th Cir. 2011) (city liable for discharging pollutants from its storm drains into navigable water, even though others had placed pollutants in the stormwater), *aff'd*, *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council*, 133 S. Ct. 710, 43 ELR 20004 (2013); *Environmental Prot. Info. Ctr. v. Pacific Lumber Co.*, 469 F. Supp. 2d 803 (N.D. Cal. 2007) (stormwater from silvicultural activity requires a §402 permit, even though point source causes no net increase in pollutants reaching stream).
92. Section 402(p), 33 U.S.C. §1342(p).
93. *Natural Res. Def. Council v. County of Los Angeles*, 636 F.3d 1235 (9th Cir. 2011). *aff'd*, *Los Angeles Cnty. Flood Control Dist.*, 133 S. Ct. 710; *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d 803.

to hold someone liable for violating the CWA, these decisions focused on the “point source” element of the offence and ignored the “addition” element, with its causation component. Thus, *El Paso Gold Mines* specifically avoided discussion of causation. Such caution may be unnecessary in most cases, however, because there can be two but-for causes of a violation.

Under the second part of EPA’s “outside world” gloss on “addition,” these decisions would be easy. The mining and other materials were from the world outside the navigable water and were therefore added by the point sources. But EPA’s “outside world” theory begins with the concept that the point source must originally place the mining wastes into water.<sup>94</sup> This is not the case in the mining waste decisions, however, because the mining wastes were in stormwater before it entered the point source; indeed, they were in the stormwater before it entered the defendant’s property. The results are more complicated but accurate if we use our sophisticated definition that “addition means the act of a person adding something (A) to something else (B) from a point source when (A) would not otherwise be in (B).” The mining wastes (A) are certainly added to navigable water (B) from a point source, but would they otherwise be in navigable water (B)?

In the absence of fact-finding in the decisions on this question, it is impossible to say with certainty. However, it is most probable that some of the mining wastes would have found their way by gravity and natural channels to navigable water without the point sources, and some would not because they would have percolated into groundwater or evaporated. As long as some of those wastes would not have found their way to navigable waters on their own, the point sources add at least those mining wastes to navigable waters. That is enough to violate the statute and require a permit.

### 3. Additions From Water Transfers

The final variant of the “passive point source” fact pattern are transfers of water from one water body to another, specifically from more-polluted navigable donor water to less-polluted navigable receiving water. Water transfers move water from one watershed to another for a variety of uses, of which agricultural irrigation and municipal water supply are the most common. The owners of point sources introducing the transferred water to the receiving water may be “passive,” in that they do not add pollutants to the donor water being transferred. But they are active in that they add more-polluted donor water to less-polluted receiving water. EPA misleadingly claims it has consistently taken the position that when donor navigable water is transferred to other navigable receiving water, nothing is added to the receiving water from the outside world because all navigable waters are one, the “unitary navigable waters” theory.<sup>95</sup>

94. That concept, however, has been rejected by the Supreme Court in *Miccosukee*, 541 U.S. at 105.

95. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107, 34 ELR 20021 (2004). The Court points out that there is at least one EPA General Counsel Opinion to the contrary. In *Catskill Mountains*

EPA’s theory conflates meanings of “addition” and “navigable waters,” forcing this Article to consider “navigable waters” as well as “addition” to understand and analyze EPA’s theory. Until quite recently, every appeals court considering the issue has ruled against EPA’s position.<sup>96</sup>

After these decisions, EPA significantly changed the legal landscape by promulgating its water transfer rule, for the first time<sup>97</sup> cloaking its interpretation of “addition” with *Chevron* deference.<sup>98</sup> The one court of appeals decision considering the issue after promulgation of the rule cited *Chevron* deference to uphold EPA’s position.<sup>99</sup> Petitions for judicial review of the rule in the circuit courts were consolidated in the Eleventh Circuit, which dismissed them for lack of jurisdiction.<sup>100</sup> The Southern District of New York subsequently heard a consolidated challenge to the rule and in March 2014, vacated the rule in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA (Catskill Mountains)*.<sup>101</sup> This opinion is not only the most recent decision on the issue, it is also by far the most comprehensive in its analysis. Appeals, of course, are sure to continue.

#### a. Early Decisions

Prior to EPA’s promulgation of the water transfer rule, the U.S. Court of Appeals for the First Circuit, the U.S. Court of Appeals for the Second Circuit, and the Eleventh Circuit all rejected EPA’s interpretation of “addition” to exclude water transfers and EPA’s unitary navigable waters theory. The First Circuit initially considered the issue in *Dubois v. U.S. Department of Agriculture*,<sup>102</sup> in which environmental plaintiffs challenged the U.S. Forest Service’s approval of plans to expand a ski facility in a national forest. The plans included withdrawing polluted water from the East Branch of the Pemigewasset River to make snow and ultimately discharging the used water to the pristine Loon Pond, without a \$402 permit. The district court held there would be no addition of pollutants to Loon Pond because all navigable waters were a “singular entity.”<sup>103</sup> The district court also reasoned from the analogy of redistrib-

*v. U.S. EPA*, 2014 WL 1284544 (S.D.N.Y. Mar. 28, 2014), EPA explained that the outlier 1975 Opinion was overcome by a 1977 amendment to the CWA. See also Agency Interpretation, *infra* note 131, at 2-3, n.5.

96. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006); *Miccosukee Tribe of Indians of Fla. v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001); and *Dubois v. U.S. Dep’t of Agric.*, 102 F.2d 1273, 27 ELR 20622 (1st Cir. 1996).

97. 40 C.F.R. §122.3(i), 73 Fed. Reg. 33708 (June 13, 2008).

98. See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

99. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

100. *Friends of the Everglades v. U.S. EPA*, 699 F.3d 1280, 42 ELR 20222 (11th Cir. 2012). Federal appellate jurisdiction for judicial review of EPA actions under the CWA is conferred in §509(b), 33 U.S.C. §1396(b), and the water transfer rulemaking did not fall within any of the categories of actions for which §509(b) granted jurisdiction.

101. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA*, 2014 WL 1284544 (S.D.N.Y. Mar. 28, 2014) (*Catskill Mountains*).

102. 102 F.2d 1273, 27 ELR 20622 (1st Cir. 1996).

103. *Id.* at 1296.

uting water from the bottom of a pond to the top of the pond, requiring no permit even if accomplished by a point source. In reversing, the First Circuit rejected this analogy as ill-conceived, because redistribution of water within the pond was redistribution within one water body, not between two water bodies.<sup>104</sup>

The Second Circuit analyzed the issue of whether a water transfer was an “addition” in greater depth in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill I)*.<sup>105</sup> Environmental plaintiffs challenged New York City’s transfer without a \$402 permit of sediment-laden water from a reservoir in the Schoharie River through the Shandaken Tunnel to Esopus Creek, a well-known and clear trout stream (or at least once clear below and still clear above the Shandaken Tunnel). The transfer was part of the city’s water supply system, moving water it collected in the protected Catskill Mountains Watershed for use in the city. The Schoharie River and Esopus Creek were connected in that they were both part of the larger Hudson River Watershed, but until they both entered the Hudson River, they were separate watersheds, having no natural influence on each other. The city argued, and the district court found, that there was no addition of sediment from the Shandaken Tunnel to Esopus Creek, relying on *Gorsuch* and *Consumers Power*. The Second Circuit rejected those precedents as having “accorded unjustified deference to the EPA’s interpretation of ‘addition,’” because its interpretation was not developed in a rulemaking or other formal administrative process.<sup>106</sup> The court also found that the decisions were distinguishable on their facts: In both of the earlier decisions, navigable donor water was withdrawn from, used, and returned to the same navigable water, essentially a “recirculation of water” within the same water body, whereas *Catskill I* involved transferring water between different navigable watersheds.<sup>107</sup>

To explain *Gorsuch* and *Consumers Power*, the Second Circuit used the analogy of taking “a ladle of soup from a pot, lift[ing] it above the pot, and pour[ing] it back into the pot,” adding nothing to the pot. If this was held to be an “addition,” “EPA might as easily require a permit for Niagara Falls.”<sup>108</sup> But the court explained that the analogy was not apt for the transfer between the Schoharie River and the Esopus: “No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the

‘same,’ such that the ‘addition’ of one to the other is a logical impossibility.”<sup>109</sup>

The city then argued there was no “addition” in the case under EPA’s “outside world” theory of addition because the city’s point source did not initially introduce the pollutants into water. The Second Circuit rejected that argument as well: “The tunnel itself need not have created the pollution; it is enough that it conveys the pollutants from their original source to the navigable water,” for point sources are conveyers, not creators or originators, anticipating the Supreme Court’s analysis and conclusion in *Miccossukee*. The Second Circuit agreed with EPA’s interpretation that for an “addition” to occur, “a point source must *introduce* the pollutant into navigable water from the outside world,”<sup>110</sup> but only if “that ‘outside world’ is construed as any place outside the particular water body to which pollutants are introduced,”<sup>111</sup> or, in our nomenclature, from outside the receiving water. Using our understanding of “addition,” the city added sediment to the Esopus from the tunnel: but for the tunnel, the sediments would not be in the Esopus.

The court specifically rejected the “singular entity” or “unitary navigable waters” theory that the addition of a pollutant to one navigable water is an addition of that pollutant to all navigable waters, both as a matter of Second Circuit precedent<sup>112</sup> and as leading to an absurd result. Concluding that the “transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants” is not an addition would be “inconsistent with the ordinary meaning of the word ‘addition.’”<sup>113</sup>

Finally, the city argued that the legislative history and the structure of the statute supported its interpretation of “addition.” The court, however, found the legislative history to be “silent on the meaning of ‘addition.’”<sup>114</sup> And the court found that the city’s reliance on §101(g) (expressing congressional policy that the authority of states to allocate water use was not abrogated by the CWA) was offset by §101(a) (expressing congressional intent to restore and maintain the integrity of the nation’s waters). The court found transfers of polluted water to pristine water would be inconsistent with §101(a). In the end, the Second Circuit found no reason to depart from the plain meaning of “addition.”

The Eleventh Circuit considered the issue in even greater depth in *Miccossukee Tribe of Indians of Florida v. South Florida Water Management District*,<sup>115</sup> in which the plaintiffs challenged the pumping of canal water contaminated

104. The First Circuit also cited earlier decisions, but they did not deal directly with water transfers. See *Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993) (overflow to stream from dam collecting polluted runoff from abandoned mining area, where the runoff would have reached the stream without the dam); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (culvert was a point source that added polluted waters from a landfill to nearby river); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 15 ELR 21091 (11th Cir. 1985) (propeller of tugboat added bottom sediment to nearby sea grass beds by stirring up the sediment).

105. 273 F.3d 481 (2d Cir. 2001).

106. *Id.* at 489-91.

107. 273 F.3d at 491-92.

108. *Id.* at 491. Of course, Niagara Falls would not violate §301(a) because the Falls is not a person.

109. *Id.* at 492.

110. *Id.* at 491, quoting *Gorsuch*, 693 F.2d at 165. *Contra Miccosukee*, 541 U.S. at 105.

111. *Id.* at 491. This is in accord with the Supreme Court’s later ruling in *Miccosukee*.

112. *Dague v. City of Burlington*, 935 F.2d 1343, 21 ELR 21133 (2d Cir. 1991). The facts in this decision may have amounted to a water transfer, but the court did not analyze it as such.

113. *Catskill I*, 273 F.3d at 493.

114. *Id.*

115. 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002).

with agricultural nutrients into less-polluted water flowing to the Everglades, without a §402 permit. The Water Management District, like New York City in *Catskill I*, relied on *Gorsuch* and *Consumers Power*, but the Eleventh Circuit rejected that reliance for the same reasons the Second Circuit had rejected it.<sup>116</sup> The Eleventh Circuit determined that the appropriate water body for determining whether a point source adds pollutants is the receiving water, not the donor water.<sup>117</sup> It then rejected the passive point source argument, concluding that a point source need not be the origin of pollutants to add them to navigable water. In part, it used a dictionary definition of “from” to include “by” stating that “no dispute exists on whether pollutants, in fact, are added to navigable waters . . . by a point source . . . .”<sup>118</sup> Finally, the court concluded that a point source adds pollutants to a navigable water if the “point source is the cause-in-fact of the release of pollutants” into that receiving water.<sup>119</sup> The point source, a pump, added pollutants from the donor water to the Everglades-bound receiving water “because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source.”<sup>120</sup>

In *South Florida Water Management District v. Miccosukee Tribe of Indians of Florida*,<sup>121</sup> the Supreme Court upheld the Eleventh Circuit’s conclusion that “addition” did not require that point sources generate the pollutants they add to navigable waters. The Court underlined its rejection of the passive point source argument, describing the argument as “untenable.”<sup>122</sup> The Court, however, based its ruling on the definition of “point source,” not on the definition of “addition.” The definition of “point source” as a “conveyance,” “makes plain that a point source need not be the original source of the pollutant: it need only convey the pollutant to ‘navigable waters.’”<sup>123</sup> But it remanded the case for further factual findings on whether the donor and receiving waters were “meaningfully distinct.”

The government argued as amicus that the inclusion of “any” before three of the four elements of the offense of water pollution, and its absence before the fourth, navigable water, “signals Congress’ understanding that NPDES [national pollutant discharge elimination system] permits

would not be required for pollution caused by the engineered transfer of one ‘navigable water’ into another.”<sup>124</sup> The Court did not respond to this argument. But it did express considerable skepticism of the “singular entity” theory, relabeled as the “unitary navigable water” theory.<sup>125</sup> The government argued that §304(f)(F), directing EPA to develop information on how state and local programs could address “flow diversion facilities” as nonpoint sources, meant that water transfers are nonpoint source pollution. The Court noted, however, that §304(f)(F) did not “exempt nonpoint pollution sources from the NPDES program if they *also* fall within the ‘point source’ definition.”<sup>126</sup>

When the government argued that its long-standing unitary navigable water interpretation should be accorded deference, the Court noted that EPA’s interpretation of “addition” had not been consistent and was inconsistent with some of EPA’s own regulations, citing the net/gross regulation.<sup>127</sup> The government further argued that it would be impractical for it to issue §402 permits for “every diversion of one navigable water into another,” because “thousands of new permits might have to be issued,” imposing special problems in “western States, whose water supply networks often rely on engineered transfers among various natural water bodies.”<sup>128</sup> The Court commented, however, that such permitting might be necessary to protect water quality; the administrative burden could be lessened by issuing general rather than individual permits; and at least one state had interpreted the CWA as requiring permits for interbasin transfers.<sup>129</sup> The Court might also have noted that diversions of water do not require CWA permits and that the discharge of irrigation return flow to navigable water after diversion does not require CWA permits either, considerably limiting the number of permits required.

The Court commented that treating all navigable water as one would be inconsistent with the water quality standards program.<sup>130</sup> The Court was correct in this regard, but did not begin to understand how inconsistent the unitary navigable water theory is with the water quality standards program, an inconsistency this Article addresses in detail below. Although the Court decided the passive point source issue, it left open for the parties to argue the unitary navigable waters theory on remand. Because the Court neither sustained nor rejected the unitary navigable waters theory, it has been reargued in cases before the Second and Eleventh Circuits and district courts. In the meantime, EPA

116. *Id.* at 1367-68.

117. *Id.* at 1368.

118. *Id.* The court’s conversion of “from” to “by” in the offense is unnecessary; the court’s “but-for” interpretation of “addition” is justification enough for its conclusion. And it is also ill-advised, as there is already a “by” prepositional phrase in the offense “by any person” in §301(a). A sentence with two “by” prepositional phrases is awkward. Indeed, §502(12) uses “of,” “from,” and “to” in its prepositional phrases, while only §301(a) uses “by” in its prepositional phrases, suggesting Congress used these prepositions advisedly.

119. *Id.* at 1368-69.

120. *Id.*

121. 541 U.S. 95, 34 ELR 20021 (2004).

122. *Id.* at 105.

123. *Id.* A secondary support for the Court’s conclusion was the intent of Congress to impose §402 permitting requirements on municipal sewage treatment plants, an intent that would be frustrated if POTW discharges were exempt from permitting because the pollutants they discharged all originated from industrial and domestic discharges into the sewer system. Municipal sewage treatment plants are referred to as POTWs.

124. *Miccosukee*, 541 U.S. at 106.

125. *Id.* at 106-12.

126. *Id.* at 107.

127. *Id.* In the net/gross regulation, EPA established a process for granting dischargers credit for pollutants in their intake water, but only if they discharged to the same water body, an intrabasin transfer. As discussed above, EPA’s restriction of net/gross credits to situations where the donor and receiving waters are the same is inconsistent with allowing interbasin water transfers where the transferred water is polluted.

128. *Miccosukee*, 541 U.S. at 108. The applicability of general permits for water transfers is also explored, in somewhat more detail, in Chris Reagen, *The Water Transfer Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 COLO. L. REV. 307, 35-37 (2011).

129. 541 U.S. at 108-09.

130. 541 U.S. at 107.

altered the legal landscape, first by issuing a detailed water-transfer interpretive statement and later by promulgating a rule exempting water transfers from the requirement of obtaining §402 permits.

## b. EPA's Interpretive Memorandum and Water Transfer Rule

EPA's interpretation of the applicability of §402 to water transfers (Agency Interpretation)<sup>131</sup> and its subsequent proposed and final water transfer rule<sup>132</sup> are considered here together because they are virtually identical in content, wording, and rationale, differing only in the more formal structure and process of rulemaking and the greater deference due to a rule.<sup>133</sup>

After the Supreme Court's *Miccosukee* decision, EPA developed the Agency Interpretation, concluding that Congress intended water transfers that "merely convey or connect navigable waters," uninterrupted by industrial, municipal, or commercial use, be overseen by authorities other than §402. Shortly thereafter, EPA published a proposed rule to add "[d]ischarges from a water transfer" to the 40 C.F.R. §122.3 list of exclusions from the §402 permit program. Its proposed definition of "a water transfer" was a conveyance "of water of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use."<sup>134</sup> The preamble to the proposed rule explained its background and rationale by repeating the body of its Agency Interpretation almost verbatim.<sup>135</sup> Two years and 18,000 public comments later,<sup>136</sup> EPA promulgated the water transfer rule, with an accompanying preamble, virtually unchanged from its earlier proposal.<sup>137</sup>

The first difficulty with the water transfer rule is to determine exactly what legal issue it addresses, the starting point for judicial review. Several issues are possible. First, on its face, the rule is a regulatory exemption for water transfers from the requirement that all additions of pollutants by point sources to navigable waters be in compliance with a permit. Both the wording of the regulation and its placement in a section listing such exemptions leave little doubt that it is a regulatory exception. That raises the legal issue of whether EPA has the authority

to promulgate such a regulatory exemption. On judicial review, however, EPA insisted that the rule did not create a regulatory exemption.<sup>138</sup> At the outset of the Agency Interpretation, the preambles to the proposed and final rule, and its argument on judicial review, EPA suggested a second legal issue by stating that the precise legal question at issue was whether water transfers are "additions" under the CWA.<sup>139</sup> EPA's legal analysis in that context posits that a "holistic" interpretation of the CWA leads to the conclusion that "addition" in the CWA does not include water transfers.<sup>140</sup> This is not a definition of "addition," but a statement of what is not an "addition," divorced from the meaning of the word.<sup>141</sup>

A third possible legal issue is interpreting "navigable waters" to mean that all navigable waters are the same, the unitary navigable waters theory. This flows from EPA's use of the theory to support its interpretation that transferring pollutants from one navigable water to another navigable water is not an "addition" of pollutants from the first navigable water to the second navigable water, because both waters are the same.<sup>142</sup> But the rule does not purport to define either "addition" or "navigable water," the rule is not codified in the definitional section of the CWA regulations, and the definitions in that section do not incorporate or suggest any of EPA's concepts.<sup>143</sup>

What words in the statute, if any, does EPA's rule interpret? Why is it so difficult to identify the legal question at issue on judicial review? Is it because EPA is playing a shell game, shuttling our attention from one statutory word to another? The most straightforward approach to EPA's objective would be for it to define "navigable waters" or "waters of the United States"<sup>144</sup> to incorporate the unitary navigable waters theory. EPA studiously avoided doing

138. *Catskill Mountains*, 2014 WL 1284544, at \*\*34-35.

139. See Proposed Rule, 71 Fed. Reg. 32887, 32889; Final Rule, 73 Fed. Reg. 33697, 33700; *Catskill Mountains*, 2014 WL 1284544, at \*\*14-15.

140. See Proposed Rule, 71 Fed. Reg. 32887, 32889; Final Rule, 73 Fed. Reg. 33697, 33701; *Catskill Mountains*, 2014 WL 1284544, at \*\*20-26.

141. In discussing the scope of its "interpretation" of "addition," EPA wrote that it "address[ed]" "addition." Agency Interpretation, *supra* note 131, at 18. (Addressing a term is much less than defining the term.) At the same time, it expressly declared it was not "address[ing] the meaning of . . . "navigable waters."

142. The initial conflation of "addition" and "navigable waters" was in *Consumers Power*: If live fish were in Lake Michigan waters when those waters were diverted to generate electricity, the fish in those diverted waters were not added to Lake Michigan when the diverted water was returned to the lake. EPA asserted that position in subsequent litigation, the Agency Interpretation, and the preamble to the final rule.

143. The definitional section of the regulations is 40 C.F.R. §122.2, while the exemption section in which the water transfer rule is located is 40 C.F.R. §122.3. In its Agency Interpretation, EPA maintains it does not address the meaning of "navigable waters," and although it "addresses the meaning" of "addition," it does not define "addition." How useful would it be for the dictionary to define "addition" as "an act that does not include water transfers"?

144. Section 502(7) defines "navigable waters" as the "waters of the United States." EPA does not define "navigable waters," but instead defines "waters of the United States" in 40 C.F.R. §122.2 and uses "waters of the United States" throughout its §402 permit regulations instead of "navigable waters." The Agency must have thought that parties to CWA disputes would come to think only of "waters of the United States" when addressing CWA jurisdiction, thus evading Commerce Clause restrictions on the scope of "navigable waters." If so, that sleight of hand did not work. See *Catskill Mountains*, 2014 WL 1284544 at \*5.

131. Memorandum From Gen'l Counsel Ann R. Klee, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005) [hereinafter Agency Interpretation], available at [http://www.epa.gov/ogc/documents/water\\_transfers.pdf](http://www.epa.gov/ogc/documents/water_transfers.pdf).

132. 40 C.F.R. §122.3(i).

133. *Catskill Mountains*, 2014 WL 1284544, at \*\*34-35. While the three documents are virtually identical in their substantive content, the proposed and final rules include sections required in promulgating regulations, but not in establishing policy. For instance, the preamble to the final rule has a section responding to comments made during the comment period after publication of the proposed rule.

134. NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32887, 32895 (June 7, 2006).

135. Compare Agency Interpretation, with proposed rule, 71 Fed. Reg. 32887, 32888-92 (June 7, 2006).

136. *Catskill Mountains*, 2014 WL 1284544, at \*10.

137. NPDES Water Transfers Final Rule, 73 Fed. Reg. 33697 (June 13, 2008), codified at 40 C.F.R. §122.3(i).

so in the Agency Interpretation and the rulemaking, although it could not avoid discussing the theory in those documents.<sup>145</sup> Indeed, it has recently proposed comprehensive amendments to its definition of “waters of the United States” which make no mention of the theory.<sup>146</sup> Why is EPA so disinclined to interpret “navigable waters” to reach the result it wants? Probably because the unitary navigable waters concept is counterintuitive and the Supreme Court has already seriously questioned the viability of the theory under the CWA.<sup>147</sup> Instead, EPA seems to have promulgated a rule exempting water transfers from the §402 permit program. But courts have long held that EPA does not have authority to exempt additions of pollutants to navigable water from point sources from being in compliance with permits<sup>148</sup> and EPA admits that,<sup>149</sup> leaving EPA no alternative but to attempt an interpretation of “addition” to exclude water transfers. However, the plain meaning of “addition” simply does not suggest such an exemption. That ultimately leaves EPA with its “holistic” interpretation of the statute to establish that Congress did not mean §§301(a) and 502(12) to prohibit water transfers in the absence of a permit, suggesting in turn that “addition” in §§301(a) and 502(12) cannot include water transfers. EPA is playing a shell game, but at least it’s understandable why EPA is playing it. Of course, if EPA has to play shell games to keep water transfers from requiring permits, the whole enterprise is dubious.

The Agency Interpretation begins by outlining the importance and pervasiveness of water transfers. It states, for instance, that the U.S. Department of the Interior’s

Bureau of Reclamation alone furnishes water to 140,000 western farmers through water transfers,<sup>150</sup> implying that as many permits might be required and farmers would be adversely affected if transfers were considered additions. This largely is a bogus issue. Water diversions from navigable water for agricultural use do not require §402 permits, because diversions take away from rather than add to navigable water.<sup>151</sup> As for the return to navigable water of irrigation water after use, the statutory definition of “point source” excludes “agricultural stormwater discharges and return flows from irrigated agriculture.”<sup>152</sup> This exclusion is reinforced by §402(l), prohibiting EPA from requiring permits for “return flows from irrigated agriculture.” The statutory exclusion and prohibition remove most transfers of western irrigation water from the requirement to obtain a §402 permit. Although EPA demonstrates the importance of water transfers to agricultural and municipal water supply, particularly in the West, it assumes but does not demonstrate that §402 thwarts water transfers. Indeed, EPA’s three documents do not cite a single case in which §402 has blocked a western water transfer. Ironically, if §402 does thwart water transfers, EPA’s water transfer rule, reaching only interbasin transfers, is less protective of transfers than the statutory exclusion that reaches both interbasin and intrabasin transfers of irrigation return flow. In any event, EPA’s implicit suggestion that states are completely autonomous in the development of water resources is largely rhetorical in that most sizable water resources projects are federally funded; those 140,000 western farmers get their water from Bureau of Reclamation water transfers, i.e., from federally funded public works.<sup>153</sup>

Water transfers are primarily, although not entirely, western phenomena associated with irrigated agriculture and municipal water supply. Indeed, western water law is composed of highly developed state systems for allocating water use as a property right and approving transfers of water between water basins.<sup>154</sup> Although there was some concern at the outset of the §402 program that

145. EPA began each of the documents by describing the legal issue addressed as “whether the movement of pollutants from one navigable water to another navigable water by a water transfer is [an] addition” (emphasis added) or a variant of that phrase. This admits of multiple bodies of navigable water, not a unitary navigable water. See Agency Interpretation, *supra* note 131, at 2; 71 Fed. Reg. 32887, 32889; and 73 Fed. Reg. 33697, 33699. But EPA could not avoid describing and using its unitary navigable water theory. For instance, in the Agency Interpretation, it quoted from the amicus brief of the United States for the Supreme Court in *Miccusukee*, stating that the issue in that case was “whether the pumping of water increased the sum of pollutants in the navigable waters as a whole, as opposed to the particular receiving water.” Agency Interpretation, *supra* note 131, at 13. In the preamble to its final rule, EPA quoted at length from the U.S. brief in *Friends of the Everglades v. South Fla. Water Mgmt. Dist.*: “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.” See 73 Fed. Reg. 33697, 33701 (June 13, 2008).

146. Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22188 (proposed Apr. 21, 2014). EPA does note in the preamble that it proposes “no change to the regulatory status of water transfers.” *Id.* at 22189. See also *id.* at 22203, stating that jurisdictional waters may include “ditches that connect two or more ‘waters of the United States.’”

147. *Miccusukee*, 541 U.S. 95, at 106-12. EPA stated in its Agency Interpretation that it developed its “holistic” theory because of the Court’s “concerns” with the unitary navigable waters theory.

148. These decisions go back to *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 8 ELR 20028 (D.C. Cir. 1977), regarding EPA’s attempt to create regulatory exceptions to the CWA permit program in its first set of permit issuance regulations. See also *Northwest Envtl. Advocates v. U.S. EPA*, 537 F.2d 1006, 1021-22 (9th Cir. 2008); *Northern Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003); *Catskill Mountains*, 2014 WL 1284544, at \*14. See also dicta in *Milwaukee v. Illinois*, 451 U.S. 304, 318, 11 ELR 20406 (1981) (“Every point source discharge is prohibited unless covered by a permit.”).

149. *Catskill Mountains*, 2014 WL 1284544, at \*14.

150. Agency Interpretation, *supra* note 131, at 3. EPA used the same information in the preambles to its proposed and final rule. See proposed rule, 71 Fed. Reg. 32887, 32889 (June 7, 2006); and final rule, 73 Fed. Reg. 33697, 33699 (June 13, 2008). The U.S. Department of the Interior’s Bureau of Reclamation operates only in the West.

151. Thus, for purposes of §401 state certifications, a diversion of water from a river is not a discharge requiring a certification, because diversions are the very opposite of discharges. See *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Energy*, 511 U.S. 700, 776, 24 ELR 20945 (1994) (Thomas, J., dissenting). The majority did not disagree in that case, but held that §401 certifications were required for federal activities, not federal discharges.

152. Section 502(14). See also §402(l)(1). The exclusion appears to be more appropriate from “pollutant” than from “point source,” since stormwater, like any water, is conveyed; it is not a conveyance.

153. See Reagen, *Water Transfer Rule*, *supra* note 128 at 320-35 (describing how dependent western agriculture and municipal water supplies are on water transfers). Like EPA, Reagen assumes that §402 permits would frustrate them, but does not demonstrate that §402 permits have frustrated them. Unlike EPA, he concludes that water transfers should be subject to §402 permits and that general permits may alleviate much of the burden on water transfers of regulation under §402.

154. See generally A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT* (5th ed. 2002).

its implementation would conflict with state water use allocation,<sup>155</sup> such conflict has not proven to be of obviously great magnitude. None of the decisions interpreting “addition” or “navigable water” in water transfers arose in a western state or a state adopting a western use allocation scheme. None of the decisions involved irrigated agriculture, probably because the exclusion of irrigation return flow resolves most potential conflict between the water quality and water quantity regimes. No reported federal decision involves an actual conflict between federal water quality requirements and state water use allocation. Neither the Agency Interpretation nor the preambles to the proposed or final rule identify any such conflicts. EPA’s elaborate water transfer policy construct is an incomplete cure for an undocumented and perhaps theoretical problem.

Although EPA stated in the Agency Interpretation that the precise legal issue was whether water transfers were “additions,”<sup>156</sup> neither that document nor the preambles to the proposed or final rule defined “addition.” Indeed, EPA never discussed the meaning of “addition” in those documents, other than to reiterate its earlier description of “addition” being “from the outside world.”<sup>157</sup> Although EPA mentioned §§301(a) and 502, it did not analyze their applicability to the issue. It relied on the precedent of *Gorsuch* and *Consumers Power*, although neither supports the Agency Interpretation or the rule and both have been discredited as persuasive precedent.<sup>158</sup> Nor did EPA note the Supreme Court’s rejection in *Miccossukee* of the first concept of EPA’s “outside world” theory of “addition.”

Instead, EPA engaged in what it termed a “holistic” analysis of the CWA to determine that Congress envisioned water transfers to be regulated by an unidentified

federal or state authority other than §402.<sup>159</sup> Although EPA did not interpret the meaning of “navigable waters,”<sup>160</sup> the only way that pollutants in navigable donor water could not be added to other navigable receiving water would be if all navigable waters are one, the unitary navigable water theory. The Agency Interpretation and preambles mention this, but EPA did not explicitly adopt it or incorporate it into the definition of either “addition” or “navigable waters.” Indeed, EPA did not discuss the meaning of navigable water in the Agency Interpretation, the rule, or the preambles. Moreover, EPA recently proposed a comprehensive amendment to its regulatory definition of “waters of the United States,” without a hint that the definition adopted the unitary waters theory.<sup>161</sup> No wonder that the Southern District of New York in *Catskill Mountains* had great difficulty determining exactly which CWA terms EPA claimed *Chevron* deference for interpreting.<sup>162</sup>

EPA’s self-described “holistic” approach is to interpret particular parts of the CWA’s text, i.e., “addition,” in the context of the entire statutory structure to avoid absurd results.<sup>163</sup> EPA concludes that the CWA, interpreted as a whole, strikes a grand balance between federal water pollution control and state water use allocation. Looking at the entire statute, EPA observes that the CWA has several programs to control pollution other than the §402 permit program, most notably the state-administered nonpoint source program.<sup>164</sup> It admits that the CWA contains no provision specifically stating the §402 program covers or does not cover water transfers. But it contends that §§101(b), 101(g), 304(f), and 510(2), taken together, establish a grand balance between federally directed water pollution control and state-controlled water use allocation, including state supervision of water transfers.<sup>165</sup> EPA concludes that interpreting “addition” not to incorporate water transfers is consistent with this understanding.<sup>166</sup>

Interpreting a long and complex statute such as the CWA as a seamless whole rather than a disjointed jumble of sections is a positive goal<sup>167</sup> and one for which EPA is uniquely qualified. Despite EPA’s claim that its interpretation of “addition” to exclude water transfers is “holistic,” EPA fails to establish it. First, neither the sections EPA

155. See H.R. REP. NO. 94-418 (1976), available at <https://bulk.resource.org/gao.gov/92-500/00006DA6.pdf>. The Report to Congress of the National Commission on Water Quality, submitted March 22, 1976, made no mention of conflicts between the CWA and state water resource management use allocation. Congress established the Commission in §315, 33 U.S.C. §1325, to study the implementation of the CWA and to suggest changes or “mid-course corrections.” The more than 800-page-long Staff Draft Report accompanying the Report to Congress devoted its last five pages to water resource management, noting that water quality and water quantity programs were not as yet “completely compatible,” but citing no conflicts between the CWA and a water transfer and making no recommendations to make the programs more compatible.

156. Agency Interpretation, *supra* note 131, at 2.

157. *Id.* at 10. Moreover, EPA did not acknowledge that the Supreme Court had rejected at least the first of the two components of EPA’s “outside world” gloss on “addition” in *Miccossukee*.

158. *Gorsuch* and *Consumers Power* dealt with intrabasin transfers, while the Agency Interpretation and rule deal with interbasin transfers and specifically exclude intrabasin transfers. Neither dams nor pump storage projects come within the rule for the same reason. *Consumers Power* is also outside the scope of the water transfer rule because the hydropower generation in that case was an industrial use of water that occurred between the diversion of the water from the lake and the return of the water to the lake, an intervening industrial use the rule excludes from the exemption. The Second and Eleventh Circuits both rejected *Gorsuch* as precedent because it gave *Chevron* strength deference to EPA’s “outside world” interpretation of “addition” when no such deference was due under *United States v. Mead Corp.*, 533 U.S. 218 (2001), insofar as it did not take place in a rulemaking or other formal regulatory activity. See *Catskill I*, 273 F.3d at 491; *Miccossukee*, 280 F.3d at 1367-68 (11th Cir. 2002).

159. Agency Interpretation, *supra* note 131, at 4-8. See also Proposed Rule, 71 Fed. Reg. 32887, 32889 (June 7, 2006); Final Rule, 73 Fed. Reg. 33697, 33701 (June 13, 2008).

160. Agency Interpretation, *supra* note 131, at 18 n.19.

161. Definition of “Waters of the United States,” *supra* note 146, 79 Fed. Reg. 22199 (proposed Apr. 12, 2014).

162. *Catskill Mountains*, 2014 WL 1284544, at \*\*14-15.

163. Although the Agency Interpretation and the preambles to both the proposed final rules cited the interpretive canon of avoiding absurd results, none of them gave examples of absurd results from requiring water transfers to obtain §402 permits. The Agency Interpretation quotes *Natural Res. Def. Council v. Muszynski*, 268 F.3d 91, 98, 32 ELR 20203 (2d Cir. 2001), to the effect that the most helpful canons in interpreting the CWA are the whole-statute canon and the avoid-absurd-results canon. The preambles to the proposed and final Water Transfer Rule repeat this. See 71 Fed. Reg. 32887, 32889 (June 7, 2006); 73 Fed. Reg. 33697, 33701 (June 13, 2008).

164. Agency Interpretation, *supra* note 131, at 5.

165. *Id.* at 5-7.

166. *Id.* at 9.

167. See *ESKRIDGE*, *supra* note 15, at 324 (interpret a statutory section “by reference to the whole act”); *SCALIA & GARNER*, *supra* note 15, at 167-70.

cited, the remainder of the statute, nor its legislative history explicitly establish any grand congressional design to strike a balance between water quality and water quantity. Second, the four statutory provisions on which EPA bases its interpretation provide, at best, ambiguous support for the meanings EPA thrusts upon them. Third, while EPA focuses on the three subsections and one paragraph of the CWA,<sup>168</sup> it ignores the remainder of the 200-page statute, consisting of over 500 subsections and over 800 paragraphs, most of which are unambiguously focused on promoting pollution control. Section 301, the locus of the basic prohibition against the “discharge of any pollutant” without a permit, alone has 16 subsections and 40 paragraphs. Claiming to interpret the statute as a whole to favor state regulation of water transfers without regard to federal concerns for water quality, based on weighing three short and ambiguous subsections against over 500 subsections and one short and ambiguous paragraph against over 800 paragraphs,<sup>169</sup> does not establish a “holistic” view of the statute. Finally, not only does EPA’s “holistic” interpretation ignore virtually all of the statute, it is in derogation of one-half of the regulatory strategies and programs of the statute: water quality standards, one of the CWA’s two grand strategies for pollution control, and §404, one of the CWA’s two permit programs for assuring water quality.

The initial sentence in the first of EPA’s four relied-upon statutory provisions, §101(b), recites congressional policy “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .” This subsection does not mention water transfers or the state allocation of rights to use water. It certainly does not state that water quantity trumps water quality. EPA may argue that it refers to western water rights when it speaks of “the primary responsibilities and rights of States . . . to plan the . . . use of . . . water resources,” (emphasis added) for western water rights are allocated by states for public and private use. But “to plan” is more consistent with reference to the states’ roles in designating uses as the initial step in establishing water quality standards under §303(c). The “to plan” in §101(b) also corresponds with the §303(3) requirement that states establish a “continuing planning process” to assure that water quality standards are attained and maintained. Allocation of water rights requires authority well beyond planning, especially when most water rights are based on a first-come first-use basis,<sup>170</sup> the very antithesis of planning.

The conclusion that the first sentence of the subsection refers to the state role in establishing water quality standards is supported by the remainder of the subsection,

which deals with federal and state roles in implementing other portions of the CWA, its grant program for construction of publicly owned treatment works, the §402 and §404 permit programs, and federal research, technical assistance, and financial aid programs for state, local, and interstate agencies. This strongly suggests that the first sentence also speaks to federal and state roles in a CWA program, the water quality standards program, rather than to ordering CWA goals and goals external to the CWA, because none of the remainder of the subsection deals with ordering CWA goals and external goals.

The second of the CWA subsections on which EPA relies for its interpretation, §101(g), is the only one that unambiguously deals with the intersection of water quality and water quantity. It states congressional policy “that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter.” The subsection was added to the CWA in a 1977 Amendment, cosponsored by Sen. Malcolm Wallop (R-Wyo.) and Sen. Gary Hart (D-Colo.), both representing western water-rights states.<sup>171</sup> The amendment, however, does not mention water transfers or hint that water quality regulation is subordinate to water transfers, nor does its legislative history. Although water transfers may be inherent in water use allocation,<sup>172</sup> the initial diversion of water for an allocated use is not regulated by §402. Water diversions add nothing to navigable water; they only subtract from it. Once allocated and diverted, water is used, most commonly in irrigated agriculture, after which use it is eventually returned to a navigable water, often to a different water body than it was diverted from. When the diverted water is returned, now polluted, to the same navigable water body or to another navigable water body, the question arises whether a §402 permit is required. Because §502(14) excludes “return flows from irrigated agriculture” from the definition of “point source,”<sup>173</sup> no §402 permit is required in most cases for the return of water from agricultural diversions. This is reinforced by §402(l), which forbids EPA from requiring a permit for irrigation return flow. Significantly, the CWA 1977 Amendments added all three of these provisions, §§101(g), 402(l), and 502(14). There is no evidence that Congress intended §101(g) to limit the reach of the §402 program, but if Congress did so intend, it defined

168. Provisions denoted by a lower-case letter are subsections and those denoted by an Arabic number are paragraphs. Thus, §§101(b) & (g) are subsections, while §510(2) is a paragraph (although paragraphs are normally indented and that was not done in §510).

169. Since subsections incorporate the paragraphs, it may be simpler to refer to four out of 525 subsections.

170. See TARLOCK, *supra* note 154, at 154-58.

171. Although §101(g) was enacted five years after the 1972 CWA, amendments are to be read harmoniously with the rest of the statute, as if they were part of the original statute. See NORMAN J. SINGER & J.D. SHAMBLE SINGER, *SUTHERLAND STATUTES & STATUTORY INTERPRETATION* [hereinafter SUTHERLAND] §22:34 & 35; ESKRIDGE, *supra* note 15, at 325, *citing* Brown v. Yuckert, 482 U.S. 137, 149-51 (1987); Sullivan v. Finkelstein, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part).

172. Under western water law, diversion of water from a natural water body is a hallmark of appropriation. Once diverted and used, it may be returned to the same or a different water body. See generally TARLOCK, *supra* note 154, ch. 5.

173. It may have been more straightforward for Congress to have placed this exclusion in the definition of “pollutant” rather than in the definition of “point source.” All of the examples of point sources given in the definition of point source are of conveyances of water rather than of types of water. Nevertheless, the intent of Congress not to regulate these agricultural discharges is clear.

that limit in §§402(l) and 502(14), removing only irrigation return flows from the permit program.

The Conference Report for the 1977 Amendments emphasizes that §101(g) “is not intended to change existing law,”<sup>174</sup> an intention repeated by Senator Wallop during U.S. Senate debates.<sup>175</sup> Indeed, Senator Wallop acknowledged in his floor statements that water quality, §402 and §404 permits, and other measures under the CWA may legitimately and necessarily “have some effect on the method of water usage . . . and incidentally affect individual water rights.”<sup>176</sup> He stated that the purpose of the amendment was to assure that effects on western water rights “if any, are prompted by legitimate and necessary water quality considerations.”<sup>177</sup> Reflecting all of this, the Supreme Court held in *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology* that §§101(g) and 510(2) “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.”<sup>178</sup>

The third of EPA’s relied-upon subsections, §304(f), directs the Agency to issue guidelines to identify pollution from and pollution control techniques for a number of sources, such as “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*.”<sup>179</sup> EPA argues that the listing of these structures in a subsection regarding “non-point sources” implies that dams, levees, channels, causeways, and flow diversions are nonpoint sources rather than point sources subject to the §402 permit program. This argument ignores the definition of “point source,” that specifically includes channels and ditches,<sup>180</sup> and that EPA admits that dams may be point sources.<sup>181</sup> While “flow diversions” are not on the list of examples of point sources, once waters are diverted for use in irrigation, they are transferred for that use in ditches, and “ditch” is listed in §502(14) as a point source. Thus, when channels and ditches discharge agricultural wastes, they are point sources, not nonpoint sources, although they may be exempt from permitting under §§402(l) and 502(14) if

they contain only irrigation return flow. “Well” may also be inferred to be a nonpoint source by being listed elsewhere in §304(f), but is on the statutory list of examples of “point source,” an unnecessary exclusion unless wells are otherwise point sources.<sup>182</sup> The Supreme Court in *Miccossukee* commented that §304(f) does not mean water transfers are exclusively nonpoint pollution or are exempted from §402 when they are point sources,<sup>183</sup> and EPA admitted that in its Agency Interpretation.<sup>184</sup>

Note also that §304(f)(F) deals only with “changes in the movement, flow, or circulation” of navigable waters” . . . “by the construction” of the listed facilities, not by their operation. This wording suggests that for listed facilities that are point sources, the concern in §304(f) is not their ultimate discharge into receiving waters, but the effects of their location, design, and construction on donor waters. Although the flow-diversion portion of water transfer facilities are not regulated by §402, because flow diversions subtract from navigable water rather than adding to it,<sup>185</sup> the location, design, and construction of those facilities may raise water quality issues.

Although EPA does not emphasize it, §208(b)(2)(F) complements §§304(f)(F), 402(l), and 502(14) by requiring states to identify and provide plans to control pollution from agricultural nonpoint sources, including irrigation return flow. Significantly, §§101(g), 208(b)(2)(F), and 402(l), and the exemption for agricultural stormwater and irrigation return flows in §502(14), were all added to the CWA in the same set of amendments in 1977, and all originated in the Senate bill.<sup>186</sup> The Senate Committee Report stated that the effect of the amendments “is to exempt irrigation return flows from all permit requirements” and made no mention of water diversions or western water rights.<sup>187</sup> Similar comments were made in reporting the Conference Committee Report to the U.S. House of Representatives.<sup>188</sup> Indeed, all but §101(g) were “in recognition of a specific recommendation of the National Commission of Water Quality.”<sup>189</sup> The Commission noted that “[w]

174. Joint Explanatory Statement of the Conference Comm., reprinted in 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 [hereinafter LEGIS. HIST.], Comm. Print of the S. Comm. on Env’t and Pub. Works, at 186, 234 & 236.

175. “It is not intended to change present law,” which is already established by §510(b). 3 LEGIS. HIST. 531.

176. *Id.* at 532.

177. *Id.* Senator Wallop was concerned that western water rights might be interfered with by persons using water pollution control measures to achieve other purposes. He indicated his concern was raised by the then-recent Option Papers for the Water Resource Policy study being conducted by the Water Resource Policy Council, raising options for using federal water pollution control law to achieve “Federal purposes that were not strictly related to water quality.” *Id.* at 531.

178. 511 U.S. 700, 720, 24 ELR 20945 (1994).

179. §304(f)(F) (emphasis added).

180. Section 502(14), 33 U.S.C. §1362(14). Of course, flow diversions are neither point nor nonpoint sources of pollution because they divert from rather than add to navigable waters.

181. EPA admitted in *Gorsuch* that under some circumstances dams are point sources, even though they are not on the statutory list of examples. See 693 F.2d at 165.

182. Compare §304(f)(D), 33 U.S.C. §1314(f)(D), with §502(14), 33 U.S.C. §1362(14).

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

184. Interpretive Memorandum, *supra* note 131, at 6.

185. Section 316(b) requires best available technology for cooling water intake structures associated with point sources, to minimize negative environmental impact.

186. H.R. REP. NO. 95-830, at §§5(a), 33(a)-(c) (1977); Joint Explanatory Statement of the Conference Comm., at 50, 52 & 69, reprinted in 3 LEGIS. HIST., at 186, 197, 234, 236 & 253.

187. S. REP. NO. 95-370, at 35 (1977) (Clean Water Act of 1977), reprinted in 4 LEGIS. HIST. 633, 668.

188. The “conference report exempts return flows from irrigated agriculture from all permit requirements . . . and recognizes that this activity is not a point source,” with no mention of water transfers or western water rights. See Statement on the House floor by Rep. Roberts, Chairman, H. Comm. on Pub. Works and Transp., authorizing committee for the 1977 Clean Water Act Amendments, Dec. 17, 1977, reprinted in 3 LEGIS. HIST. at 318.

189. 3 LEGIS. HIST. at 318. When Congress enacted the CWA in 1972, it established a National Commission to study the implementation of the statute and report its recommendations to Congress. The National Commission on Water Quality submitted its Report to Congress on March 22, 1976, with recommendations for “mid-course” corrections for the statute. See H.R. REP. NO. 94-418 (1976).

hile there is little doubt that Congress defined irrigation return flows as point sources” in 1972, controlling them through the §402 permit program “has proved difficult.”<sup>190</sup> The Commission recognized, however, that pollution from irrigation return flow was an important cause of degradation in the nation’s waters and concluded it should not be exempted from coverage by the statute. Instead, the Commission recommended that irrigation return flow be addressed by more-flexible regulatory measures at the state level.<sup>191</sup> At the same time, the Commission did not identify a conflict between the §402 permit program and water transfers or western water rights as the root of the irrigation return flow problem. Indeed, the Commission Report did not mention water transfers or western water rights.<sup>192</sup> If Congress perceived that §402 interfered with water transfers, it did so in the context of irrigated agriculture, and it dealt with that issue completely in 1977 by adding language in §§208(b)(2)(F), 304(f)(F), 402(l), and 502(14).

The final provision supporting EPA’s “holistic” analysis, §510(2), provides that nothing in the CWA shall “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such states.” This preemption preclusion provision should be read in conjunction with §510(1), which provides that the CWA does not preclude a state from adopting or enforcing a limitation on discharges of pollutants or a requirement respecting water pollution control, except that a state cannot adopt or enforce such a limitation or requirement less-stringent than a federal requirement under the CWA. This section does not mention water transfers and does not hint that regulation of water quality is in any way subordinate to allocation of water use. The first part of the section suggests it is limited to federal and state roles in water pollution control. The Supreme Court in *PUD No. 1* held that “[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls . . . .”<sup>193</sup> Finally, as noted by the Southern District of New York in *Catskill Mountains*, the protection of state rights and jurisdiction in §510 applies “[e]xcept as expressly provided in this chapter.” “Because this language does not address what other provisions of the Act ‘expressly’ provide[ ],” this provision has little bearing on the interpretation of those

other provisions—i.e., §§301(a) and 502(12).<sup>194</sup> In other words, the preemption preclusion applies only when the statute is silent.

The three subsections and one paragraph analyzed above simply do not support EPA’s assertions that Congress intended a grand balance in the CWA between federal water quality control and water use allocation; that Congress intended water transfers to be exempt from the §402 permit program; or that Congress intended water transfers not to be “additions” in the CWA. None of the four provisions mention water transfers. The Supreme Court has held that three of them do not so limit the CWA. The legislative sponsor of §101(g), which speaks the most directly of any of the four provisions to water resource management, agreed on the Senate floor that water allocation may be subordinate to water quality control. To interpret §301(a), the central prohibition of the statute, to exclude a major category of discharges, such as water transfers, based on four ambiguous, minor provisions out of hundreds of provisions in the statute would require that the provisions unambiguously establish the exclusion. They do not.

As the Supreme Court suggested in *Miccusukee*, EPA’s interpretation of “addition” and its unitary navigable water theory are also inconsistent with one of the CWA’s two grand strategies for controlling water pollution. Before the enactment of the CWA in 1972, water quality standards were the only strategy employed for that purpose.<sup>195</sup> With the enactment of the CWA’s technology-based standards requirements in 1972, water quality standards temporarily took a secondary, fallback role in pollution control, but resurfaced as the potential driver for further pollution reduction after pollution sources achieved technologically achievable pollution reduction.<sup>196</sup> Water quality standards and their implementation are a multistage process with interplay between EPA and states that Congress established in detail. In the first step, states designate the desired uses to be made of different navigable waters within their borders,<sup>197</sup> such uses as body contact sports, cold water fisheries, and drinking water without treatment. In the next step, states designate the maximum concentrations of various pollutants, known as criteria, compatible with the designated uses of the water bodies. Designating uses is a political decision, designating criteria is a scientific decision. EPA must approve a state’s designated uses and

190. 3 LEGIS. HIST. at 40. The difficulty resulted from differences in geography, climate, agricultural method, and drainage, and water application methods made it impossible to develop uniform national technology-based standards.

191. National Commission on Water Quality, Report to Congress, 40-1 (Mar. 22, 1976). The Staff Draft Report issued November 1975 elaborated on this. See 3 LEGIS. HIST. at I-51 to I-54.

192. National Commission on Water Quality, *supra* note 191. Staff Draft Report at VI-54 to VI-55. The Commission staff did discuss the relationship between water quality control and water use allocation. The staff saw the two as complementary in part, because water resources are diminished when they are too polluted to be available for successive use. At the same time, the staff commented that water quality and water quantity concerns were not yet “completely compatible,” but made no recommendations to make them so. The Commission itself did not note any incompatibility between water quality and water quantity and made no recommendations to reconcile any incompatibility.

193. 511 U.S. 700, 720, 24 ELR 20945 (1994).

194. *Catskill Mountains*, 2014 WL 1284544, at \*23.

195. See FRANK F. GRAD, TREATISE ON ENVIRONMENTAL LAW §3.03.

196. See generally OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION (2d ed. 2002). It may seem impossible that water pollution could be treated beyond the best technology achievable to meet water quality standards. But while the CWA specifies cost criteria to be considered in promulgating technology-based standards, it does not specify them in establishing water quality standards. Compare §304 (a)(&) (b)(1)(B), (2)(B), and (4)(B), 33 U.S.C. §1314(a) & (b)(1)(B), (2)(B), and (4)(B). Thus, cost constraints may limit technology-based standards, while more expensive means of controlling pollution may be necessary and required to achieve water quality standards.

197. Section 303(c)(2); 40 C.F.R. §131.2; see also 40 C.F.R. §130.2. According to EPA’s regulations, 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 . . . establishing the water quality goals for a specific water body.”

supporting criteria, but EPA's role is much greater with criteria.<sup>198</sup> If a state does not adopt an approvable water quality standards program, EPA must do so.<sup>199</sup>

Once these uses and criteria are in place, effluent limitations for individual §402 permits affecting specific water bodies or segments are calculated to achieve the more stringent of state established water quality criteria or EPA-promulgated technology-based standards.<sup>200</sup> This inherently requires examining navigable waters as individual water bodies and separate segments of individual water bodies, rather than as a unitary whole body of navigable water. Section 302(a) restates this explicitly for more-protective water quality uses: If application of effluent limitations in a permit based on technology-based standards would "interfere" with the "attainment or maintenance of that water quality in a specific portion of the navigable water . . . effluent limitations . . . for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality."<sup>201</sup> The CWA also requires states to develop a list of "those waters within the State" that will not achieve water quality standards and "for each segment of the navigable waters"; a list of point sources preventing achievement of water quality standards for toxic pollutants; and control strategies for those point sources to achieve the standards.<sup>202</sup> Section 319 complements this by requiring states to identify "those navigable waters within the State, which" cannot attain water quality standards without controlling nonpoint sources and to identify "particular nonpoint sources which add significant pollution to each portion of the" identified navigable waters.<sup>203</sup> In developing nonpoint source control management plans under §319, states are to "develop and implement [them] . . . on a watershed-by-watershed basis."<sup>204</sup> EPA's implementing regulations have states submitting lists of "water quality limited segments,"<sup>205</sup> "the water quality of all waters of the United States" and "waters needing action,"<sup>206</sup> "those waters within the State" and "all navigable waters in such State" not meeting water quality standards, "each segment of navigable waters included on such list," and "a water" meeting a condition.<sup>207</sup>

One aspect of water quality standards merits special mention, for it overlays this entire pattern. EPA's regulations require states to establish antidegradation programs

for waters that have achieved the criteria established for their designated uses.<sup>208</sup> This requirement helps ensure that pristine waters remain pristine. That is wholly antithetical to transferring a polluted water into a pristine water.

Water quality standards are established, and achievement of them is accomplished river by river, stream by stream, lake by lake, water segment by water segment, reflecting local conditions, local uses, and local goals. The standards result in effluent limitations for particular point sources to meet particular local water quality goals. Considering all navigable waters as one does not conform to or accomplish this strategy on a conceptual basis, much less on a point source-specific basis. How does a state compile a list of waters meeting specific and different conditions if all waters are one? If all navigable waters are one, they would have the same designated use and be subject to the same criteria. Perhaps, EPA considers navigable waters as one just for the purposes of defining addition, but multiple waters for other purposes. That would be an odd concept, perhaps unworkable, and contrary to the canon of construction that words are to be interpreted identically throughout a statute.<sup>209</sup> It is also contrary to the CWA's definition section, which provides that the definitions it provides apply throughout the statute "[e]xcept as otherwise specifically provided."<sup>210</sup>

The Supreme Court in *Miccosee* commented on the inconsistency between the unitary navigable waters theory and water quality standards.<sup>211</sup> EPA ignored the Court's comment and did not respond to it either in the Agency Interpretation or in the preambles to its proposed and final rule. Indeed, in the preamble to the final rule, when responding to public comments that the water transfer rule was inconsistent and would interfere with water quality standards, EPA only addressed the concern as it related to water impoundments for settling sediments in mining wastes, merely replying that the rule "does not affect the permitting of such facilities"<sup>212</sup> and that states can establish their own water quality standards if they wish to.<sup>213</sup> Its assurance was wholly unresponsive to the broader question of the compatibility of the rule and the theory with water quality standards under the CWA.

EPA's "outside world" and unitary navigable water theories also create significant inconsistencies with the §404 program. In a typical §404 wetlands landclearing case, soil and vegetation are moved from one area to another

198. Use designation is a political decision, having nothing to do with science. Establishing criteria, however, requires a scientific judgment of the concentration of particular pollutants that will or will not interfere with a chosen use. EPA has established detailed scientific guidance on criteria and requires states to follow that guidance or demonstrate that other criteria are appropriate using scientifically defensible methods. 131 C.F.R. §131.11. By contrast, EPA is wholly responsible for establishing technology-based standards. §§301(b), 304, and 306.

199. Section 303(b), (c)(4).

200. Sections 301(b), 302(b); 33 U.S.C. §§1311(b), 1312(b).

201. Section 302(a); 33 U.S.C. §1312(a) (emphasis added).

202. Section 304(d)(1), 33 U.S.C. §1314(d). See also EPA's implementing regulations, 40 C.F.R. Parts 130 & 131.

203. Section 319(a)(1)(A) & (B), 33 U.S.C. §1329(a)(1)(A) & (B).

204. Section 319(b)(4), 33 U.S.C. §1329(b)(4).

205. 40 C.F.R. §131.7.

206. 40 C.F.R. §130.8.

207. 40 C.F.R. §130.10(d).

208. 40 C.F.R. §131.12. See also §304(d)(4)(B), 33 U.S.C. §1324(d)(4)(B). Although the 1972 version of the CWA did not mention the antidegradation policy, water quality standards existing at that time contained such provisions and §303(a) continued them in force. When Congress amended §303 in 1987, it included a reference to the antidegradation policy in §303(d)(4)(B). The Court discusses the history of the antidegradation policy in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 718, 24 ELR 20945 (1994).

209. *ESKRIDGE*, *supra* note 15, at 324, citing *Sullivan v. Stroop*, 496 U.S. 478, 83 (1990); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'ts, Lt.*, 484 U.S. 335 (1998). See also *SCALIA & GARNER*, *supra* note 15, at 170-73.

210. Section 502, 33 U.S.C. §1362.

211. 541 U.S. at 107.

212. 73 Fed. Reg. 33697, 33703; *Catskill Mountains*, 2014 WL 1284544, at \*35.

213. 73 Fed. Reg. 33697, 33705; *Catskill Mountains*, 2014 WL 1284544, at \*35.

area in the same wetland to convert it to a dry and level field for agricultural or other use.<sup>214</sup> If the unitary navigable water theory is applied to such landclearing, there is no addition, because the material redeposited in the wetland was already in the waters of the United States (the wetland) and therefore could not be added to the waters of the United States (another part of the same wetland). Responding to comments on this, EPA attempted to avoid the issue in the preamble to the final transfer rule by pointing out that the definition of “pollutant” includes “dredged spoil,” which by definition comes from water. EPA believes this makes it clear that Congress “explicitly forbade discharges of dredged material” except in compliance with a §404 permit, emphasizing that “dredged material” is a “pollutant.”<sup>215</sup> Therefore, EPA believed the rule “would not have an effect on the 404 program.”<sup>216</sup>

The expected origin of dredged spoil pollutants in navigable water, however, only addresses the issue of whether dredged spoil is a “pollutant.” But an activity does not violate §301(a) because it satisfies one of the four elements of the offense (“pollutant”); it must meet all four elements, including “addition” and “navigable waters.”<sup>217</sup> Under both EPA’s “outside world” and “unitary navigable water” glosses on “addition” and “navigable waters,” the dredged spoil does not come from a world or a water outside the wetland or the unitary navigable water. Unless “addition” and “navigable water” have different meanings for §402 and for §404, many activities currently regulated under §404 are not subject to §404 jurisdiction under EPA’s interpretations because the waters from which fill material is taken and the waters to which it is redeposited are one and the same. But, again, words are to be read consistently throughout the statute under both cannons of statutory construction and the wording of §502.<sup>218</sup> The interpretation of “addition” in §404 cases is discussed in more detail below.

The Agency Interpretation and the preamble to the proposed rule view the CWA as constructing a grand balance between state powers to allocate water use and federal powers to protect water quality. Perhaps, perceiving the weakness of this grand balance approach, discussed above, the preamble to the final rule more modestly relies on the same three subsections and one paragraph simply to establish congressional intent that water transfers not be regulated

under §402, because application of §402 to water transfers would interfere with or subvert state water use allocation, which the CWA preserves. However, the four provisions, whether individually or collectively, do not support even this more modest argument, as discussed above. Moreover, the Agency Interpretation and the preambles never explain how subjecting water transfers to §402 jurisdiction has interfered or will interfere with or subvert state water use allocation. If such interference or subversion is real, surely EPA would be aware of examples of it during the 40-year history of the §402 program. But the legislative history of §101(g), added in 1977 and addressing this issue more directly than any other subsection in this statute, mentioned no examples of such interference or subversion. Nor does EPA mention any examples of such interference or subversion in its Agency Interpretation or the preambles to its proposed and final rules.

Because use of such examples could only strengthen EPA’s justification for the transfer rule, EPA’s failure to mention water transfers negatively impacted by §402 infers such negative impacts are few and far between, if they exist at all. The lack of relevant case law also suggests water transfers negatively impacted by §402 are not numerous or are not severely impacted. The only examples of water transfers challenged for not having §402 permits are in Florida, New Hampshire, and New York, states with no western water-law allocation schemes. Indeed, in none of those decisions is there a hint that the water diversion in question was part of a state water use allocation scheme. Moreover, despite New York City’s allegations in *Catskill I* and *II* that the application of §402 would cripple the city’s water supply, presumably by requiring expensive treatment of the polluted water before its transfer, the Second Circuit noted that there was considerable flexibility on how the CWA’s requirement could be met under the circumstances.<sup>219</sup> Indeed, if the holding in *Catskill II* has crippled the city’s ability to supply water to its citizens, that inability has been a well-kept secret in the dozen years following the decision. Not only did EPA fail to describe the extent of economic harm occasioned by the lack of the rule, it failed to describe the extent of environmental harm that would be caused by the rule. What sort of a reasoned balance is that?

### c. Post-Interpretive Memorandum and Water Transfer Rule Decisions

In *Catskill I*, the Second Circuit remanded the case to the district court to proceed with the remedy phase. Appealing from the district court’s decision on remand, New York City asked the Second Circuit to reconsider *Catskill I* in light of the Supreme Court’s decision in *Miccusukee* and EPA’s 2005 Agency Interpretation. In *Catskill Moun-*

214. *Avoyelles Fishermen’s League, Inc. v. Marsh*, 715 F.2d 897, 13 ELR 20942 (5th Cir. 1983).

215. 73 Fed. Reg. at 33703.

216. *Id.*

217. *See, e.g., Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005) (rejecting challenge to EPA regulation extending §402 permit requirements to concentrated animal feeding operations (CAFOs) making no additions to navigable water, even though CAFOs are statutorily defined as point sources); *Community Ass’n for Restoration of Env’t*, 2011 WL 61882 (W.D. Wash. 2011) (unpermitted CAFO not discharging pollutants to navigable water does not violate the statute); *Nelson Faria Dairy, Inc., Higbee v. Starr*, 598 F. Supp. 323 (E.D. Ark. 1984), *aff’d without opinion*, 782 F.2d 1045 (8th Cir. 1985); *Waterkeeper Alliance, Inc. v. Hudson*, 2012 WL 6651930, 43 ELR 20010 (D. Md. Dec. 20, 2012) (unpermitted CAFO not discharging pollutants to navigable water does not violate the statute).

218. *ESKRIDGE*, *supra* note 15, at 324; *SCALIA & GARNER*, *supra* note 15, at 170-73.

219. *Catskill II*, 451 F.3d 77, 85. The best available technology for preventing sediments in the transferred water, for instance, might be locating intake structures at different points in the reservoir, enabling the waters withdrawn to be taken from the location the least burdened by sediments at the time.

tains *Chapter of Trout Unlimited, Inc. v. City of New York (Catskill II)*,<sup>220</sup> the Second Circuit held that the Supreme Court's *Miccosukee* decision confirmed rather than questioned *Catskill I*, in particular the Second Circuit's distinction between interbasin (*Gorsuch* and *Consumers Power*) and intrabasin (*Dubois* and *Catskill I*) transfers. Indeed, as discussed below, the *Miccosukee* Court had even adopted the Second Circuit's "soup ladle" analogy designed to illustrate the differences between such transfers. The Second Circuit then considered EPA's new Agency Interpretation, looking at its "power to persuade" rather than giving it *Chevron* deference.<sup>221</sup> It found nothing in the document that the city had not raised, albeit in a less-detailed way, in *Catskill I*. The Second Circuit concluded:

In the end, . . . these "holistic" arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language . . . . It is the meaning of the word "addition" upon which the outcome of *Catskill I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context.<sup>222</sup>

Although the Second Circuit did not explicitly employ the two-step *Chevron* deference test to EPA's water transfer rule, it left no doubt how it would have decided the case under *Chevron*. With regard to the first step, whether the statute is ambiguous, the court in *Catskill I* held the statute's plain meaning was clear.<sup>223</sup> With regard to the second step, whether the Agency's interpretation was reasonable, the court held "[n]o one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the 'same'" and that such a conclusion led to absurd results.<sup>224</sup>

After *Catskill II*, EPA promulgated its water transfer rule and multiple parties filed petitions for judicial review in several federal courts of appeal and in the Southern District of New York. The appeals court petitions were consolidated in the Eleventh Circuit. At the time, the Eleventh Circuit already had an appeal before it, from a citizen suit in which the validity of the rule was an issue. The Eleventh Circuit stayed the consolidated petition for judicial review until it decided that appeal in *Friends of the Everglades v. South Florida Water Management District*,<sup>225</sup> reexamining its earlier rejection of the unitary navigable water theory.<sup>226</sup> It initially noted that all existing court of appeals precedents had rejected the theory,<sup>227</sup> but that none had considered EPA's new regulation, which was entitled to *Chevron*

deference.<sup>228</sup> The court then undertook the familiar two-step *Chevron* analysis: (1) is the statute ambiguous; and (2) if so, is the agency's interpretation a reasonable one?

As to ambiguity, the Eleventh Circuit found that precedents either did not involve interbasin transfers, *Gorsuch* and *Consumers Power*, or did not consider whether the statute was ambiguous, *Catskill I & II* and its *Miccosukee* decision.<sup>229</sup> The court was not correct, however, in reading *Catskill I & II* to find ambiguity in the meaning of "addition."<sup>230</sup> After analyzing the wording of the relevant provisions and the structure of the statute as a whole, the Eleventh Circuit concluded that it was ambiguous whether "addition . . . to navigable waters" in §502(12) "referred to waters in the individual sense or as one unitary whole."<sup>231</sup> The court concluded that the use of the plural "waters" was not dispositive, for it could be used to denote all waters in general or specific waters in particular, for example, the waters of Mobile Bay.<sup>232</sup> While the absence of "any" before "navigable waters" and its presence before the other three elements of the offense was suggestive that "navigable waters" was meant generally rather than specifically, that inconsistency was not dispositive either, because Congress included or omitted "any" before "navigable water" or "navigable waters" elsewhere in the statute randomly rather than connoting either general or specific waters.<sup>233</sup> All of these arguments, of course, are directed at the meaning of "navigable water," not "addition."

Finally, the Eleventh Circuit concluded that the structure of the statute as a whole did not resolve the ambiguity. In this inquiry, it considered the statute's objective of restoring and maintaining the integrity of the nation's waters in §101(a), the dominant role of the §402 permit program in achieving that objective, and the absurdity of "pumping dirty canal water into a reservoir of drinking water" without a permit.<sup>234</sup> The court found that while "it may seem inconsistent with the lofty goals" of the CWA "to leave out of the permitting process the transfer of pollutants from one navigable body of water to another, . . . it is no more so than to leave out all non-point sources, allowing agricultural run-off to create a huge 'dead zone' in the Gulf of Mexico."<sup>235</sup> That is a bad analogy, however, for Congress chose explicitly not to regulate nonpoint sources through the §402 permit program. It did not make an explicit choice to exempt water transfers from the §402 permit program.

In the end, the Eleventh Circuit wrongly found the statute ambiguous and, for the same reasons, found EPA's interpretation of "addition" reasonable, although the court might have reached a different interpretation on its own.

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

221. *Catskill II*, 451 F.3d at 82, citing *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001), and *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 14 ELR 20507 (1984). Under *Mead*, *Chevron* deference is due only to agency interpretations developed in rulemaking or other formal administrative procedure.

222. *Catskill II*, 451 F.3d at 82.

223. *Catskill I*, 273 F.3d at 492 & 94.

224. *Id.* at 492.

225. 570 F.3d 1210 (11th Cir. 2009).

226. *Miccosukee Tribe of Indians of Fla. v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002).

227. *Friends of the Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1218 (11th Cir. 2009).

228. *Id.* at 1219.

229. *Id.* at 1220-22.

230. *Catskill I*, 273 F.3d at 492, 94; *Catskill II*, 451 F.3d at 84.

231. *Friends of the Everglades*, 570 F.3d at 1223.

232. In the absence of an indication in the statute to the contrary, the singular includes the plural and the plural includes the singular. See SCALIA & GARNER, *supra*, note 15, at 129-31. See also 1 U.S.C. §1.

233. *Friends of the Everglades*, 570 F.3d at 1224-25.

234. *Id.* at 1225-26.

235. *Id.* at 1227.

The court's examination of the structure of the statute, on which it based both its *Chevron* step one and step two analyses, is significantly deficient. The court failed to examine or even to perceive the weaknesses in EPA's arguments that §§101(b), 101(g), 304(f)(F), and 510(1) established a grand balance between water quality and water quantity. And it failed entirely to consider that the rule was inconsistent with the water quality standards strategy of the statute and with the \$404 permit program.

To illustrate the reasonableness of EPA's interpretation, the Eleventh Circuit posited the analogy of the four-marble rule:

Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets?" On the one hand, as the Friends of the Everglades might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the Water District might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other we cannot say that either side is unreasonable.<sup>236</sup>

While either interpretation may be reasonable when involving solid, inert marbles, are they equally reasonable when involving four ounces of liquid or dissolved toxic pollutants in a bucket? To get equal amounts of liquid or dissolved pollutants in both buckets (two ounces in each), the contents of both buckets would have to be mixed together in a larger container and then equally divided between the two buckets, considerably more complicated than playing marbles. Moreover, the end result would be two buckets with poisonous water rather than one, not consistent with the goals of the CWA, especially the antidegradation provision, which the court did not consider.

Once the Eleventh Circuit decided this citizens suit appeal, it turned to the consolidated petitions for judicial review of the water transfer rule and dismissed them for lack of jurisdiction under §509(b).<sup>237</sup> In the meantime, the Southern District of New York had stayed the consolidated petitions before it, pending the outcome of the petitions in the Eleventh Circuit.<sup>238</sup> After the Eleventh Circuit dismissed those petitions, the Southern District vacated its stay and proceeded with judicial review of the rule in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA*.<sup>239</sup> In this, the most recent decision on the issue, the district court vacated and remanded EPA's rule. Turning to the first step of the *Chevron* analysis, the court agreed

with the Eleventh Circuit that the CWA was ambiguous as to whether it required water transfers to have \$402 permits.<sup>240</sup> On the *Chevron* step-two analysis, however, the court found EPA's interpretation to be unreasonable for many of the reasons discussed above, especially because: (1) EPA's "holistic" analysis of the CWA was anything but holistic, examining only the four small parts of the statute supposedly favoring its conclusion and ignoring the overwhelming remainder of the statute not supporting it; and (2) EPA gave no reasoned justification for its decision, including an explanation of how the rule was consistent with water quality standards and the \$404 permit program and an analysis of the relative harms to the economy and the environment of promulgating and of not promulgating the rule. The decision is very thorough, making it easy for the Second Circuit to affirm on appeal, especially because it is in accord with the Second Circuit's own earlier decisions. If the Second Circuit does affirm, the decision will result in a split between the Second and Eleventh Circuits on EPA's rule, setting the basis for a grant of certiorari by the Supreme Court for resolution of the issue it did not reach earlier in *Miccosukee*.

An interesting and perhaps significant aspect of the appellate decisions discussed above is that all but one develops or adopts an analogy to describe the unitary navigable waters theory or to distinguish interbasin from intra-basin transfers.<sup>241</sup> The district court in *Catskill Mountains*

240. *Catskill Mountains*, 2014 WL 1284544, at \*\*31-55. Although, as discussed above, it appears that the Second Circuit had already concluded that the statute was not ambiguous on that issue with regard to EPA's Agency Interpretation, it had not precisely held so because EPA had not yet promulgated its water transfer rule, so that the Second Circuit was not performing a *Chevron* analysis.

241. The Supreme Court in *Miccosukee* adopts the analogy from *Catskill I* that in an intrabasin transfer, "one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot . . . [not adding] soup or anything else to the pot" 541 U.S. at 110, quoting 273 F.3d at 492 (discussed in further detail in the Article at Section III.C.1., below). The Second Circuit developed the "soup ladle" analogy to characterize *Gorsuch* and *Consumers Power*, both involving discharges of water from one water body back to the same water body, and to distinguish them from *Catskill I*, involving the discharge from one water body to a distinctly different water body. The Second Circuit agreed that no permit was required for a transfer within the same water body, otherwise, "the EPA might as easily require a permit for Niagara Falls." 273 F.3d 292. In the case of Niagara Falls, the discharge is not "by any person" and would therefore not require a CWA permit. The district court in *Dubois*, in adopting the government's unitary navigable waters theory (in that decision called the "singular entity" theory), developed the analogy of a "pond in which 'we place a pipe . . . and we pump the pond water from the bottom to the surface. No one would reasonably contend that internal pumping causes an 'addition' of pollutants to the pond. Instead, we would consider the pumping to be a redistribution of pollutants from one part of the pond to another.'" *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296-97, 27 ELR 20622 (1st Cir. 1996) (quoting the unreported district court decision). The First Circuit rejected the comparison as "not at all analogous to the instant case" that featured a transfer between two distinct bodies of water that would not mingle in a state of nature. *Id.* at 1297. In *Friends of the Everglades, Inc. v. South Fla. Water Mgmt. Dist.*, 2006 WL 3635465 at \*34 (S.D. Fla. 2006), a post-*Miccosukee* decision, the defendant offered, as an analogy for the unitary navigable water theory, "a hypothetical law that bans the addition of wine to the United States. The ban would undoubtedly apply to the importation of wine from, for example, France or Italy. However, it would have no effect on the movement of wine from California to Florida, as movement between states would not result in the addition of any wine to the United States as a whole."

236. *Friends of the Everglades*, 570 F.3d 1228.

237. *Friends of the Everglades v. U.S. EPA*, 699 F.3d 1280, 42 ELR 20222 (11th Cir. 2012).

238. *Catskill Mountains*, 2014 WL 1284544 at \*26.

239. *Id.*

labeled them “warring analogies.”<sup>242</sup> These analogies raise several questions. Why do the courts of appeal use analogies in all but one of their water transfer decisions, but use them in only one other decision interpreting “addition”?<sup>243</sup> Why do courts use them so pervasively to interpret “addition,” but not to interpret “pollutant,” “navigable water,” or “point source?”

Are the analogies useful in determining the meaning of “addition”? We use analogies to explain an abstract or difficult idea by making it more concrete and easier to understand, suggesting that courts find the idea of the unitary navigable water theory singularly difficult to grasp. But the idea of all navigable water being one entity is not difficult to understand. What is difficult to understand is the rationale of applying that abstract concept to water pollution control. The analogies may help understand the theory, but they do not suggest a rationale for the theory, and they certainly do not explain the meaning of “addition.” The wine import ban analogy in *Friends of the Everglades*, for instance, is understandable as a means of economic protectionism, but why would we require §402 permits for transfers of water from Manitoba<sup>244</sup> to Montana, but not from Idaho to Montana, when the water quality impacts are the same? The four-marble analogy raises the question of why our water pollution control statute would authorize doubling the number of polluted stream miles, as opposed to continuing pollution only where it currently exists; indeed, this is inconsistent with EPA’s antidegradation policy.<sup>245</sup> The courts’ use of analogies regarding the unitary navigable water theory signals their unease with the theory; the analogies they develop do not alleviate that unease.

If a point source adds a pollutant to a navigable water in the course of an interbasin transfer, that transfer should require a §402 permit. EPA has exempted such a transfer from §402, however, in its water transfer rule. EPA justifies its rule, not as an interpretation of “addition,” but instead as a “holistic interpretation” of the statute, based on four brief passages that EPA sees as establishing a “grand balance” between water quality achievement and water resource management. Examined closely, none of the four passages support EPA’s use of them. Even if they did, four brief passages are insufficient to support any grand balance in a 200-page-long statute. Worse, the “unitary navigable waters” theory underlying EPA’s interpretation of “addition” in the rule is incompatible with water quality standards, particularly the antidegradation policy, and drastically limits the jurisdiction of the §404 permitting program. EPA’s flimsy construct cannot withstand the force of the basic goals and strategies of the CWA, each rooted in long, explicit, and detailed statutory provisions.

242. Indeed, the district court used warring analogies as one indication in its first-step *Chevron* analysis to find that the CWA was ambiguous on the meaning of “addition” in the context of water transfers.

243. The court in *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005), analogized abandoned mining operations to leaky faucets: “[I]f you own the leaky ‘faucet,’ you are responsible for its ‘drips.’”

244. Manitoba intervened as a plaintiff in *Catskill Mountains*, seeking to overturn the rule. See *Catskill Mountains*, 2014 WL 1284544 (caption to decision).

245. 40 C.F.R. §131.12. See also 33 U.S.C. §303(d)(4)(B).

The rule and the theory are contrary to the purposes and structures of the statute, are bad policy, and should either be withdrawn by EPA or overturned on judicial review.

On the other hand, the definition of “addition” suggested in this Article applies comfortably to water transfers, without creating interpretive difficulties. Under that definition, water transfers that add pollution to receiving waters require §402 permits. Transfers are the but-for causes of pollutants from dirty navigable donor water flowing into clean navigable receiving water; they add pollutants from the donor water to the receiving water, when the pollutants would not otherwise be in the receiving water. This will not sound the death knell of western water rights; EPA offers no evidence that §402 has interfered in any significant way with western water rights for the last 40 years, probably because the CWA itself exempts the return of agricultural irrigation water from the §402 permit program.

## B. Indirect Additions to Water From the Air

Some point sources directly add pollutants to the air and indirectly add the same pollutants to water, when gravity or precipitation take them from the air to the water below. The most-detailed analyses of such indirect additions are in challenges to aerial spraying of pesticides into or near navigable water in an attempt to eradicate mosquitoes carrying the West Nile virus or other pathogens. In *No Spray Coalition, Inc. v. City of New York*,<sup>246</sup> the plaintiffs sought to enjoin New York City from spraying pesticides, on the grounds that the spraying constituted the addition of pollutants to navigable waters from point sources without §402 permits. The city applied the pesticides for a purpose and in a manner EPA had approved under the federal statute regulating the manufacturing, sale, and use of pesticides, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>247</sup> FIFRA authorizes applications of EPA-registered pesticides, for EPA-approved purposes, and in accordance with directions on EPA-approved labels.

The Southern District of New York decided the case primarily on the grounds that Congress intended pesticide application to be governed by FIFRA rather than the CWA, and that Congress did not intend the CWA’s citizen suit provision to be used to enforce FIFRA, which lacks such a provision. But the court also held, with little analysis, that pesticides sprayed near water and drifting into water were not added to water. According to the court, the city “discharge[d] the insecticides into the atmosphere and not into the navigable waters. It would be stretching the language of the statute well beyond the intent of Congress to hold that the *de minimus* incidental drift over navigable waters is a discharge from a point source into those waters.”<sup>248</sup> The court commented that the “fact that a pollutant might ultimately end up in the navigable

246. 2000 WL 1401458 (S.D.N.Y. 2000), *rev’d*, 351 F.3d 602 (2d Cir. 2003).

247. 7 U.S.C. §§136-136y, ELR STAT. FIFRA §§2-35.

248. *No Spray Coalition*, 2000 WL 1401458 at \*3.

waters as it courses through the environment,” does not make its use a violation of CWA §301(a). If it did, every emission of “smoke, exhaust fumes and pesticides” would violate the statute.<sup>249</sup>

Two neighboring New York district courts came to the same conclusion, using both the same and different reasoning. In *Altman v. Town of Amherst*,<sup>250</sup> the Western District’s main reasoning was that pesticides used for their intended purposes were not pollutants, also holding that FIFRA rather than the CWA governed. In *Peconic Baykeeper, Inc. v. Suffolk County*,<sup>251</sup> the Eastern District’s main reasoning was cursory: “[a]tmospheric emission of aerial adulticides are not defined as a pollutant [and] at no time was the spray made directly to navigable water.” The court also held that FIFRA governed the situation and that the spray bars attached to trucks and planes were not point sources. Finally, it deferred to EPA’s policy that such spraying of pesticides was not subject to permitting under CWA §402.

The Second Circuit reversed all three decisions, on different grounds. In *No Spray Coalition, Inc. v. City of New York*,<sup>252</sup> it held that if the plaintiffs alleged a cognizable cause of action for a violation of the CWA, they could maintain a citizen suit under it. The court, however, did not address whether the plaintiffs in the case alleged a cognizable CWA cause of action, in particular whether discharges of pesticides into the atmosphere near navigable water could constitute an addition to the navigable waters into which they drifted or whether spraying pesticides in compliance with FIFRA could violate the CWA. In *Altman v. Town of Amherst*, the Second Circuit found that the district court had granted a motion for summary judgment on an insufficient record and remanded the case to proceed with discovery, allowing plaintiffs to make their case that defendant had added pollutants to navigable waters from point sources.<sup>253</sup> The court stated that until EPA “articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for a NPDES permit—the question of whether properly used pesticides can be pollutants that violate the CWA will remain open.”<sup>254</sup>

Before the Second Circuit decided *Peconic Baykeeper, Inc. v. Suffolk County*,<sup>255</sup> EPA, hoping to avoid such litigation or at least affect its outcome, issued an interpretive statement and promulgated a rule exempting from the §402 permit requirements the application of registered FIFRA pesticides for FIFRA-approved purposes and in accordance with FIFRA-approved labels. The exemption covered both (1) direct application to navigable waters for control of waterborne pests and (2) application to land adjacent to navigable waters for control of pests on adjacent

land, from which pesticides drift into navigable waters.<sup>256</sup> The Second Circuit thereafter decided *Peconic Baykeeper*, cognizant of the rule, which the Sixth Circuit by then had overturned in *National Cotton Council of America v. U.S. EPA*,<sup>257</sup> discussed immediately below. Because the Sixth Circuit had stayed its mandate, the rule remained in effect and authorized many of the defendant’s actions. On the facts found by the district court, however, some of the spraying appeared not to be in conformity with the FIFRA label, and the Second Circuit reversed the district court’s ruling to that extent.

Although judicial review of EPA’s pesticide application rule in *National Cotton Council* focused on EPA’s interpretation of “pollutant,” it also considered the meaning of “addition.” EPA argued that pesticides are not pollutants, while admitting that excess pesticides and pesticide residues are pollutants.<sup>258</sup> It then argued that pesticide applicators spray pesticides (nonpollutants), but do not spray excess pesticides or pesticide residue (pollutants). Thus, EPA argued, pesticide applicators do not add pollutants to the water because the pesticides they spray are not “pollutants” and they do not spray excess pesticides or pesticide residue, which are pollutants. Excess pesticides and pesticide residue “are not created [and hence are not added] until later, presumably after they are already in the water.”<sup>259</sup> But the Sixth Circuit concluded that EPA offered no support, other than this descriptive narrative, “for its assertion that a pesticide must be ‘excess’ or ‘residue’ at the time of discharge [addition] if it is to be considered as discharged from a point source.” This omission of authority is understandable, as none exists.<sup>260</sup> Indeed, EPA’s semantic gymnastics<sup>261</sup> ignore the reality that when the pesticide applicator sprays pesticides, it is simultaneously spraying molecules of pesticide, a few of which hit their targets and most of which do not, but instead fall into water, although it is impossible to tell at the point of spraying which molecules of the sprayed material will be in each category.

The court rejected EPA’s attempt to tie “addition” to “point source” in a temporal sense, finding it “unsupported by the Act” and contrary to the purpose of the permit program to prevent harmful discharges, which include “discharges which are innocuous at the time they are made

249. *Id.*

250. 190 F. Supp. 2d 467 (W.D.N.Y. 2001).

251. 585 F. Supp. 2d 377 (E.D. N.Y. 2008).

252. 351 F.3d 602 (2d Cir. 2003).

253. 47 Fed. Appx. 62 (2d Cir. 2002).

254. *Id.* at 67.

255. 600 F.3d 180 (2d Cir. 2010).

256. 40 C.F.R. §122.3(h).

257. 553 F.3d 927, 39 ELR 20006 (6th Cir. 2009).

258. This mirrors earlier arguments by EPA that consumer products used for their intended purposes are not waste under the RCRA, governing the management and disposal of hazardous waste. For instance, EPA determined that lead shot fired over water at ducks or skeet, missing them, and falling in the water were consumer products used for their intended products and were not waste under EPA’s definition of that term. See *Cordiano v. Metacom Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009). The argument might be applicable to pollutants fitting only within one of the subcategories of “waste” in §502(6), e.g., “chemical waste.”

259. *National Cotton Council*, 553 F.3d at 939.

260. *Id.*

261. EPA’s semantic gymnastics in *National Cotton Council* are reminiscent of the metaphysics of *United States v. Deaton*, 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000) (discussed in the Article at Section III.C.1., below), in which dredged material is metamorphosed into pollutants when the dredge lifts from the water.

but extremely harmful at a later point.”<sup>262</sup> It found that the plaintiff’s position conformed to EPA’s “outside world” gloss on “addition,” because the pesticide applicator adds pesticide residue or excess to the water from the outside world. Moreover, although not noted by the court, spraying the pesticide from a point source is the but-for cause of the pesticide residue and excess entering navigable water.<sup>263</sup>

In *Chemical Weapons Working Group, Inc. v. U.S. Department of the Army*,<sup>264</sup> environmental advocates challenged the Army’s incineration of chemical warfare agents, in part because CWA §301(f) prohibits the “discharge . . . [of] . . . any . . . radiological, chemical, or biological warfare agent.” The state of Utah had issued a Clean Air Act (CAA)<sup>265</sup> permit authorizing emissions from the U.S. Army’s incinerator. The plaintiffs contended that some of those emissions would be added to navigable waters by unspecified “atmospheric deposition,” in violation of §301(f).<sup>266</sup> The Tenth Circuit rejected the claim, concluding that the “stack emissions constitute discharges into the air—not water,”<sup>267</sup> labeling them “indirect discharges.”<sup>268</sup> In addition, the court rejected the plaintiffs’ argument because it would create a regulatory conflict between the CWA and the CAA, enacted by Congress to regulate such emissions.<sup>269</sup>

In both of these situations, it is important to remember that all four elements of §301(a) must be met before the CWA is violated, and the only issue considered in this Article is whether these types of emissions into the air constitute additions to water. The two other significant questions are whether these materials are pollutants, especially those whose purpose is introduction in, on, or into the water and whether point sources convey them to the water or merely into the air. Even if all four elements are met in a given instance, it is possible that another statute governs or that regulation by another statute could influence how EPA or courts interpret one of the elements.

None of the decisions in these cases analyze the “addition” element in any depth, although many of them allude to it. The most that can be deduced from the decisions is that spraying pesticides directly on water may be addition, while long-range land and water deposition from smoke-

stacks are not direct addition, but may be indirect addition. While spraying pesticides from an airplane and spewing air pollutants from smokestacks appear to be similar, in that both emit material into the air and some of the material predictably finds its way into water by natural means, the actions are very different in terms of their underlying facts. The underlying factual differences in turn result in differences in the feasibility of regulating them within the CWA’s structure. And those differences, in turn, affect the analysis of how to interpret the CWA *in pari materia* with the other statutes.

The underlying factual differences between these two situations are apparent. The pesticide-spraying plane flies above water, points the nozzles of its spray bar at the water, the target pests it aims at are in or fly above the water, and most of the pesticide inevitably enters the water without making contact with the targets. The pesticides enter the water from the plane much as they would pour into the water from a horizontal industrial or municipal outfall pipe terminating a few feet above the receiving water. So described, it is difficult to characterize this as anything other than direct addition of the pesticides to the water. The smokestack, however, is not above the water, but is on dry land, perhaps many miles from water. It points its emissions straight up into the air. It has no targets in or above the water; its purpose is to dispose of waste into the air. Some of its emissions eventually come to rest on land, some on water, and some wander to the upper atmosphere. Some of its emissions ultimately may fall into hundreds of separate water bodies, located in many states downwind from the smokestack. In turn, any one of these waters may receive pollutants from many upwind smokestacks in different states. It is difficult to characterize the smokestacks as adding this material to any particular water, except indirectly and inadvertently.

Direct addition by spraying pesticides over water is susceptible to regulation under the CWA because there is an identifiable pollutant, an identifiable point source, an identifiable addition, and an identifiable navigable receiving water, usually located in the same state in which the spraying occurs. Issuing or denying a CWA permit for spraying pesticides on a particular water body adds no complications to the normal CWA permit issuance process, requiring only the determinations of whether there are applicable technology-based standards (there are none at present), whether best management practices are available to minimize the waste pesticide and pesticide residue that reach the water, and whether the spraying will interfere with the attainment of the designated water quality standards applicable to the receiving water. Most of the relevant environmental protection can be provided by issuing a CWA permit requiring best management practices or by denying the permit because the spraying will violate water quality standards.

On the other hand, emissions from smokestacks are far more difficult to regulate under the CWA. Because EPA has not promulgated a technology-based standard under the

262. *National Cotton Council*, 553 F.3d at 939.

263. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 12 ELR 20538 (1982), a citizen suit against Navy bombing practice in which many bombs missed their targets and landed in the sea. Although the case is similar on the facts, the Court did not analyze the “addition” issue.

264. 111 F.3d 1485, 27 ELR 21130 (10th Cir. 1997).

265. Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.

266. *Chemical Weapons Working Grp.*, 111 F.3d at 1489-91.

267. *Id.* at 1490.

268. *Id.* at 1490 n.3. “Indirect discharges” was a confusing choice of words because “indirect dischargers” under the CWA refers to industrial dischargers to municipal sewage treatment systems. See 40 C.F.R. §122.2. While those indirect dischargers do not require §402 permits, they are subject to directly applicable and directly enforceable technology-based pretreatment standards for toxic pollutants and to general prohibitions against interfering with or passing untreated through a municipal sewage treatment plant. See §307(b), 33 U.S.C. §1317(b).

269. 111 F.3d at 1490-91. See also *United States ex rel. McKeown v. Port Auth. of N.Y. & N.J.*, 162 F. Supp. 2d 173 (S.D.N.Y. 2001).

CWA for smokestack emissions, it would have to base the permit's effluent limitations in a CWA permit for smokestack emissions largely on preventing the emissions from violating the water quality standards of the waters into which they fell.<sup>270</sup> Indeed, when issuing a CWA permit, EPA or the state must ensure that the pollutants discharged will not violate water quality standards "established pursuant to any State law or regulations."<sup>271</sup> Moreover, the permit issuer must notify both EPA and downwind states whose waters are affected of the proposed permit, allowing them to comment and request a public hearing.<sup>272</sup> If EPA is the permit issuer, it could establish effluent limitations in the permit to meet affected water quality standards in states downwind from the permitted source.<sup>273</sup> If a state is the permit issuer, EPA presumably could veto a permit that failed to provide effluent limitations to meet affected water quality standards in downwind states.<sup>274</sup>

Applying water quality standards to smokestack emissions, however, presents two complications. First, the emissions from a smokestack, particularly a tall one, may fall into many downwind water bodies in many states. The only way to determine which water bodies smokestack emissions might enter is by developing a mathematical model, by definition only an approximation of reality.<sup>275</sup> Once each of the hundreds of receiving water bodies are identified, the states in which each receiving water body is located must calculate the total maximum daily load (TMDL) for each relevant pollutant to determine whether the smokestack emissions would have to be limited. If they do, the states in which the affected water bodies are located would have to develop waste-load allocations to determine how much of the required emission reductions would be allocated to the particular smokestack. This invites interstate disputes, because the state with the receiving water develops TMDLs for its waters and has every incentive to disproportionately burden out-of-state pollution sources. A single smokestack whose emissions eventually fall into hundreds of water bodies could be subject to hundreds of such exercises for a variety of pollutants. Worse, the exercises for each water body would have to consider each smokestack whose emissions enter that water body, and there may be hundreds of such smokestacks.

Developing TMDLs considering traditional water pollution sources took decades and protracted litigation,<sup>276</sup> strongly suggesting that the more difficult task of controlling thousands of indirect smokestack sources in hundreds of TMDLs would take the better part of this century and convert most litigation lawyers into TMDL warriors.

Water pollution permits are simply not designed to control smokestack air pollution. Similar complications prompted the Supreme Court to reject the considerably easier application of injured downstream states' common-law torts to point source pollution from upstream states.<sup>277</sup>

Programs have been developed under the CAA, however, to deal with just such problems. It is far more feasible to regulate smokestack emissions under the CAA than under the CWA. While it is beguiling for friends of clean water to interpret the CWA to regulate all activities producing emissions that eventually enter water, particularly in cases where most or all of the material inevitably falls into nearby navigable water<sup>278</sup> (atmospheric deposition is a major source of water pollution, accounting, for example, for most of the mercury in the Great Lakes and the acidification of lakes in the Northeast and neighboring Canada),<sup>279</sup> nothing in the CWA speaks explicitly to regulating such indirect additions. "Addition" could be interpreted to cover them or not cover them. Each of the actions at issue, however, is routinely and typically regulated by another federal statute, the CAA or FIFRA. Those other statutes authorize EPA to take the impact on water quality into account in regulating air emissions and pesticide applications, enabling EPA to prevent water pollution without invoking the CWA.<sup>280</sup> The question in both situations is how best to interpret the statutes involved to implement them without conflict.

The underlying concept of *in pari materia* comes into play when two statutes may govern the same situation. *In pari materia* posits that "similar statutes should be interpreted similarly"<sup>281</sup> and "interpreted together, as if they were one law."<sup>282</sup> A corollary is that statutes should be

277. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 495-500, 17 ELR 20327 (1987).

278. A pioneering article makes the case that atmospheric deposition of pollutants into navigable water may violate the basic prohibition of the CWA. See Amil Anthony, *Shotguns, Spray, and Smoke: Regulating Atmospheric Deposition of Pollutants Under the Clean Water Act*, 29 UCLA J. ENVTL. L. & POL'Y 215 (2011). Amil Anthony's argument might be stronger if augmented with an element-by-element analysis. However, he underestimates the interference with the CAA and FIFRA of regulating air emissions and pesticide application under the CWA. While his argument may not lead to a revolutionary expansion of CWA jurisdiction, it may provide a template in particularly deserving cases, much as Mary Christina Wood's article, *Regulating Discharges Into Ground Water: The Critical Link in Pollution Control Under the CWA*, 12 HARV. ENVTL. L. REV. 369-426 (1988), did for CWA citizen suits against point source addition of pollutants to tributary groundwater.

279. Anthony, *supra* note 278, at 221-32.

280. CAA §109(b), 42 U.S.C. §7409(b), requires EPA to promulgate primary and secondary air quality standards, primary standards protecting public health and secondary standards protecting public welfare, both of which could include effects on water, see CAA §302(h), 42 U.S.C. §7602(h). Air quality standards are much like water quality criteria under the CWA: they trigger many of the regulatory requirements under their respective statutes. Moreover, the CAA includes a regional cap-and-trade program to control acid rain deposition from midwestern coal-fired power plants affecting waters in the northeastern United States and eastern Canada. See CAA §§401-416, 42 U.S.C. §§7651-7651o. FIFRA §3(c)(5)(C), 7 U.S.C. §136a(c)(5)(C), provides as one criterion for EPA's registration of a pesticide for a particular use that "it will perform its intended function without unreasonable adverse effects on the environment." "Environment," of course, includes "water." See FIFRA §2(j), 7 U.S.C. §136(j).

281. ESKRIDGE, *supra* note 15, at 327.

282. SCALIA & GARNER, *supra* note 15, at 252. See also SUTHERLAND, *supra* note 170, at §51.2.

270. In the absence of promulgated effluent guidelines for technology-based standards, the permit writer could devise technology-based standards on a case-by-case basis using best engineering judgment. See §402(a).

271. Section 301(b)(1)(C) (emphasis added).

272. Section 402(b)(3) & (5).

273. See *Arkansas v. Oklahoma*, 503 U.S. 91, 22 ELR 20552 (1992).

274. Section 402(d).

275. See, e.g., *Ohio v. U.S. EPA*, 784 F.2d 224, 16 ELR 20447 (6th Cir. 1986), in which the court held that EPA's reliance on a computer-generated model to calculate emissions limitations for smokestacks was arbitrary and capricious.

276. See HOUCK, *supra* note 196.

interpreted not to conflict with each other.<sup>283</sup> If a conflict between statutes cannot be avoided, the more-specific statute or the latest in time governs.<sup>284</sup> The initial question is whether statutes are *in pari materia*. Justice Antonin Scalia writes that statutes relating to the same subject, having one object in view, or acting in one system fall within that category. Under that definition, surely the CAA and the CWA are *in pari materia*: Both protect the ambient environment, have similar goals, have similar structures, share common tactics and strategies to control discharges of pollutants to air and water, and even have very similar provisions.<sup>285</sup> FIFRA is further afield; it is a product-control statute with a completely different structure than the CWA, using different tactics and strategies, and having no similar provisions.<sup>286</sup> As a product-control statute, its first purpose is to assure that pesticides are efficacious,<sup>287</sup> as well as not unreasonably harmful to the environment.<sup>288</sup> Although FIFRA is not as closely related to the CWA as is the CAA, Justice Scalia has observed that all statutes are part of a single *corpus juris*, and courts should interpret them accordingly.<sup>289</sup>

Interpreting statutes *in pari materia* avoids interpreting a statute to conflict with another statute, and avoids creating requirements on the regulated public that conflict with requirements imposed on it by other statutes. The *in pari materia* analysis of whether the CWA applies to spraying pesticides regulated by FIFRA is different from whether the CWA applies to emitting pollutants from smokestacks regulated by the CAA. The CWA and FIFRA do not perform the same functions in protecting the environment. Under FIFRA, EPA registers pesticides for uses and applications that will not result in “unreasonable effects on the environment,” including water.<sup>290</sup> By its nature, EPA’s determination in the registration process is whether a pesticide will have unreasonable effects on water generally, rather than on particular water bodies, for it is not clear to what water bodies pesticides will be applied until they are manufactured, sold, and about to be used, well after FIFRA registration. Under the CWA, however, EPA’s determinations of whether to issue or deny a permit and of what effluent limitations to include in a permit are based, in part, on protecting individual water bodies and the water quality standards designated

for them. Moreover, FIFRA’s “unreasonable effects of the environment” standard involves an “economic, social, and environmental” risk/benefit analysis,<sup>291</sup> while the water quality standards designated under the CWA for particular water bodies are not limited by economic impact or any other risk/benefit analysis.<sup>292</sup>

If EPA denies a CWA §402 permit for spraying a pesticide on a particular water body or adds conditions beyond those already imposed by FIFRA on such spraying to achieve its water quality standards, the denial or extra conditions would not interfere with FIFRA’s goals of providing that approved pesticides are efficacious and do not unreasonably adversely affect the environment. There is no conflict if both statutes apply; the more-stringent requirements govern in any particular situation, providing the greatest protection of the environment. Finally, issuing or denying a CWA permit for spraying pesticides on a particular water body adds no complications to the normal CWA permit issuance process, requiring only the determinations of whether there are applicable technology-based standards (there are none at present), whether management practices are available to minimize the pesticide that reaches the water, and whether the spraying will interfere with attainment of the designated water quality standard for the particular and known water body.

On the other hand, the CWA and CAA perform many of the same or similar functions in protecting the environment. Both provide for the issuance of permits to sources of emissions or discharges of pollutants to protect the environment. Both apply technology-based standards for pollution reduction and both condition permits to meet ambient standards in the air or water. They are *in pari materia* and should be interpreted in harmony. Of course, they could be in harmony if both applied to a particular smokestack and the more-stringent of the two governed. That is how the CWA reconciles differences between federal and state water pollution requirements.<sup>293</sup> And the imposition of the more-stringent standard does not interfere with the environmental protection afforded by the superseded statute, since by definition it provides greater environmental protection. But because the CAA primarily regulates smokestacks, and some emissions from many or most smokestacks eventually fall into water, requiring CWA permits for smokestack emissions could result in the CWA superseding the CAA in many or most cases, a result almost certainly not intended by Congress. Moreover, the issuance of CWA permits to smokestacks imposes such great complications on CWA permit issuance process that it is doubtful Congress intended the CWA to apply in such cases.

Concluding that spraying pesticides onto navigable water is a classical addition of pollutants to navigable water from a point source under the CWA does not conflict with

283. SUTHERLAND, *supra* note 170, at §51:2.

284. *Id.*

285. Both have ambient standards, NAAQS, national ambient air quality standards, and WQS, water quality standards, that are to be met by controlling pollution. Both use technology-based standards. Both are implemented by cooperative federalism. Both have similar inspection, enforcement, and citizen suit provisions.

286. Instead of controlling the discharge of pollutants by individual sources, FIFRA registers pesticides.

287. FIFRA §3(c)(5)(A), 7 U.S.C. §136a(c)(5)(A) (that “[the product’s] composition is such as to warrant the proposed claims for it”).

288. FIFRA §3(c)(5)(C), 7 U.S.C. §136(5)(C) (that “[the product] will perform its intended function without unreasonable adverse effects on the environment”).

289. SCALIA & GARNER, *supra* note 15, at 252-56. See also SUTHERLAND, *supra* note 170, at §51.3, “various statutes relating to environmental policy” are *in pari materia*.

290. FIFRA’s definition of “environment” includes water. See FIFRA §2(j), 7 U.S.C. §136(j).

291. FIFRA §2(bb), 7 U.S.C. §136(bb).

292. CWA §§303 & 304(a), 33 U.S.C. §§1313 & 1314(a). But see CWA §302(b), 33 U.S.C. §1312(b).

293. CWA §510, 33 U.S.C. §1370.

FIFRA. Moreover, the considerations necessary to issue or deny a CWA §402 permit for spraying pesticides into water do not differ substantially from the considerations necessary to issue or deny §402 permits for adding pollutants to navigable water from other point sources. On the other hand, concluding that emissions from a smokestack require a CWA permit because some of those emissions eventually enter navigable water would conflict with the CAA by largely superseding it. Moreover, the difficulties in issuing CWA permits for smokestack emissions are overwhelming. While it may be tempting to define the CWA's jurisdiction to include regulation of emissions from the occasional smokestack whose emissions largely fall on and significantly pollute an adjacent body of water, this author knows of no principled way to differentiate between smokestacks that sufficiently pollute a water body to be regulated under the CWA and those that pollute many water bodies insufficiently to be regulated under it.

While the above analysis is directed toward pesticides sprayed from airplanes and emissions from smokestacks, the same analysis can be performed to determine whether any activity discharging pollutants into the air that come to rest, in whole or in part, in water is regulated by the CWA or another statute, usually the CAA. For instance, EPA regulates paint-spraying under the CAA,<sup>294</sup> but would spray-painting a bridge or a shipyard when some paint falls into the water also require a CWA permit?

### C. Section 404 Decisions

Section 301(a) declares that the addition of pollutants to navigable waters from point sources is unlawful, except in compliance with a §402 or §404 permit. The decisions reviewed earlier in this Article primarily concerned additions not in compliance with §402 permits. The following decisions concern activities not in compliance with §404 permits. The only structural differences between the two is that §402 authorizes EPA and states with approved programs to issue permits for discharges of "pollutants," while §404 authorizes the U.S. Army Corps of Engineers (the Corps) and states with approved programs to issue permits for discharges of "dredged or fill material."<sup>295</sup> The §502(6) definition of "pollutant" includes "dredged spoil," which appears to be synonymous with "dredged material," while that definition does not include "fill material." Most materials used as fill, however, fall under the broad §502(6) definition of "pollutant."<sup>296</sup> This poses a potential ambiguity: Under which section should a permit be issued when the fill material added to navigable water consists of or contains pollutants? Under §402 because the material contains pollutants, or under §404 because the pollutants are fill material? Section §402(a) suggests a solution to this problem by authorizing EPA to issue permits for the discharge

of pollutants, "except as provided in [§404.]" Accordingly, the Corps is to issue permits under §404 for the addition of dredged or fill material and EPA is to issue permits under §402 for the addition of other pollutants.<sup>297</sup> EPA and the Corps define "fill material" to mean "material [that] has the effect of . . . [c]hanging the bottom elevation of water."<sup>298</sup>

Section 404 has come to be seen as the guardian of wetlands. Its scope, however, is too narrow to achieve that goal. Most reported §404 decisions concern the issue of whether particular landclearing and related wetlands development activities require §404 permits. By definition, §404 only regulates additions of material to wetlands or other navigable water, not extractions of material or water from wetlands or other navigable water. Landclearing or drainage activities do not inherently fill or add material to wetlands. Indeed, if wetlands developers could sweep a giant vacuum device over a wetland and suck up all the vegetation, other loose material, and water, they could clear and dry the wetland, without adding anything to it or filling it in any way, as long as they emptied the vacuum cleaner elsewhere on dry land. Thus, owners of wetlands can drain them to dry land with impunity, as long as they add no pollutants while doing so, even if they intend later to fill the dried former wetlands.<sup>299</sup> In terms of damage to wetlands, removal of wetland soils harms wetlands as much or more than filling wetlands with wetlands soils, but §404 regulates only the latter.

Section 404 landclearing decisions run a spectrum from moving unwanted material from one part of a wetland to fill other parts of the same wetland, which almost all courts consider addition,<sup>300</sup> to the sort of incidental fallback that occurs when digging a hole in sand and some sand trickles back from the shovel into the hole, which almost all courts hold is not addition.<sup>301</sup> Most of the decisions on the spectrum in between broadly interpret "addition" to require

297. *Coeur Alaska, Inc. v. Southeastern Alaska Conservation Council*, 557 U.S. 261 (2009).

298. 40 C.F.R. §232.2.

299. *See, e.g., Save Our Cmty. v. U.S. EPA*, 971 F.2d 1195, 22 ELR 21532 (5th Cir. 1992). *See also* *Orleans Audubon Soc'y v. Lee*, 742 F.2d 901, 15 ELR 20030 (5th Cir. 1984) (the deliberate drainage of a swamp is not the discharge of fill material); and *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 13 ELR 2094 (5th Cir. 1983). The notion that, once drained, a wetland may be filled because it is no longer navigable water, however, is at odds with the well-established doctrine that once a water is navigable, it is always navigable. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940).

300. *See, e.g., United States v. Cundiff*, 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001); *United States v. Deaton*, 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 15 ELR 21091 (11th Cir. 1985); *Avoyelles Sportsmen's League, Inc.*, 715 F.2d 897; *United States v. Fabian*, 522 F. Supp. 2d 1078 (N.D. Ind. 2007); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assoc., LLC*, 278 F. Supp. 2d 654 (E.D.N.C. 2003); *United States v. Hummel*, 2003 WL 1845365 (N.D. Ill. 2003); *United States v. Bay-Houston Towing Co.*, 33 F. Supp. 2d 1033 (N.D. Ill. 1998); *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 21 ELR 21323 (D. Mont. 1990).

301. *See, e.g., National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 28 ELR 21318 (D.C. Cir. 1998); *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 2007 WL 259944 (D.D.C.); *American Mining Cong. v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267, 27 ELR 20589 (D.D.C. 1997).

294. 40 C.F.R. §§11511, 11514, 11516, 11519 & 11522.

295. The approval of state programs is more limited under §404 than under §402. *Compare* §404(g), *with* §402(b).

296. For instance, biological material, rock, and sand. *See* §502(6).

§404 permits. After examining these decisions, the Article will consider how they square with EPA's "from the outside world" gloss on "addition" and the Agency's theory of unitary navigable water.

## I. Redeposit

Most redeposit decisions are rooted in *Avoyelles Sportsmen's League, Inc. v. Marsh*,<sup>302</sup> in which an environmental group challenged a soybean farmer's clearing of woodlands that exhibited wetlands characteristics, without a §404 permit. The defendants and the government had argued before the district court that landclearing by the mere removal of wetlands vegetation without a §404 permit was not an addition and therefore not a violation of §301(a). The district court rejected this argument as "untenable" because it would "frustrate the ecological purposes of the CWA."<sup>303</sup> The U.S. Court of Appeals for the Fifth Circuit did not reach the issue on appeal, because the district court's factual findings demonstrated that defendant's landclearing activities included filling small sloughs, partially filling large sloughs, digging holes, and burying logs in them, rendering this more than a "mere removal" case.<sup>304</sup> The court held that "addition" . . . may reasonably be understood to include 'redeposit,' finding that definition consistent with both the purpose and the legislative history of the CWA.<sup>305</sup> The court noted in passing that the EPA's "outside world" theory might jeopardize the application of §404, but did not address the issue because no party raised it.<sup>306</sup>

*Avoyelles* involved landclearing activity in which defendants moved materials considerable distances, for redeposit in the same wetlands. Other decisions consider more modest movement of material, many of them involving "sidecasting." Sidecasting occurs when soil is removed by digging a hole, often a ditch, and the soil is then placed beside the hole, an activity that moves material but does not add new material. In *United States v. Deaton*,<sup>307</sup> the defendant argued that sidecasting could not be addition, because the ordinary meaning of addition is the introduction of new material or an increase in the amount of material already there, while in sidecasting, there is no new material or increase in the amount of material.<sup>308</sup> The U.S. Court of Appeals for the Fourth Circuit concluded that the CWA does not prohibit the addition of "material," but rather prohibits the addition of a "pollutant." Earth and vegetable matter are not "dredged spoil" before they are excavated by defendants, but once they are removed from the ditch, they became "dredged spoil," which is a "pollutant." When defendants redeposit the material in the

wetland, they add a pollutant where there had been no pollutant before.

The court's semantic sleight of hand is ingenious, almost metaphysical. But it ignores that much, if not all, of the soil and vegetative matter moved were "pollutants" under the statute's definition, even before they became dredged spoil.<sup>309</sup> The Supreme Court also impliedly rejected the theory in *Miccusukee* when it adopted the Second Circuit's *Catskill I* soup-ladle analogy for addition.<sup>310</sup> In it, the soup in the pot represents navigable water (whether one body of navigable water or unitary navigable waters). Let's say the soup is cream of asparagus soup; it consists of water and some biological material (cream, asparagus pieces, and asparagus residue), just as wetlands bottoms consists of water and biological material (wetlands vegetation and the organic portion of the soil). The ladle lifts soup from the pot and pours it back in, adding nothing, according to the Supreme Court and the Second Circuit. Why would pouring the cream and asparagus residue and pieces from the soup back into the soup pot add pollutants to the water where there were none before?<sup>311</sup> Because they were not pollutants before they were taken from the soup, but they were pollutants when they are replaced in the soup? That is a strained reading. Strained reading, of course, is far from plain meaning, the preferred reading of "addition."<sup>312</sup>

The Fourth Circuit in *Deaton* justified its reading of the statute by reference to the statute's purpose; dredged spoil is as harmful to the waters of the United States whether it was dredged from the same or different waters.<sup>313</sup> That, however, depends entirely on what the court means by harmful. If the harm is pollution, moving indigenous biological material, sand, or soil from one part of a natural wetland to another part of the same wetland is far less harmful than moving dredged spoil laden with heavy metals and toxic pollutants from a navigation channel or port bottom to a natural wetland, the initial focus of §404. Moreover, if the purpose of §404 is to prevent the loss of wetlands, the harm consists of the destruction of wetlands by digging drainage ditches in them, not regulated by §404, rather than by redepositing or sidecasting some of the wetlands dug to form the ditches, apparently regulated by §404.

309. The definition lists "biological material" as a pollutant and "biological material" includes vegetation and the organic portion of the soil. See §502(6). The definition states that biological material and other substances are pollutants when they are "discharged into water." Although the courts engaged in this metaphysical transformation do not cite the phrase, it does support their arguments. However, the phrase seems to be a meaningless redundancy. It certainly would have been an odd and roundabout way for Congress to have established that redepositing or sidecasting dredged spoil requires a §404 permit. When Congress enacted this definition, it considered §404 to regulate the disposal of spoil from river and harbor dredging far from the site of the dredging. In this context, the dredged material would not have been from the same place as the disposal site, and the metaphysical transformation would have been unnecessary.

310. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110, 34 ELR 20021 (2004); *Catskill I*, 273 F.3d 481, 492.

311. The D.C. Circuit rejected such a notion in *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 28 ELR 21318 (D.C. Cir. 1998).

312. See *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (where "[t]he statute admits a reasonable construction which gives effect to all of its provisions . . . we will not adopt a strained reading").

313. *United States v. Deaton*, 209 F.3d 331, 336, 30 ELR 20508 (4th Cir. 2000).

302. *Avoyelles Sportsmen's League, Inc.*, 715 F.2d 897.

303. *Avoyelles Sportsmen's League, Inc. v. Alexander*, 473 F. Supp. 525, 536, 11 ELR 20315 (W.D. La. 1979).

304. *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 923.

305. *Id.*

306. 715 F.2d at 924, n.43.

307. 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000).

308. *Deaton*, 209 F.3d at 335.

Despite the strained reasoning of *Deaton*, subsequent sidecasting and similar decisions followed it. Addressing the argument that sidecasting adds nothing new to the wetland, the Sixth Circuit in *United States v. Cundiff*<sup>314</sup> combined *Deaton*'s metamorphosis theory with the *Avoyelles* conclusion that any other interpretation of addition would read §404 out of the statute.<sup>315</sup> *Cundiff* further supported its decision with a nod to *Chevron* deference,<sup>316</sup> but since neither EPA nor the Corps defined "addition" in regulations, it is not apparent how *Chevron* deference is relevant. A Michigan district court held in *United States v. Bay-Houston Towing Co., Inc.*<sup>317</sup> that sidecasting in the construction of drainage canals in a peat-harvesting operation was not incidental fallback, but instead was "purposeful relocation"—in other words, "addition."<sup>318</sup>

*Borden Ranch Partnership v. U.S. Army Corps of Engineers*<sup>319</sup> held that "deep ripping" of wetlands constitutes addition. Deep ripping pokes holes in a relatively impermeable layer of soil beneath a wetland, so that the wetland drains. In the process, the soil is "wrenched up, moved around, and redeposited somewhere else."<sup>320</sup> When the defendant argued that he added nothing new to the wetland, the Ninth Circuit cited *Deaton* and *Avoyelles* and rejected an argument that only incidental fallback took place. An Illinois district court in *United States v. Hummel*<sup>321</sup> even held that material excavated to create a ditch for sewer lines in a wetland was added to the wetland when the material was placed on top of the sewer lines to fill the ditch. Perhaps, the most extreme of these decisions is *United States v. M.C.C. of Florida, Inc.*,<sup>322</sup> where the Eleventh Circuit held that a tugboat propeller in essence dug a channel by repeatedly traversing the same area, pushing bottom sediment onto adjacent sea grass beds, thereby adding dredge spoil to the sea grass beds by redepositing the material onto the ocean bed, a dubious application of *Avoyelles*.<sup>323</sup> There are similar decisions,<sup>324</sup> and few contrary ones.<sup>325</sup>

## 2. Incidental Fallback

The "redeposit" decisions discussed above essentially hold that moving soil and biological material from one part of a wetland to another part of the same wetlands is an "addition" of the material to the other part of the wetland. As the points of removal and redeposit converge, however, that understanding becomes increasingly strained. When the two points are the same, the ordinary understanding of "addition" collapses, and the metaphysics of *Deaton* is all that remains. That helps explain why courts have drawn the "addition" line at incidental fallback.

Environmental plaintiffs challenged the Corps' initial exclusion from its regulatory definition of "discharge" the de minimis soil movement that occurs during normal dredging operations. The Corps settled the case and, pursuant to the settlement, replaced the exemption with explicit coverage of any redeposit of dredged materials including "incidental fallback."<sup>326</sup> The National Mining Association challenged the jurisdiction of the Corps to regulate "incidental fallback" as an "addition" of dredged or fill material. Incidental fallback occurs when material is excavated from water or wetlands by lifting and moving it elsewhere and some of the sediment incidentally falls back into the water or wetlands from which it is removed. The Corps argued that under *Avoyelles* this was "addition." But that decision involved removing substantial amounts of material and intentionally redepositing it some distance away from where it was removed. It did not involve removing substantial amounts of material and inadvertently redepositing a small amount of it at or very near the point of removal.

The D.C. district court in *American Mining Congress v. U.S. Army Corps of Engineers* held that "incidental fallback" was not "addition" for several reasons.<sup>327</sup> Most importantly, incidental fallback is an inevitable consequence of dredging, and §404 does not regulate dredging (removing), it only regulates filling; dredging is regulated by 33 U.S.C. §403. Second, legislative history indicates that Congress did not intend §404 to regulate "the small-volume incidental discharge that accompanies excavation and landclearing activities."<sup>328</sup> Third, the Corps took the position for 18 years prior to the challenged regulation, that §404 did not regulate incidental fallback,<sup>329</sup> a position also taken by courts.<sup>330</sup> Finally, Congress had rejected amendments to expand the jurisdiction of §404 to include such incidental discharge.<sup>331</sup>

314. 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009).

315. *Id.* at 213-14. See also *Avoyelles*, 715 F.3d at 924, n.43.

316. *Cundiff*, 555 F.3d at 214.

317. 33 F. Supp. 2d 596, 29 ELR 21011 (E.D. Mich. 1999).

318. *Bay-Houston Towing*, 33 F. Supp. 2d at 605.

319. 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001).

320. *Borden Ranch*, 261 F.3d at 815.

321. 2003 WL 1845365 (N.D. Ill. 2003) (citing *Deaton* and distinguishing deliberate redeposit of material from incidental fallback).

322. 772 F.2d 1501, 15 ELR 21091 (11th Cir. 1985).

323. *M.C.C. of Florida*, 772 F.2d at 1506. The material moved from developing a channel through grass beds was not added to navigable water for two reasons. First, it was not from the outside world. Second, the material was not a "pollutant" since it was not "discharged into water," §502 (6); it was already in the water and never left the water. The metamorphosis theory will not work either, for the sediment was never out of the water.

324. See, e.g., *United States v. Fabian*, 522 F. Supp. 2d 1078 (N.D. Ind. 2007) (moving material, including earth, dirt, and sand laterally in a wetland constituted addition); *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 21 ELR 21323 (D. Mont. 1990) (moving streambed material to redirect a channel constituted the redeposit or addition of fill material).

325. See, e.g., *United States v. Wilson*, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997) (holding that sidecasting was not addition in a criminal prosecution; two of the three judges on the panel filed concurring opinions, and the decision appears superseded by the Fourth Circuit's *Deaton* decision); *United States v. Hallmark Constr. Co.*, 30 F. Supp. 2d 1033 (N.D. Ill.

1998) (construction of a farm pond where the only discharge is incidental fallback did not constitute addition).

326. This history is recited in detail in *American Mining Cong. v. U.S. Army Corps of Eng'rs*, 951 Supp. 267, 269-71, 27 ELR 20589 (D.D.C. 1997).

327. *Id.* at 273.

328. *Id.*

329. *Id.* at 274.

330. *Salt Pond Assocs. v. U. S. Army Corps of Eng'rs*, 815 F. Supp. 766, 23 ELR 21026 (D. Del. 1993); *United States v. Lambert*, 18 ERC 1294, 13 ELR 20045 (M.D. Fla. 1981), *aff'd*, 695 F.2d 536, 13 ELR 20436 (11th Cir. 1983).

331. *American Mining*, 951 F. Supp. at 276.

The D.C. Court of Appeals affirmed,<sup>332</sup> rejecting the Corps' metamorphosis theory that wetlands sediment becomes a "pollutant" (dredged spoil) once it is removed from a wetland and thus when it falls back, it is added as a pollutant for the first time. The court stated that regardless of any "legal metamorphosis," it "fail[ed] to see how there can be an addition of *dredged material* when there is no addition of *material*," reasoning that "Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away."<sup>333</sup> The plaintiffs argued that the inability to regulate redeposit of dredged material would read §404 out of the statute, an observation made by the Fifth Circuit in *Avoyelles*.<sup>334</sup> The court responded the Corps could regulate some forms of redeposit, but not all redeposit, at least not incidental fallback redeposit.<sup>335</sup> Although the Corps promulgated an interim revised rule, it did not satisfy regulated industry, and skirmishes over the details of the incidental fallback exclusion continued.<sup>336</sup>

### 3. Section 404, the Outside World, and the Unitary Navigable Waters Theory

Defendants in §404 cases could use EPA's outside world gloss on "addition" and its unitary navigable waters theory as the bases for arguing that §404 does not prohibit many unpermitted wetlands-clearing operations. When a land developer moves material from one part of a wetland, a navigable water, to another part of the same wetland, the same navigable water, the material arguably does not come from outside the wetland's or navigable water's world. This is underscored by the Supreme Court's adoption of the Second Circuit's analogy of taking a ladle of soup from a pot, lifting it from the pot, and pouring it back into the pot. Nothing is added to the pot. If EPA's "outside world" gloss is applied to movement of soil within the same wetlands, no §404 permit is required for most clearing and filling of wetlands and most reported decisions upholding CWA actions against such activity are ill-founded, unless one part of a wetland is "outside world" to another part of the same wetland.

This "outside world" gloss by itself, however, would not affect the original purpose of §404, which was to regulate disposal of material dredged from harbors and navigation channels and disposed of in noncontiguous wetlands.<sup>337</sup> In such activities, dredged material is taken from one navigable water, a river or harbor, and discharged to another

navigable water, an unrelated wetland, so that the material dredged is from outside the wetland, and a §404 permit would be required.

The combination of the "outside world" gloss and unitary navigable waters theory, however, undermines §404's applicability in both situations. Whether water and material discharged to a wetland originate from the same wetland, from a different wetland, or from anywhere in navigable water, if all navigable waters are one, the dredged materials do not come from the outside world. Even that, however, would not eliminate §404 entirely; it would still apply to filling wetlands with material not originating in water. But that is not what Congress intended. It enacted §404 in 1972 to apply to discharges of material from dredging river channels and harbors and discharging them into nonadjacent waters, including wetlands, and amended it in 1977 to affirm that it applied, *inter alia*, to filling wetlands, including by landclearing activities. The "outside world" gloss and the "unitary navigable water" theory are inconsistent with these congressional objectives.

The Fifth Circuit in *Avoyelles* recognized in a footnote that the "outside world" theory could jeopardize the operation of §404, but did not address the issue because no party raised it.<sup>338</sup> The court surmised that no party raised the issue because "'dredged' material is by definition material that comes from the water and a requirement that all dredged spoil come from outside the water world would effectively remove the dredge-and-fill provision from the statute."<sup>339</sup> In other words, the Fifth Circuit suggested that the "outside world" theory could not apply to §404 because its application would render §404 without meaning.

Its logic is wrong on at least two grounds. First, the "outside world" theory would not eliminate the application of §404; the section would still apply to adding dredged spoil that originated from outside the wetland being filled, including the original target of §404, dredged spoil from harbors and navigation channels. Second, if the "outside world" theory did eviscerate §404, the most natural conclusion is that the theory is with the CWA and the theory does not apply to any part of the statute. EPA's suggestion that the theory applies to §402, but does not apply to §404 requires interpreting "addition" differently under §402 and §404, counter to the canon requiring us to "interpret the same . . . terms in a statute in the same way."<sup>340</sup> It also ignores the fact that critical use of "addition" is in the definition of "discharge of a pollutant" in §301(a), which prohibits the discharge of a pollutant except in compliance with a §402 or §404 permit. EPA's argument would require interpreting the same word "addition" differently depending on whether the allegation was that it was not in compliance with a §402 or a §404 permit.

332. *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 28 ELR 21318 (D.C. Cir. 1998).

333. *Id.* at 1404.

334. *Id.* at 1405. See *Avoyelles*, 715 F.2d at 924, n.43.

335. *National Mining*, 145 F.3d at 1405.

336. *American Mining Cong. v. U.S. Army Corps of Eng'rs*, 120 F. Supp. 2d 23 (D.D.C. 2000).

337. "Congress understood 'discharge of dredged material' to mean open water disposal of material removed during the digging or deepening of navigable waterways." See *American Mining*, 951 F. Supp. at 273 (citing pertinent legislative history).

338. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43, 13 ELR 20942 (5th Cir. 1983).

339. *Id.*

340. *ESKRIDGE*, *supra* note 15, at 324, citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assts., Ltd.*, 484 U.S. 365 (1998). See also *SCALIA & GARNER*, *supra* note 15, at 170-73.

In response to comments that its proposed water transfer rule and the related unitary navigable waters theory would undermine §404, EPA adopted the Fifth Circuit's comments in the Agency's preamble to the final water transfer rule: "Because Congress explicitly forbade discharges of dredged material except as in compliance with . . . [§404], today's rule has no effect on the 404 permit program."<sup>341</sup> EPA's explanation misses the mark, as did the Fifth Circuit. The Fifth Circuit's observation merely establishes that dredged material is a "pollutant" and has nothing to do with whether there is an "addition" of that pollutant; all elements of the §301(a) prohibition must be met before a §404 permit is required. While EPA's "outside world" theory of "addition" does not itself entirely eviscerate the §404 program, when combined with EPA's unitary navigable waters theory, they eviscerate most of the reach of §404. If all navigable waters are one, then moving dredged spoil from one part of a navigable water or wetland to another part of the same navigable water or another wetland does not require a permit because the waters or wetlands are the same.

The current dominant purpose of §404 is to regulate the disposal of dredge and fill material into wetlands, most often material redeposited within a single wetland by landclearing activities. Courts have universally interpreted "addition" to include redepositing such material from one part of a wetland to another part of the same wetland. Their interpretation is compatible with our suggested definition of addition, as well as with EPA's "outside world" theory of addition, so long as the part of the wetland from which the material is taken is located at some remove from the part of the wetland into which the material is redeposited. Although courts are comfortable with this, they have balked in applying "addition" to situations where the place of extraction and the place of deposit are virtually identical, as with incidental fallback. Sidecasting is so close to incidental fallback that decisions interpreting "addition" to include sidecasting push the meaning of "addition" about as far as it can go. EPA's unitary navigable waters theory, however, would eliminate the application of §404 in cases in which spoil is moved from navigable water, including wetlands, to navigable water, including wetlands, whether the navigable water or wetlands are the same or different. EPA avoids this conclusion by stating that its unitary navigable waters theory applies to §402 but not to §404.

EPA's explanation falls before the canon that statutory terms are to be interpreted consistently throughout a statute, unless specifically provided otherwise in the statute.

Moreover, the definition of "navigable waters" in §502 provides that "[e]xcept as otherwise specifically provided, when used in this chapter . . . [t]he term 'navigable waters' means . . . ." The CWA does not specifically provide that "navigable waters" has different meanings in §402 and §404. EPA's unitary navigable waters theory is incompatible with §404 and is therefore incompatible with the CWA. For that reason and others discussed in this Article, EPA's unitary navigable waters theory must be rejected in its entirety.

#### IV. Conclusion

EPA has not promulgated a definition of "addition," although it has interpreted the element as addition "from the outside world" and as excluding water transfers. These interpretations neither define "addition" nor withstand scrutiny. Indeed, the Supreme Court has rejected the first concept in EPA's "outside world" theory, holding in *Miccosukee* that a point source need not be the original source of a pollutant for a point source to add it to navigable water. The Eleventh Circuit's *Miccosukee* decision suggested that "addition" incorporates the notion of but-for causation, a principled and useful distinction between actions that add or do not add pollutants. The definition suggested at the outset of this Article incorporates that notion: "addition" is 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."

With few exceptions, when applied to decisions interpreting "addition" in the difficult fact patterns examined above, the definition suggested in this Article either leads to results consistent with the decisions or may have done so if the decisions had made more-detailed findings of fact to address the causation aspect of "addition." Section 404 sidecasting redeposit decisions push "addition" to its outer limit and cross that limit when it comes to incidental fallback. EPA's "outside world" gloss on "addition," its unitary navigable waters theory, and the water transfer rule based on them are all contrary to the CWA's water quality standards program, eliminate most of the traditional jurisdiction of its §404 program, and are unsupported by the CWA. EPA should disavow the two theories and withdraw the rule. If EPA fails to do so, courts should reject the theories, overturn the rule, and give no deference to the Agency's interpretations supporting them. Finally, EPA should promulgate this Article's suggested definition of "addition" in 40 C.F.R. §122.2.

341. 73 Fed. Reg. 33697, 33703 (June 13, 2008).

**TABLE A**  
**Decisions Interpreting “Addition”**

<b>Supreme Court Decisions</b>	
1.	S.D. Warren Co. v. Maine Board of Environmental Protection, 547 U.S. 370 (2006)
2.	South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 34 ELR 20021 (2004)
<b>Court of Appeal Decisions</b>	
3.	Natural Resources Defense Council, Inc. v. County of Los Angeles, 673 F.3d 880, 41 ELR 20109 (9th Cir. 2011)
4.	West Virginia Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159, 40 ELR 20014 (4th Cir. 2010)
5.	Friends of the Everglades v. South Florida Waste Management Dist., 570 F.3d 1210 (11th Cir. 2009)
6.	United States v. Cundiff, 555 F.3d 200, 39 ELR 20025 (6th Cir. 2009)
7.	National Cotton Council of America v. U.S. Env't'l Protection Agency, 553 F.3d 927, 39 ELR 20006 (6th Cir. 2009)
8.	Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006)
9.	Sierra Club and Mineral Policy Center v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005)
10.	Waterkeeper Alliance, Inc. v. U.S. Env't'l Protection Agency, 399 F.3d 486, 35 ELR 20049 (2d Cir. 2005)
11.	Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004)
12.	No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2d Cir. 2003)
13.	Alabama Rivers Alliance v. Federal Energy Regulatory Commission, 325 F.3d 290 (D.C. Cir. 2003)
14.	Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist., 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002)
15.	Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001)
16.	Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001)
17.	United States v. Deaton, 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000)
18.	National Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 28 ELR 21318 (D.C. Cir. 1998)
19.	United States v. Wilson, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997)
20.	North Carolina v. Federal Energy Regulatory Commission, 112 F.3d 1175, 27 ELR 20929 (D.C. Cir. 1997)
21.	Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army, 111 F.3d 1485, 27 ELR 21130 (10th Cir. 1997)
22.	Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 27 ELR 20622 (1st Cir. 1996)
23.	Committee to Save Mokelumne River v. East Bay Mun. Utility District, 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993)
24.	United States v. Law, 979 F.2d 977, 23 ELR 20466 (4th Cir. 1992)
25.	Save Our Community v. U.S. Env't'l Protection Agency, 971 F.2d 1155, 22 ELR 21532 (5th Cir. 1992)
26.	American Mining Congress v. U.S. Env't'l Protection Agency, 965 F.2d 759, 22 ELR 21135 (9th Cir. 1992)
27.	Rybachek v. U.S. Env't'l Protection Agency, 904 F.2d 1276, 20 ELR 20973 (9th Cir. 1990)
28.	National Wildlife Federation v. Consumers Power Co., 862 F.2d 580, 19 ELR 20235 (6th Cir. 1988)
29.	United States v. M.C.C. of Florida, Inc. 772 F.2d 1501, 15 ELR 21091 (11th Cir. 1985)
30.	Tennessee Valley Authority v. Tennessee Water Quality Control Board, 717 F.2d 992, 14 ELR 20598 (6th Cir. 1983)
31.	Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 13 ELR 20942 (5th Cir. 1983)
32.	National Wildlife Federation v. Gorsuch, 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982)
33.	Missouri ex rel. Ashcroft v. U.S. Dep't of the Army, 672 F.2d 1297, 12 ELR 20368 (8th Cir. 1982)
34.	United States v. Earth Sciences, Inc., 599 F.2d 368, 9 ELR 20542 (10th Cir. 1979)
35.	Appalachian Power Co. v. Train, 545 F.2d 1351, 6 ELR 20732 (4th Cir. 1976)
36.	American Iron & Steel Institute v. U.S. Env't'l Protection Agency, 526 F.2d 1027, 6 ELR 20068 (3d Cir. 1975)
<b>District Court Decisions</b>	
37.	Community Ass'n for the Restoration of the Environment v. Nelson Faria Dairy, Inc., 2011 WL 61882, No. 04-3060 (E.D. Wash. Jan. 7, 2011)
38.	Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. Env't'l Protection Agency, 630 F. Supp. 2d 295 (S.D.N.Y. 2009)
39.	United States v. Fabian, 522 F. Supp. 2d 1078, 37 ELR 20083 (N.D. Ind. 2007)
40.	National Ass'n of Home Builders v. U.S. Army Corps of Engineers, 2007 WL 259944, No. 01-0274 (D.D.C. Jan. 30, 2007)
41.	Environmental Protection Information Center v. Pacific Lumber Co., 469 F. Supp. 2d 803 (N.D. Cal. 2007)

42. Friends of the Everglades, Inc. v. South Florida Water Management Dist., 2006 WL 3635465, No. 07-13829 (S.D. Fla. Dec. 11, 2006)
43. North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC, 278 F. Supp. 2d 654 (E.D.N.C. 2003)
44. United States v. Hummell, 2003 WL 1845365, No. 00 C 5184 (N.D. Ill. Apr. 8, 2003)
45. United States PIRG v. Atlantic Salmon of Maine, LLC, 215 F. Supp. 2d 239 (D. Me. 2002)
46. Sierra Club v. El Paso Gold Mines, Inc., 2002 WL 33932715, No. 01PC2163 (D. Colo. Nov. 15, 2002)
47. Greenfield Mills, Inc. v. O'Bannon, 189 F. Supp. 2d 893 (N.D. Ind. 2002)
48. United States ex rel. McKeown v. Port Authority of New York & New Jersey, 162 F. Supp. 2d 173 (S.D.N.Y. 2001)
49. American Mining Congress v. U.S. Army Corps of Engineers, 120 F. Supp. 2d 23 (D.D.C. 2000)
50. No Spray Coalition, Inc. v. City of New York, 2000 WL 1401458, No. 00 Civ. 5395 (S.D.N.Y. Sept. 25, 2000)
51. United States v. Bay-Houston Towing Co, 33 F. Supp. 2d 596, 29 ELR 21011 (E.D. Mich. 1999)
52. United States v. Hallmark Const. Co., 30 F. Supp. 2d 1033, 28 ELR 21438 (N.D. Ill. 1998)
53. Frobel v. Meyer, 13 F. Supp. 2d 843 (E.D. Wis. 1998)
54. American Mining Congress v. U.S. Army Corps of Engineers, 951 F. Supp. 267, 27 ELR 20589 (D.D.C. 1997)
55. Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 26 ELR 20639 (D. Mont. 1995)
56. Salt Pond Associates v. U.S. Army Corps of Engineers, 815 F. Supp. 766, 23 ELR 21026 (D. Del. 1993)
57. United States v. Sinclair Oil Co., 767 F. Supp. 200, 21 ELR 21323 (D. Mont. 1990)
58. National Wildlife Federation v. Consumers Power Co., 657 F. Supp. 989, 17 ELR 20801 (W.D. Mich. 1987)
59. National Wildlife Federation v. Gorsuch, 530 F. Supp. 1291, 12 ELR 20268 (D.D.C. 1982)
60. United States v. Lambert, 18 ERC 1294, 13 ELR 20045 (M.D. Fla. 1981), *aff'd*, 695 F.2d 536, 13 ELR 20436 (11th Cir. 1983)
61. Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525, 11 ELR 20315 (W.D. La. 1979)
62. South Carolina Wildlife Federation v. Alexander, 457 F. Supp. 118, 8 ELR 20757 (D.S.C. 1978)
63. United States v. Velsicol Chemical Corp. 438 F. Supp. 945 (W.D. Tenn. 1976)

**TABLE B**  
**ANALYSIS OF DECISIONS**

Decision Number	Year	+/- <sup>a</sup>	Type of Case <sup>b</sup>	Canons Used <sup>c</sup>	Number of Canons Used	CWA §
Supreme Court Decisions						
1.	2006	+	Jud. Rev.	3, 5, 8, 10, 11, 12	6	§401
2.	2004	+	Cit. S.	1, 2, 3, 10, 11, 12	6	§402
Court of Appeals Decisions						
3.	2011	+	Cit. S.	4, 10, 11	3	§402
4.	2010	+	Cit. S.	1, 2, 3, 10, 11	5	§402
5.	2009	--	Cit. S.	2, 3, 5, 10, 11	5	§402
6.	2009	+	Enf.	3, 10, 11, 12	4	§404
7.	2009	+	Jud. Rev.	1, 2, 3, 4, 7	5	§402
8.	2006	+	Cit. S.	2, 3, 9, 10, 11, 12	6	§402
9.	2005	+	Cit. S.	3, 6, 10, 11, 12	5	§402
10.	2005	+	Cit. S.	2, 3, 10, 11, 12	5	§402
11.	2004	+	Cit. S.	2, 3, 10, 11, 12	5	§404
12.	2003	+	Jud. Rev.	4, 10, 11	3	§401
13.	2002	+	Cit. S.	3, 10, 11	3	§402
14.	2001	+	Cit. S.	2, 3, 5, 6, 10, 11	6	§402
15.	2001	+	Jud. Rev.	2, 7, 10, 11	4	§404
16.	2001	+	Cit. S.	9, 10, 11	3	§402
17.	2000	+	Enf.	2, 7, 10, 11	4	§404
18.	1998	--	Jud. Rev.	1, 7, 9, 10, 11, 12	6	§404
19.	1997	--	Crim.	1, 10, 11	3	§404
20.	1997	--	Jud. Rev.	8, 10, 11, 12	4	§401
21.	1997	--	Cit. S.	1, 9	2	§402
22.	1996	+	Cit. S.	1, 6, 10, 12	4	§402
23.	1993	+	Cit. S.	10, 11	2	§402
24.	1992	+	Crim.	10, 11	2	§402
25.	1992	--	Cit. S.	3, 10, 11	3	§404
26.	1992	+	Jud. Rev.	2, 3, 5, 10, 12	5	§402
27.	1990	+	Jud. Rev.	10, 11	2	§402
28.	1988	--	Jud. Rev.	1, 3, 10, 11, 12	5	§402
29.	1985	+	Enf.	2, 11	2	§404
30.	1983	--	Cit. S.	11	1	§402
31.	1983	+	Enf.	2, 5, 10, 11	4	§404
32.	1982	--	Jud. Rev.	2, 3, 5, 10, 11, 12	6	§402
33.	1982	--	Cit. S.	10	1	§402
34.	1979	+	Cit. S.	10	1	§402
35.	1976	--	Jud. Rev.	10	1	§401
36.	1975	--	Jud. Rev.	10	1	§402
District Court Decisions						
37.	2011	--	Cit. S.	10, 11	2	§402
38.	2009	+	Jud. Rev.	3, 10, 11	3	§402
39.	2007	+	Enf.	11	1	§404

Decision Number	Year	+/- <sup>a</sup>	Type of Case <sup>b</sup>	Canons Used <sup>c</sup>	Number of Canons Used	CWA §
40.	2007	--	Jud. Rev.	11	1	§404
41.	2007	+	Cit. S.	11	1	§402
42.	2006	+	Cit. S.	2, 3, 5, 6, 10, 11, 12	7	§402
43.	2003	+	Cit. S.	11	1	§402
44.	2003	+	Enf.	10, 11	2	§404
45.	2002	+	Cit. S.	10, 11	2	§402
46.	2002	+	Cit. S.	10, 11, 12	3	§402
47.	2002	--	Cit. S.	11	1	§404
48.	2001	--	Enf.	10, 11	2	§402
49.	2000	--	Cit. S.	9, 10, 11	3	§402
50.	1999	+	Enf.	11	1	§404
51.	1988	+	Enf.	11	1	§404
52.	1988	--	Cit. S.	11, 12	2	§§402/404
53.	1997	--	Jud. Rev.	2, 3, 5, 9, 10, 11, 12	7	§404
54.	1995	+	Cit. S.	10	1	§402
55.	1993	--	Enf.	3, 5, 10	3	§402
56.	1990	+	Enf.	10, 11, 12	3	§404
57.	1987	+	Cit. S.	10, 11	2	§402
58.	1982	+	Cit. S.	2, 10, 11	3	§402
59.	1979	+	Cit. S.	2, 5, 10	3	§402
60.	1978	+	Cit. S.	10, 11	2	§402
61.	1976	+	Enf.	10	1	§402

- a. Plus (+) denotes an expansive interpretation of "addition," minus (-) denotes a restrictive interpretation. Note that even though the interpretation of "addition" may be expansive, the environmental party may have lost the case for other reasons.
- b. Avoid absurd results; 2. Broad policy goals, interpret in light of; 3. Deference to agency interpretation; 4. Inclusive or exclusive nature of definition, interpret in light of; 5. Legislative history; 6. Metaphor; use of; 7. Metamorphosis between statutory terms (not a canon of construction, but used enough here to note); 8. Noscitur a sociis; 9. Other statutes, interpret harmoniously with; 10. Plain meaning; 11. Precedent; 12. Structure of statute.
- c. Cit. S. means citizen suit; Crim. means criminal prosecution; Enf. means civil enforcement; Jud. Rev. means judicial review.