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# Up the River Without a Permit: Why the Water Transfers Rule Endangers the Louisiana Wetlands

## INTRODUCTION

The National Pollution Discharge Elimination System (NPDES) in the Clean Water Act (CWA) has been referred to as the “linchpin,” the “centerpiece,” and the “most important component” of the Clean Water Act.<sup>1</sup> The NPDES permitting program is a major part of the invaluable protection the CWA provides for the Nation’s waters. Congress enacted the CWA in response to a growing crisis in the waters of the United States. In 1972 Congress took a more aggressive stance on pollution control while maintaining a realistic view of the industrialized society Americans live in. The CWA allows the Environmental Protection Agency (EPA) to set maximum effluent limits for navigable waters and then issue permits so as to keep the pollution levels below those limits. Without a permit, it is unlawful to execute “any addition of any pollutant into navigable waters from any point source.”<sup>2</sup>

At some point in the early 2000s, the EPA began to champion a theory known as the Unitary Waters Theory. The theory posits that each individual body of water in the United States is not distinct and individual at all, but rather is part of one unitary whole. If all waters are part of the same whole, a transfer from one to another will never be an “addition” to the whole. Under the Unitary Waters Theory, the Colorado River in the west and the Delaware River in the east are considered the same body of water. Therefore, taking a pollutant from the Delaware River and adding it to the Colorado River would not be an addition of a pollutant. This example highlights the flaw of the Unitary Waters Theory.

Remarkably, even after receiving no support in the court system, the EPA still promulgated a notice and comment rule in the hope that the Unitary Waters Theory would gain legitimacy. Publishing an already flawed argument does not remove the flaws. However, upon conducting the *Chevron* Test for deference to agency action, the Eleventh Circuit concluded the wording of the statute is ambiguous on whether the waters of the United States should be considered a collection of independent and distinct water

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1. Chris Reagen, *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 U. COLO. L. REV. 307, 312 (2011).

2. 33 U.S.C. § 1362(12) (2012).

bodies or one unitary whole.<sup>3</sup> Further, the court held that the EPA's Water Transfer Theory, now formalized as the Water Transfers Rule, was a reasonable interpretation of the Section 402 requirements in the CWA.<sup>4</sup> As one commentator put it, "one may be better off drinking whiskey than the dirty water the EPA is fighting to save from NPDES regulation through its unitary waters theory."<sup>5</sup>

This Comment will outline the myriad of problems caused by the Water Transfers Rule and how it affects Louisiana in particular. It will analyze the Eleventh Circuit's ruling in *Friends of the Everglades v. South Florida Water Management District*<sup>6</sup> and explain why the court erred in granting *Chevron* deference to the rule, including why the statute is clear and why the EPA's interpretation of the statute is unreasonable. It will also describe why concerns over federal usurpation of state responsibility are misplaced. After establishing that the Water Transfers Rule is flawed and that NPDES permits should be required for transfers from one meaningfully distinct body of water to another, this Comment will determine that the Louisiana wetlands are a meaningfully distinct body of water, separate from the Mississippi River and the Gulf of Mexico. For this reason, Water Quality Standards and Total Maximum Daily Loads (TMDLs) should be established for the Louisiana wetlands. Any transfer of water containing pollutants into the wetlands should require an NPDES permit under Section 402 of the CWA. This Comment will conclude by addressing concerns that a permitting system is overly expensive absent the Water Transfers Rule and establish that using the existing NPDES permitting program along with a Water Quality Credit Trading Program will keep the permitting cost down and produce real reductions in pollutant discharges into the wetlands.

## I. BACKGROUND

Federal water regulation began as a way for the government to assert control over the Nation's waters to promote interstate commerce. As industrialization took its toll on the waters, the Federal Government began to take on the role of protecting the

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3. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009).

4. *Id.*

5. Heidi Hande, *Is the EPA's Unitary Waters Theory All Wet?*, 6 WYO. L. REV. 401, 404 (2006).

6. 570 F.3d 1210 (11th Cir. 2009).

water itself in the interest of the health of the environment. As legislation progressed, the balance between federal and state control over the waters has changed as well, ultimately leading to a healthy balance where the Federal Government sets a general framework within which the states are free to assert their own regulations. In response to overly ambitious goals, the more recent trend in water regulation has been towards enacting regulations that promote feasible solutions to water pollution.

*A. Pre Clean Water Act Legislation Falls Short of Accomplishing Clean Water*

The first instance of federal regulation of the Nation's waterways occurred in 1899 with the Rivers and Harbors Appropriations Act (RHAA).<sup>7</sup> Since then, the Federal Government has expanded its control over the waters of the United States in both a commercial and an environmental interest. The RHAA included several sections that are still in force today, including Section 10<sup>8</sup> and Section 13, also known as the Refuse Act.<sup>9</sup> Section 10 made it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of" navigable waters.<sup>10</sup> Section 10 mandates a permit to alter the course of a United States waterway.<sup>11</sup> The Refuse Act made it unlawful to discharge refuse into navigable waters or their tributaries.<sup>12</sup>

In 1948, the Federal Government took on a more supportive role, secondary to the states, by passing The Federal Water Pollution Control Act (FWPCA).<sup>13</sup> Under the FWPCA, the Federal Government provided money and technical services to state pollution control programs.<sup>14</sup> However, this supportive role of the Federal Government did not last long.

In 1961 Congress passed a set of amendments that returned responsibility for water pollution control back to the Federal Government. These amendments increased federal power to initiate enforcement conferences, although initiation of these

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7. Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 529 (2005).

8. 33 U.S.C. § 403 (2012).

9. Murchison, *supra* note 7, at 529. The Refuse Act is now integrated into Section 402 of the Clean Water Act.

10. 33 U.S.C. § 403.

11. *Id.*

12. Murchison, *supra* note 7, at 529; 33 U.S.C. § 407.

13. Murchison, *supra* note 7, at 530.

14. *Id.*

conferences still required a state governor's request.<sup>15</sup> Significantly, the 1961 amendments also broadened the definition of "interstate or navigable waters" to include all coastal waters.<sup>16</sup>

In 1965 Congress passed The Water Quality Act.<sup>17</sup> The Water Quality Act was another expansion of the Federal Government's responsibility to control water pollution in that the Act implemented the establishment of water quality standards for interstate waters.<sup>18</sup> States were to create these standards and submit them to the new Water Pollution Control Administration for approval before implementation.<sup>19</sup> The shortcomings of these amendments were that they did not allow for a federal implementation plan in the event of a state's failure to act, nor did they control individual sources of pollution.<sup>20</sup> These failures would be addressed within ten years.

Unfortunately, none of these amendments had much effect on improving the water quality of the United States.<sup>21</sup> Prior to 1970, the Federal Government initiated just one enforcement action under the FWPCA.<sup>22</sup> In fact, were it not for two Supreme Court decisions expanding the power of the Refuse Act in pollution control,<sup>23</sup> the FWPCA might have been nothing more than a farce.

#### *B. The 1972 Amendments Become the CWA*

In 1972 the Cuyahoga River in Cleveland, Ohio caught fire because of high levels of pollutants on the river's surface. This incident alerted Congress to the harm incurred by the industrialization of the 20th century.<sup>24</sup> The Cuyahoga disaster prompted Congress to pass the Water Pollution Control Act of 1972.

Because the FWPCA was well accepted by diverse groups, many of the substantive parts of the FWPCA were retained in the CWA.<sup>25</sup> Generally, the 1972 Amendments focused on feasibility.<sup>26</sup>

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15. *Id.* at 532.

16. *Id.*

17. *Id.*

18. *Id.*

19. Murchison, *supra* note 7, at 532.

20. *Id.*

21. *Id.* at 534.

22. *Id.*

23. *Id.* at 534–35 (discussing *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966)).

24. Reagen, *supra* note 1, at 311.

25. The Act of 1972 had the support of different groups including industrial dischargers, environmental groups, local governments, and farmers. Murchison, *supra* note 7, at 536–37. Industrial dischargers supported the Act because it

The Amendments established pollution standards for categories of point sources, making the standards simpler and clearer for industrial polluters.<sup>27</sup> Point sources were distinguished into existing and new point sources and then further distinguished into those that were publicly owned and those that were non-publicly owned.<sup>28</sup> For existing point sources, both publicly and non-publicly owned point sources had a two-step process for implementation of new standards.<sup>29</sup> Publicly owned treatment works must “employ the best treatment control technology over the life of the works.”<sup>30</sup> Non-publicly owned point sources, on the other hand, had to employ the “best practicable control technology currently available” (BPT) by 1977 and since 1983, must now employ the “best available control technology economically achievable” (BAT).<sup>31</sup> While these new standards added clarity and certainty to the water pollution problem in the United States, the most significant contribution to the feasibility-focused approach was the creation of permits that made the standards more palatable to industry.<sup>32</sup>

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allowed for permits as a way around an absolute prohibition of discharges. *Id.* Environmental groups supported it because it expanded the federal jurisdiction beyond the navigable waters of the United States and created the Environmental Protection Agency (EPA). *Id.* at 537. Local governments supported the Act because it increased funding for their programs. *Id.* Farmers supported the Act because it eased regulations on farming operations and discharges from fields. *Id.*

26. Murchison, *supra* note 7, at 539.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 540.

31. Murchison, *supra* note 7, at 540. BPT standards directed the EPA to establish standards based on what amounts to a cost-benefit analysis based on how much it will cost to implement technologies that deliver different levels of effluent reduction. In establishing BPT standards, the EPA looked at the *average* of the best performers and was to recommend those when the cost of the technology necessary to achieve those standards made them practical. *Id.* at 540 n.94. BAT standards differ from BPT standards in that the cost is now only one factor to consider as opposed to the main factor to consider. BAT standards use the best performers in an industrial category as the reference point and these standards were to be implemented with only partial consideration of cost. *Id.* at 540 n.95.

32. While a full description of the permits introduced by the 1972 legislation is beyond the scope of this paper, many of the permits introduced were maintained in the Clean Water Act and are still in effect today. *See* Murchison, *supra* note 7, at 541–50.

*C. The Clean Water Act*

The 1972 FWPCA came under fire for being both overly ambitious and under-inclusive.<sup>33</sup> Therefore, Congress once again amended the legislation in an attempt to make pollution control significant and realistic. This attempt is known as the 1977 Clean Water Act.<sup>34</sup>

Section 301 of the CWA prohibits the discharge of pollutants into navigable waters.<sup>35</sup> However, in keeping with the feasibility approach, individuals or industries can obtain NPDES permits that allow them to dump a set amount of pollutants into a certain body of water at a certain point source.<sup>36</sup> Included in Section 402 is a provision that allows states to create their own NPDES programs subject to EPA approval.<sup>37</sup> The EPA may suspend or withdraw the approval of a state's program.<sup>38</sup> Another important aspect of the NPDES program is an individual's ability to sue the EPA for a failure to properly monitor the United States waterways.<sup>39</sup> Significantly, the CWA kept the 1972 permit system as an attempt to stay true to the feasibility approach to water quality control.

Two permits are of particular concern in this Comment: Section 10 permits and Section 402 permits. Section 10 permits are required whenever one wishes to alter the course or navigability of a waterway of the United States<sup>40</sup> and are mostly useful in regulating the waterways as channels of commerce under the Commerce Clause of the United States Constitution.<sup>41</sup> However, Section 10 permits can also be used to regulate pollution. Section 402 provides for NPDES permits and are most significant because they are most affected by the EPA's Water Transfers Rule of 2008.<sup>42</sup>

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33. *Id.* at 551 (criticizing the standards set as being impossible to obtain and for not applying to nonpoint sources).

34. This name was chosen because the 1972 Act had already become known as the Clean Water Act and this was merely codifying it.

35. 33 U.S.C. § 1311 (2012). *See also* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102 (2004).

36. 33 U.S.C. § 1342; Hande, *supra* note 5, at 405–06.

37. 33 U.S.C. § 1342(b). Forty-seven of the 50 states have developed their own NPDES permits. *See Specific State Program Status*, ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/npdes/basics/State-Program-Status.cfm>, archived at <http://perma.cc/A5ME-RDBX> (last updated July 14, 2014).

38. Hande, *supra* note 5, at 406–07; 33 U.S.C. § 1342(b).

39. Hande, *supra* note 5, at 408.

40. 33 U.S.C. § 403.

41. U.S. CONST. art. I, § 8, cl. 3.

42. 40 C.F.R. § 122.3(i) (2013).

The NPDES is a step-by-step process. First, the EPA must set water quality standards for each body of water.<sup>43</sup> These standards are established through Section 301 of the CWA, which directs states to establish effluent limitations on all point sources.<sup>44</sup> If the standards can be met through available technology, the EPA will issue NPDES permits in accordance with that technology and the determined standards.<sup>45</sup> If the established standards cannot be met through the available technology, the EPA must then establish TMDLs for each distinct water body and issue NPDES permits in accordance with the TMDLs so that each point source is allowed to contribute only a proportionate part of the TMDL.<sup>46</sup> The complex process for establishing water quality standards and issuing NPDES permits, however, pales in comparison with the difficulty of determining when an NPDES violation has occurred.

#### *D. NPDES Violations Serve as the Centerpiece of the CWA*

NPDES permitting requirements were enacted under Section 402 of the CWA. These permits replaced Section 13 Refuse Act permits under the RHAA.<sup>47</sup> An NPDES violation has five elements: (1) there must be a *discharge* of (2) a *pollutant* (3) from a *point source* (4) into *navigable waters* (5) *without a permit*.<sup>48</sup> “Discharge of pollutants” as defined in the CWA is “any addition of any pollutant to navigable waters from any point source.”<sup>49</sup> It is important to define “pollutant,” “navigable waters,” “point source,” and most difficultly, “addition.”

First, the CWA defines “pollutant” narrowly. The CWA states, “The term ‘pollutant’ *means* . . .” without using *includes*.<sup>50</sup> This indicates the items listed are exhaustive and not merely exemplary.<sup>51</sup> The pollutants listed include, among other things, biological materials, heat, rock, sand, cellar dirt, and agricultural waste discharged into water.<sup>52</sup> Additionally, the definition lists certain things that are expressly *excluded* from the definition of

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43. 33 U.S.C. § 1314 (2012); Cozette Tran-Caffee, *The Water Transfers Rule: Weakening the Clean Water Act One Reasonable Interpretation at a Time*, 37 *ECOLOGY L.Q.* 751, 756–57 (2010). A full description of how water quality standards are determined is beyond the scope of this paper.

44. 33 U.S.C. § 1311(b).

45. 33 U.S.C. § 1311; Tran-Caffee, *supra* note 43, at 757.

46. 33 U.S.C. § 1313(d)(3); Tran-Caffee, *supra* note 43, at 757.

47. 33 U.S.C. § 1342(a)(4); § 1342(a)(5).

48. Hande, *supra* note 5, at 409.

49. 33 U.S.C. § 1362(2012).

50. 33 U.S.C. § 1362(6) (emphasis added).

51. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982).

52. 33 U.S.C. § 1362(6).



pollutant, which further supports a narrow interpretation of pollutant.<sup>53</sup>

Second, a “point source” in the CWA is defined as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.”<sup>54</sup> Significantly, this definition gives an exemplary, but not exhaustive, list of possible point sources. The only specificity given is the exclusion sentence stating what is not included. “[A]gricultural stormwater discharges and return flows from irrigated agriculture”<sup>55</sup> both fall under the separate category of nonpoint source discharges and are delegated to the states to regulate.<sup>56</sup> However, the Supreme Court determined that in order to be considered a point source, the sources do not have to actually contribute the pollutants themselves to the body of water, but the sources must merely be *capable* of transporting the pollutants.<sup>57</sup> Lower courts have determined that dams and pumps are both considered point sources.<sup>58</sup> A river diversion would also be a “discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”<sup>59</sup>

Third, “navigable waters” is used as a jurisdictional term, defined as “waters of the United States, including the territorial seas.”<sup>60</sup> This is a broader meaning than the traditional notion that navigable waters are those waters that are navigable in fact.<sup>61</sup> For example, in 1985 the Army Corps of Engineers (the Corps) determined that wetlands that abut a navigable creek are protected by the CWA.<sup>62</sup> This is a reasonable interpretation because the purpose of the CWA is to “restore and maintain the . . . integrity of”<sup>63</sup> the waters of the United States, and the best way to achieve this is to also control all things that have a hydrologic connection

53. *Id.*

54. 33 U.S.C. § 1362(14).

55. *Id.*

56. *See* 33 U.S.C. § 1288 (2012).

57. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

58. *Gorsuch*, 693 F.2d at 165; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001).

59. 33 U.S.C. § 1362(14).

60. 33 U.S.C. § 1362(7).

61. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

62. *Riverside Bayview Homes*, 474 U.S. at 135.

63. 33 U.S.C. § 1251(a) (2012).

with the navigable waters.<sup>64</sup> The definition of “navigable waters” continued to evolve, and in 2001 the Supreme Court introduced the Significant Nexus Test.<sup>65</sup> For an area to be considered part of the waters of the United States, the area in question must have a significant nexus to waters that are navigable in fact.<sup>66</sup>

The latest case to define “navigable waters” provided more uncertainty than it did clarity. In *Rapanos v. United States*, the Supreme Court faced the question of whether ditches and drains near wetlands were “navigable waters” under the CWA.<sup>67</sup> The Court produced a 4-1-4 split decision with three different methods of determination.<sup>68</sup> Justice Scalia wrote the plurality opinion in which the Court remanded the case to the Corps to determine whether the ditches or drains near each wetland were waters of the United States.<sup>69</sup> In order to be included as “waters of the United States,” the waters in question must be (1) relatively permanent, standing, or continuously flowing, and (2) must have a continuous surface connection to other regulated bodies of water.<sup>70</sup> In the concurrence, Justice Kennedy agreed with remanding the case to the Corps to decide the factual question of whether the ditches or drains were waters of the United States, but he also advocated a broader definition of “navigable waters” to include all waterways with an ecologically significant nexus.<sup>71</sup> In Kennedy’s view, if a waterway has a significant hydrological downstream effect on navigable waters, it will be considered a navigable waterway under the CWA.<sup>72</sup> Kennedy also stated in his concurrence that he did not support regulation based merely on speculation; instead, he advocated that there should be a case-by-case analysis to determine if there was actually a significant effect on downstream navigable waters.<sup>73</sup> Justice Kennedy criticized the plurality by claiming that their definition would exclude seasonable rivers that dry up during

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64. Because of this view, the Court required Section 404 permits for the discharge of fill materials into a wetland in *Riverside Bayview Homes*, 474 U.S. at 139.

65. *Solid Waste Agency*, 531 U.S. at 167 (holding that the deciding factor in *Riverside Bayview Homes* was the significant nexus between the wetlands and the navigable waters). Following this test, the Court found that ponds not adjacent to navigable waters did not have a significant nexus to waters of the United States and were not under the jurisdiction of the CWA. *Id.* at 172.

66. *Id.*

67. *See Rapanos v. United States*, 547 U.S. 715 (2006).

68. *See id.*

69. *Id.* at 757.

70. *Id.* at 742.

71. *Id.* at 786.

72. *Id.*

73. *Rapanos*, 547 U.S. at 786.

dry seasons and flow steady during the spring as a result of snowmelt.<sup>74</sup> In the dissent, Justice Stevens argued that the Court should defer completely to the discretion of the Corps in determining what is navigable and what is not as long as the Corps' decision supports the purpose of the CWA, which the Court found it did.<sup>75</sup>

In any case, the Louisiana wetlands that lie directly adjacent to both the Mississippi River and the Gulf of Mexico would be considered waters of the United States under all three interpretations because the Louisiana wetlands lie adjacent to the Mississippi River and the Gulf of Mexico, both of which are navigable in fact and therefore waters of the United States. *Rapanos* did not overturn the prior settled jurisprudence from *Riverside Bayview Homes*, which held that wetlands that directly abut navigable waters are also included under the jurisdiction of the CWA.

Lastly, the term "addition" has stirred much debate mostly due to the fact that the CWA does not define "addition." Commentators have identified two prevailing schools of thought concerning the definition of an addition in the context of the CWA.<sup>76</sup> Some commentators argue in support of a traditional view while others argue in support of the Unitary Waters Theory.<sup>77</sup> The traditional view takes the stance that the movement of pollutants from one *meaningfully distinct* body of water to another is an addition.<sup>78</sup> In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Supreme Court, without deciding the validity of the Unitary Waters Theory, remanded the case to the lower court to determine as a preliminary matter, whether the two water bodies in question were "meaningfully distinct."<sup>79</sup> Prior to that decision, in *National Wildlife Federation v. Gorsuch*, the plaintiffs urged the D.C. Circuit to adopt the principle that "any adverse change in the quality of reservoir water from its natural state involves a 'pollutant' and that release of polluted water through the [point source] into the downstream river constitutes the 'addition' of a pollutant to navigable waters 'from' a point source."<sup>80</sup> The traditional approach can be summed up as follows: if the two water

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74. *Id.* at 769–70. See also *id.* at 736 n.7.

75. *Id.* at 811–12.

76. Reagen, *supra* note 1, at 314.

77. *Id.*

78. *Id.*

79. 541 U.S. at 112 (remanded to determine if the water bodies at issue were meaningfully distinct without deciding the validity of the Unitary Waters Theory).

80. Hande, *supra* note 5, at 412 (quoting *Gorsuch*, 693 F.2d at 165).

bodies in question are determined to be *meaningfully distinct*, then the transfer of any pollutant between them by means of a point source requires an NPDES permit because that transfer constitutes an “addition” of a pollutant from a point source. If the two water bodies are determined not to be meaningfully distinct, no NPDES permit is needed for any transfer of polluted water because there is no “addition.”

Alternatively, the Unitary Waters Theory has a much narrower interpretation of what qualifies as an “addition.” This theory was first presented in *Gorsuch*, which questioned whether water that passed through a dam and back into the same water body needed an NPDES permit.<sup>81</sup> All sides agreed that dams are point sources within the definition provided in the CWA.<sup>82</sup> The issue was whether the effects of the dam constituted an “addition of pollutants.”<sup>83</sup> The EPA presented the view that an “addition” of a pollutant only occurs if the point source itself introduces the pollutant, and not if the point source simply transfers the pollutant from one body of water to another.<sup>84</sup> Hence, the introduction of a pollutant into a water body is only an addition if it comes from the outside world.<sup>85</sup> Essentially, Unitary Waters proponents contend that Congress intended that all waters within the borders of the United States be treated as one big body of water.<sup>86</sup> Ultimately, the court held that the EPA’s interpretation that the alterations from the dams were not pollutants under the NPDES permit program was reasonable, so the question of what constituted an “addition” was left unanswered.<sup>87</sup>

#### *E. Limited Exclusions from NPDES Permits*

Section 402 allows for some exceptions from NPDES permit requirements. Under Section 318, the EPA has the authority to allow the discharge of certain pollutants under certain conditions when done as part of an aquaculture project.<sup>88</sup> Also excepted are permits issued under Section 404 of the CWA,<sup>89</sup> which are

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81. *Gorsuch*, 693 F.2d at 174–75.

82. *Id.* at 165.

83. *Id.*

84. *Id.* at 175. The decision was two years before *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and hence the Court did not refer to “*Chevron* deference.”

85. *Gorsuch*, 693 F.2d at 165.

86. *Hande*, *supra* note 5, at 412.

87. *Gorsuch*, 693 F.2d at 182.

88. *See* 33 U.S.C. § 1342(a)(1) (2012).

89. *See id.*

required for the discharge of dredged or fill material.<sup>90</sup> The separation of 402 and 404 permits is significant. Section 404 allows for the issuance of general permits, whereas Section 402 does not.<sup>91</sup> More importantly, 404 permits fall under the jurisdiction of the Corps<sup>92</sup> and 402 permits fall under the jurisdiction of the EPA.<sup>93</sup> When the jurisdiction of the Corps is invoked, there should also be an analysis of whether a Section 10 permit for the alteration of the navigability of a waterway is needed.<sup>94</sup> If a point source falls under the authority of the Corps pursuant to a Section 10 permit, the CWA will not apply because of the express prohibition in Section 511 of the CWA.<sup>95</sup> Following this progression, the issuance of a 404 permit could completely preclude the requirement of an NPDES permit.

Other exclusions from NPDES permits include agricultural return flows and stormwater runoff from oil, gas, and mining operations.<sup>96</sup> Under Section 208 of the CWA these nonpoint sources are regulated according to area-wide waste treatment management plans to be implemented by the states.<sup>97</sup> The EPA's NPDES permitting system already faces a major limitation in that the EPA cannot use Section 402 to override the plans set forth by the states.<sup>98</sup> The Water Transfers Rule adds another limitation by exempting any pollutants discharged in water transfers.

#### *F. Problems in the Louisiana Wetlands*

The Mississippi River carries numerous pollutants in its waters. Of primary concern are dangerously high concentrations of phosphorus and nitrogen.<sup>99</sup> These pollutants cause the annual dead zone in the Gulf of Mexico by creating giant algae blooms.<sup>100</sup> The

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90. 33 U.S.C. § 1344(a).

91. 33 U.S.C. § 1344(e).

92. *See* 33 U.S.C. § 1344(d).

93. *See* 33 U.S.C. § 1342(d).

94. Paul F. Foley, *Missing the Point with Point-Source "Addition" Semantics: Section 511 of the Clean Water Act Exempts Interconnected Waterways from Section 402 Jurisdiction, Period?*, 9 OCEAN & COASTAL L.J. 65, 96 (2003).

95. *Id.* at 68.

96. *See* 33 U.S.C. § 1342(l) (2012).

97. *See* 33 U.S.C. § 1288(b).

98. *See* 33 U.S.C. § 1288(e).

99. Jon Devine et al., *Missing Protection: Polluting the Mississippi River Basin's Small Streams and Wetlands*, NRDC ISSUE PAPER 6 (Oct. 2008), <http://www.nrdc.org/water/pollution/msriver/fmsriver.pdf>, archived at <http://perma.cc/UK4Z-A4BU>.

100. *Id.* at 4.

algae blooms die off and decompose, taking all of the oxygen out of the water.<sup>101</sup> The dead zone has grown in size over the years. In 2008, the dead zone was measured at a size of 20,720 km<sup>2</sup> or roughly the size of the entire state of New Jersey.<sup>102</sup> Contributing to the expansion of the dead zone are the existing river diversions in the Atchafalaya River basin.<sup>103</sup> The shallow water of the basin's wetlands prevents the oxygen-depleted water from settling to the bottom of the Gulf as it does at the mouth of the Mississippi.<sup>104</sup> The dead zone leads to the death of fish and shellfish in the area or their migration to other areas of the Gulf, which has a devastating impact on the local economies of Louisiana. The dead zone costs the United States' economy an estimated \$50 million a year.<sup>105</sup>

Unfortunately, the majority of the nitrogen and phosphorus comes from upstream, outside of Louisiana's borders.<sup>106</sup> Nitrogen and phosphorus are by-products of fertilizers and manure that come from field runoff and discharge from sewage treatment plants and industrial facilities, all of which are considered nonpoint sources and qualify under Section 208 plans. Because of their source, Louisiana is unable to regulate them in any meaningful manner and cannot petition the EPA to regulate them because of the nonpoint source exception.<sup>107</sup> In fact, no federal enforcement mechanism is in place to combat pollution coming from nonpoint sources.<sup>108</sup> Louisiana is in desperate need of an alternative method to control the nitrogen and phosphorus levels in the Mississippi River.

Recently, a lot of controversy has centered on Louisiana's Coastal Plan to rebuild and preserve the wetlands along the Louisiana coast.<sup>109</sup> The proposed plan calls for sediment diversions

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101. *Id.*

102. *Id.* at 10–11.

103. *Id.* at 12.

104. *Id.*

105. Endre Szalay, Comment, *Breathing Life into the Dead Zone: Can the Federal Common Law of Nuisance Be Used To Control Nonpoint Source Water Pollution?*, 85 TUL. L. REV. 215, 220 (2010).

106. Devine, *supra* note 99, at 7–8.

107. See 33 U.S.C. § 1342(l) (2012).

108. Szalay, *supra* note 105, at 217.

109. See, e.g., Mark Schleifstein, *Louisiana Coastal Scientists Say Criticism of Plans to Build Large Sediment Diversions is Unfounded*, THE TIMES-PICAYUNE, Apr. 17, 2013, at 5pp; Todd Masson, *Louisiana's Coastal Master Plan Will Destroy Fishing, Harm Coast, Opponents Say at Monday Meeting*, NOLA.COM (Apr. 30, 2013, 10:04 AM), [http://www.nola.com/outdoors/index.ssf/2013/04/louisianas\\_coastal\\_master\\_plan.html](http://www.nola.com/outdoors/index.ssf/2013/04/louisianas_coastal_master_plan.html); archived at <http://perma.cc/A3RM-K7E5>.

from the river into the marshes and wetlands of the state.<sup>110</sup> Sediment diversions distribute sediment in addition to freshwater in an attempt to rebuild land and combat saltwater intrusion to help freshwater plant life grow.<sup>111</sup> Opponents of the plan criticize the diversions on the basis that the diversions will lead to more pollutants in the wetlands.<sup>112</sup> More nutrient pollution will lead to a higher level of decomposition and loss of soil strength, which can cause a deterioration of plant life and more land loss due to the lack of a root system to hold the soil in place.<sup>113</sup>

## II. CURRENT ISSUES

In 2008 the EPA promulgated the Water Transfers Rule, which endangers the waterways of the United States by loosening restrictions on discharging pollutants. The Water Transfers Rule goes directly against the stated goals of the CWA and risks the progress made since 1972 on cleaning the Nation's waters. The Eleventh Circuit made an egregious error when they granted *Chevron* deference to the EPA on their impermissible interpretation of the clear wording of the CWA.

### *A. EPA's Water Transfers Rule of 2008 Goes Against the Stated Goals of the CWA*

The national goal of the CWA is to eliminate the "discharge of pollutants into the navigable waters."<sup>114</sup> Furthermore, the CWA aims to provide "for the protection and propagation of fish, shellfish, and wildlife and [provide] for recreation in and on the water."<sup>115</sup> Significantly, Section 101 of the CWA explicitly states that the Act should be used to control both point *and* nonpoint sources of pollution.<sup>116</sup> All three of these explicitly stated goals are ignored in the EPA's Water Transfers Rule.

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110. *Louisiana's Comprehensive Master Plan for a Sustainable Coast*, LA. COASTAL PROT. & RESTORATION AUTH. 69 (2012), <http://www.lacpra.org/assets/docs/2012%20Master%20Plan/Final%20Plan/2012%20Coastal%20Master%20Plan.pdf>, archived at <http://perma.cc/3RW7-XSQL> [hereinafter *Master Plan*].

111. See generally J.M. TEAL ET AL., *MISSISSIPPI RIVER FRESHWATER DIVERSIONS IN SOUTHERN LOUISIANA: EFFECTS ON WETLAND VEGETATION, SOILS, AND ELEVATION* (A.J. Lewitus et al. eds., 2012).

112. *Id.* at 25.

113. *Id.*

114. 33 U.S.C. § 1251(a)(1) (2012).

115. 33 U.S.C. § 1251(a)(2).

116. 33 U.S.C. § 1251(a)(7) (emphasis added).

Under the first goal of the CWA, if one puts pollutants into a body of water and increases the pollution levels of that water, then that person has illegally discharged pollutants into the navigable waters. However, the EPA's Water Transfers Rule goes directly against this clearly stated policy goal by allowing pollutants to enter into a water body, *adding* to the pollution level of that water body. The second goal is also in jeopardy. Allowing pollutants in the Mississippi River to enter into the wetlands and the Gulf of Mexico without a permit creates a dead zone that leads to the death, or at best, a jubilee of the fish, shellfish and wildlife in the waters.<sup>117</sup> The Water Transfers Rule allows this activity without regulation. The third goal was enacted in 1987 in response to the failure of Section 208 to regulate nonpoint sources as intended.<sup>118</sup> Nonpoint sources, as the most significant source of water pollutants in the country, contribute more pollutants than point sources.<sup>119</sup> The Water Transfers Rule perpetuates the already absent control over nonpoint source pollutants by allowing them to pass through point sources without regulation. The three goals mentioned above, and the failure of the Water Transfers Rule to adhere to them, highlight the need to strengthen the NPDES program, not weaken it.

### *1. The Beginning: The Unitary Waters Theory*

The Water Transfers Rule evolved from the Unitary Waters Theory, which holds that all waters within the borders of the United States are considered to be one big body of water.<sup>120</sup> Prior to any formal enactment, the courts uniformly rejected the Unitary Waters Theory. The theory is based on the wording of the definition of "discharge of pollutants" which says it is "any addition of any pollutant to navigable waters from any point source."<sup>121</sup> The use of "navigable waters" as opposed to "*any* navigable waters" is the focal point of the argument the EPA put forth in *South Florida Water Management District v. Miccosukee Tribe of Indians*.<sup>122</sup> This was the same argument put forward in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New*

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117. A jubilee is the phenomenon where fish and shrimp flee hypoxic water created by the dead zone in large numbers in order to escape suffocation. See Szalay, *supra* note 105, at 244.

118. Szalay, *supra* note 105, at 239.

119. Tran-Caffee, *supra* note 43, at 757.

120. Hande, *supra* note 5, at 403.

121. 33 U.S.C. § 1362(12) (2012).

122. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-06 (2004).



*York (Catskill I)*<sup>123</sup> and again in *Catskill II*.<sup>124</sup> In all three instances, the argument failed.

In *Miccosukee*, the Supreme Court ultimately rejected the Unitary Waters Theory because it was not advanced at the appellate level.<sup>125</sup> However, the Court criticized the theory on the grounds that the CWA does not exempt nonpoint sources from NPDES permitting when those sources also qualify as point sources.<sup>126</sup> The Court further criticized the theory by pointing to several other provisions of the NPDES that suggest the permits are meant to protect individual bodies of water as well as the waters of the United States as a whole.<sup>127</sup> Because the issue was not raised, however, the Court left the question over the validity of the Unitary Waters Theory open to the Eleventh Circuit on remand.<sup>128</sup>

In *Catskill I* the Second Circuit considered the Unitary Waters Theory under the “one pot” analogy.<sup>129</sup> This analogy explains that if a person uses a ladle to spoon some soup out of a pot and then pours the same soup back into the same pot, nothing has been “added” to the pot.<sup>130</sup> The Second Circuit refused to apply *Chevron* deference and, just as the Supreme Court did, criticized the EPA for never formalizing the Unitary Waters Theory in a notice-and-comment rulemaking or formal adjudication.<sup>131</sup> The Second Circuit instead examined the theory under the *Mead* standard.<sup>132</sup> Finding the Unitary Waters Theory unpersuasive, the court refused to grant deference.<sup>133</sup> The court criticized the theory by stating that “[n]o one can reasonably argue that the water in the Reservoir and the [creek] are in any sense the ‘same,’ such that ‘addition’ of one to

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123. *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York (Catskill I)*, 273 F.3d 481, 489–90 (2d Cir. 2001).

124. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill II)*, 451 F.3d 77, 83–84 (2d Cir. 2006).

125. *Miccosukee*, 541 U.S., at 109.

126. *Id.* at 106.

127. *Id.* at 107.

128. *Id.* at 109. On remand, the case was dismissed for a lack of jurisdiction. See *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191 (11th Cir. 2009).

129. *Catskill I*, 273 F.3d at 492.

130. *Id.*

131. *Id.* at 489–90.

132. *Id.* at 491 (citing *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)). *Mead* deference requires the court to grant deference to an agency position only to the extent it is persuasive when the agency has not adopted the position in a rulemaking or other formal position.

133. *Id.*

the other is a logical impossibility.”<sup>134</sup> The EPA responded to the criticism by publishing its 2005 Interpretation Paper.<sup>135</sup>

### *2. EPA Responds: 2005 EPA Interpretation Paper*

In the EPA’s 2005 Interpretation Paper, the Agency considered the question to be “whether movement of pollutants from one navigable water to another by a water transfer is the ‘addition’ of a pollutant potentially subjecting the activity to the permitting requirement under Section 402 of the Act.”<sup>136</sup> The EPA focused its discussion on the balance between state and federal responsibility for water monitoring and used statutory and historical interpretations while noting that there had been no previous formal statement by the EPA on the issue.<sup>137</sup>

Under its statutory interpretation, the EPA first considered the statute as a whole and noted that absurd results should be avoided.<sup>138</sup> The EPA then argued that the overriding direction of the CWA is to not interfere with states’ water allocations and that it was Congress’ intent to leave nonpoint source pollution control to the states.<sup>139</sup> The EPA found it was reasonable to interpret “addition” in Section 402 to not include transfers because Congress intended to control pollutants at the initial source instead of waiting until after they are already in the waters of the United States.<sup>140</sup>

Regarding individual case evaluations, the EPA’s Interpretation Paper first stated that a case-by-case analysis should be avoided altogether, but if individual analyses are needed, the “meaningfully distinct” test should be used narrowly in a two-step process.<sup>141</sup> The first step examines whether the water bodies in the transfer are distinct. If the water bodies are or ever have been part of the same, they are not distinct.<sup>142</sup> A full evaluation of the

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134. *Id.* at 492 (emphasis added).

135. Letter from Ann R. Klee, Gen. Counsel, Env’tl. Prot. Agency, to Regional Admin. (Aug. 5, 2005), available at [http://www.epa.gov/ogc/documents/water\\_transfers.pdf](http://www.epa.gov/ogc/documents/water_transfers.pdf), archived at <http://perma.cc/M2VJ-7D33>[hereinafter *Agency Interpretation*].

136. *Id.* at 2.

137. *Id.*

138. *Id.* at 4–5 (quoting *Natural Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001)).

139. *Id.* at 6–7. *But see* *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 102 (1972) (holding federal law should control pollution of interstate waters as opposed to state law).

140. *Id.* at 7–8.

141. *Agency Interpretation*, *supra* note 135, at 15.

142. *Id.* at 16.

hydrological connection between the two bodies of water should be conducted, including both man-made conveyances, such as a pump, and natural conveyances.<sup>143</sup> If the two water bodies are determined to be distinct, the second step examines whether the distinct water bodies are *meaningfully* distinct. This analysis essentially focuses on environmentally significant interactions between the two. The EPA stated the “specific context of the transfer should be evaluated to determine whether the transfer would have a substantial adverse impact on the receiving water body [sic].”<sup>144</sup> The Interpretation Paper concluded by stating that it was the EPA’s stance that Congress intended water transfers to not be regulated by Section 402 permits, but rather by the states and that the EPA intends to initiate a rule making process.<sup>145</sup>

Following the Interpretation Paper, the Second Circuit heard *Catskill II*. Rejecting the Unitary Waters Theory again, the Second Circuit relied on *Miccosukee* and stated that the Supreme Court implied that “at least in the context of the CWA, the unitary water theory has no place.”<sup>146</sup> The court also considered arguments by the EPA, labeled “holistic arguments,” that objected to interference with the allocation of rights and responsibilities between the EPA and the states regarding states’ rights to allocate their own water. The court rejected this argument just as it did in *Catskill I*.<sup>147</sup> In *Catskill II* the Second Circuit applied the plain language of the statute to conclude, contrary to the EPA’s assertion, that the Unitary Waters Theory was not consistent with Congress’ intent in the CWA.<sup>148</sup>

### 3. EPA Promulgates a Rule: Water Transfers Rule

The final rule issued by the EPA explains that a “[w]ater transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.”<sup>149</sup> The EPA

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143. *Id.*

144. *Id.* at 18.

145. *Id.* at 19.

146. *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York (Catskill II)*, 451 F.3d 77, 83 (2d Cir. 2006) (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105–09 (2004)).

147. *Id.* at 83–84.

148. *Id.* at 84–85.

149. 40 C.F.R. §122.3(i) (2013).

states that water transfers do not require NPDES permits because there is no “addition” of a pollutant.<sup>150</sup>

In explaining its rationale for this rule, the EPA begins by explaining the legal framework for its rule and then examines the statutory language and the legislative history of the CWA. As the Eleventh Circuit stated, because the EPA had promulgated a rule, any judicial review now had to be done under the *Chevron* test.<sup>151</sup> The EPA concedes that the term “addition” has been interpreted by some courts as being the transfer of water from one meaningfully distinct body of water to another.<sup>152</sup> However, the EPA relies on other courts’ interpretations that a pollutant must come from the outside world and merely passing through a point source such as a dam or a pump does not require regulation under the NPDES.<sup>153</sup> These courts, however, were interpreting the use of the word “addition” very narrowly. For instance, in *Gorsuch*, the D.C. Circuit decided to limit the term “addition” to a situation where a dam was putting water back into the same water body that it came from.<sup>154</sup> It is important to note that because a dam can be considered a point source,<sup>155</sup> it logically follows that point sources do not necessarily have to divide two “meaningfully distinct water bodies.”<sup>156</sup> For example, a dam in the middle of a river does not make the river two distinct bodies of water.<sup>157</sup> Once the point source introduces a pollutant, it then becomes an “addition” and is subject to NPDES permitting.<sup>158</sup> It is unlikely the D.C. Circuit would have excluded the dam from permitting had water been

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150. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33697, 33699 (proposed June 27, 2008) (to be codified at 40 C.F.R. pt. 122).

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

152. *See* NPDES Water Transfer Rule, 73 Fed. Reg. 33697, 33699 (June 13, 2008).

153. *Id.*

154. *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156,175 (D.C. Cir. 1982) The water was flowing from the reservoir, through the dam, into the downstream river that was being dammed up to begin with.

155. *Id.* at 165.

156. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004).

157. *See* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1220 (11th Cir. 2009). (discussing why *Gorsuch* did not decide the issue of what constitutes an “addition”). The court also explained why *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the other case relied upon by the EPA in its rule, did not decide the issue of transferring pollutants between distinct water bodies either. *Friends of the Everglades*, 570 F.3d at 1220–21.

158. *Gorsuch*, 693 F.2d, at 174–75.

taken from the dam and transported to another, separate river, yet this is exactly what the EPA is contending in its Water Transfers Rule.

The EPA goes on to explain that in statutory interpretation, statutes should be interpreted as a whole to determine their purpose and intent and yet, astoundingly, the EPA is still able to conclude that Congress intended a narrow view of the term “addition” in the definition of “discharge of pollutants.”<sup>159</sup> Remember Section 101 of the CWA states that the goal is to control both point and nonpoint sources of pollution,<sup>160</sup> and further, the goal is to eliminate the discharge of pollutants into navigable waters.<sup>161</sup> The EPA justifies their radical view by arguing that Congress’ primary intent was to maintain a balance between federal and state control over waterways and that this concern should take precedent over the other explicit goals of the CWA.<sup>162</sup> While this is a concern of the CWA, it is hardly the primary concern given the move since 1961 towards more federal involvement.<sup>163</sup> Also, as the Second Circuit stated, “the CWA balances a welter of consistent and inconsistent goals. In contrast with [this concern], the CWA also expressly includes a broad and uncompromising policy of ‘restoring and maintaining the chemical, physical and biological integrity of the Nation’s waters.’”<sup>164</sup> Further, the court stated that, “[w]here a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer.”<sup>165</sup> Nevertheless, after a short analysis of the legislative history of the CWA, the Water Transfers Rule concludes, as it did in its statutory analysis, that Congress intended to leave more power with the states to control water pollution in order to avoid duplicative legislation in the states that already had control over water transfers.<sup>166</sup>

#### *B. Enter the Eleventh Circuit.*

Very shortly after the EPA promulgated its Water Transfers Rule the Eleventh Circuit heard *Friends of the Everglades v. South*

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159. NPDES Water Transfer Rule, 73 Fed. Reg. 33697, 33701 (2013).

160. 33 U.S.C. § 1251(a)(7) (2012).

161. 33 U.S.C. § 1251(a)(1).

162. 73 Fed. Reg. at 33701.

163. See Murchison, *supra* note 7, at 532.

164. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill I)*, 273 F.3d 481, 494 (2d Cir. 2001).

165. *Id.*

166. 73 Fed. Reg. at 33702 (2013).

*Florida Water Management District* to determine whether the Water Transfers Rule applies to water transfers from polluted canals in South Florida to Lake Okeechobee.<sup>167</sup> The situation in *Friends of the Everglades* is markedly similar to the circumstances occurring in southern Louisiana. In southern Florida water flow is controlled by a system of canals and pump stations similar to that in Louisiana.<sup>168</sup> The Everglades swamp lies to the south of Lake Okeechobee where a series of canals were dug to help drain runoff from sugar cane fields.<sup>169</sup> These canals carry chemicals such as nitrogen and phosphorus and have low oxygen content.<sup>170</sup> Pumps are used to transfer the polluted water in the canals uphill into Lake Okeechobee, which is used for recreational activities.<sup>171</sup> As noted in the opinion, these pumps do not add any pollutants into the water, but merely transfer it from one water body to another through pipes.<sup>172</sup>

The Eleventh Circuit started its discussion by considering the necessary elements for requiring a permit and establishing what was present and what was missing.<sup>173</sup> There needed to be an “addition of any pollutants to navigable waters from any point source.”<sup>174</sup> Nitrogen, phosphorus, low oxygen, and other chemicals in the water all qualified as pollutants.<sup>175</sup> Lake Okeechobee was a navigable waterway and the pumps were point sources.<sup>176</sup> The only remaining question was whether there was an “addition” by moving the pollutants from one navigable waterway to another.<sup>177</sup> The District Court decided this was an addition.<sup>178</sup> However, this decision came *before* the EPA promulgated the Water Transfers Rule.

The Eleventh Circuit reviewed the District Court’s opinion under a newly promulgated rule and had to decide how much deference to grant that rule. Before going into a discussion of *Chevron* deference, the court summarized the Unitary Waters Rule and its widespread failure in the courts, including the Eleventh

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

168. *Id.* at 1214.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Friends of the Everglades*, 570 F.3d at 1214.

173. *Id.* at 1216.

174. 33 U.S.C. § 1362(12) (2012).

175. *Friends of the Everglades*, 570 F.3d at 1216.

176. *Id.*

177. *Id.*

178. *Id.* at 1217.

Circuit itself.<sup>179</sup> However, as the court pointed out, prior interpretations do not matter under *Chevron*; all that matters is that the agency provides a “reasonable construction of an ambiguous statute.”<sup>180</sup> The issue to be decided was whether the word “addition,” as used in Section 402, was ambiguous. The court examined “the text of the statute, its structure, and its stated purpose.”<sup>181</sup> On one side, “addition to the waters of the United States” refers to the waters as one unit (all the rivers, lakes, streams, canals, etc. of the United States are all the same water).<sup>182</sup> Alternatively, “addition to the waters of the United States” means additions to one discrete body of water from another separate and discrete body of water.<sup>183</sup> The court held that the absence of the word “any” before “navigable waters” created ambiguity because it is present in other instances throughout the CWA, including the same section at issue.<sup>184</sup> The court further held that examining the statute as a whole did not alleviate any of the ambiguity.<sup>185</sup> The court relied on the fact that other provisions in the Act seemed contrary to the stated purpose of the statute as a whole.<sup>186</sup> Essentially, the court’s rationale was that because other parts of the statute may be questionable, this part must be questionable as well.

Because the court held the statute to be ambiguous, it turned next to whether the EPA’s interpretation of the statute was reasonable. The court attempted to solve the problem through a simple hypothetical involving marbles and buckets where the marbles represented pollution and the buckets represented bodies of water.<sup>187</sup> The court framed the hypothetical this way:

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”?<sup>188</sup>

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179. *Id.* at 1217–18.

180. *Id.* at 1219.

181. *Friends of the Everglades*, 570 F.3d at 1223 (quoting *Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1063 (11th Cir. 2008)).

182. *Id.*

183. *Id.*

184. *Id.* at 1224–25.

185. *Id.* at 1225.

186. *Id.* at 1227.

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

188. *Id.*

When phrased in this simplistic and isolated language, it is possible to see some ambiguity. Therefore, the Eleventh Circuit granted the EPA's Water Transfers Rule deference under *Chevron*, finding it to be a reasonable interpretation of an ambiguous statute.<sup>189</sup>

### III. WHY THE WATER TRANSFERS RULE FAILS

The Eleventh Circuit erred in granting the EPA's Water Transfer Rule *Chevron* deference. Under the *Chevron* analysis, the first step is to determine if the language of the enabling statute is clear and unambiguous.<sup>190</sup> If the language of the statute is clear as to the intent of Congress, then that is the end of the discussion.<sup>191</sup> If the language is ambiguous, however, the court next must determine not what the best interpretation of the statute is, but rather whether the interpretation adopted by the regulating agency is permissible.<sup>192</sup> The Eleventh Circuit erred when it said the language of the statute was ambiguous. The language of the statute is clear; any alternative interpretation exceeds the statutory authority Congress granted the EPA under the CWA. Further, even if there were ambiguity in the language of the statute, the Water Transfers Rule would still fail. The EPA's interpretation of the rule is not permissible because it goes against the stated policy of the CWA.

#### *A. The Statutory Language is Clear and Unambiguous*

In the case of 402 permits, the language is "sufficiently clear to point to an answer."<sup>193</sup> Permits are required for the "discharge of any pollutant" into the waters of the United States.<sup>194</sup> "Discharge of any pollutant" is defined in the context of the CWA as "any addition of any pollutant to navigable waters from any point source."<sup>195</sup> This language is clear. The EPA's interpretation perverts the common understanding of the word "addition."<sup>196</sup> The Eleventh Circuit's misguided attempt to break down the issue into a simplistic analogy of marbles and buckets fails for the simple reason that pollutants are not marbles and the water bodies of the

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189. *Id.*

190. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

191. *Id.* at 843.

192. *Id.*

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

194. 33 U.S.C. § 1342(1) (2012).

195. 33 U.S.C. § 1362(12).

196. Reagen, *supra* note 1, at 321–22.



United States are not buckets. In the court's analogy, marbles are seen exactly as they are: neutral, innocuous items. If the rule is that no marbles can be added to buckets, the rule seems completely arbitrary and without meaning because marbles have no negative characteristics. In reality, however, the discussion is not about marbles. It is about toxic pollutants that kill plant and animal life and cost the country millions of dollars in damage every year.

A better hypothetical would be to say that the marbles are toxic and when they come into contact with the buckets, the contamination requires an expensive and resource-exhausting process to remove them from the buckets and restore the buckets to their original state. Phrased this way, it is clear that the purpose of the "no addition of any marbles rule" is to keep as many buckets free of marbles as possible. Putting additional marbles in a bucket undeniably goes against the clear intent of the rule.

Further, as other commentators have suggested, the term "navigable waters" is nothing more than a jurisdictional term used to define *where* the EPA has authority.<sup>197</sup> As Reagen points out, the *Friends of the Everglades* court incorrectly focused on the absence of a word instead of what was actually there.<sup>198</sup> The court should have focused on where the term "any" *is* used.<sup>199</sup> The statute explicitly states that the discharge of a pollutant is "*any addition . . .*"<sup>200</sup> This shows Congress' obvious intent for a broad interpretation of the word addition. "[A]ny addition" clearly means a permit is required for anything added to a body of "navigable water."<sup>201</sup> Even looking solely at the term "navigable waters," the court again ignored what is actually there and focused on what is not. Congress did not use the singular term, "navigable water," but rather the plural, "waters."<sup>202</sup> The use of the plural form makes it clear Congress is not referring to "one unitary body of water," but multiple distinct bodies of water.

The court also ignored another significant part of the statute. In Section 101(g) of the CWA, Congress explicitly used the term "reduce" in setting the policy of the CWA.<sup>203</sup> The use of the word "reduce" is more indicative of congressional intent than the absence of a word, just as congressional action is more indicative

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197. *Id.* at 323.

198. *Id.*

199. *Id.*

200. 33 U.S.C. § 1362(12) (2012).

201. Reagen, *supra* note 1, at 323.

202. Hande, *supra* note 5, at 432.

203. 33 U.S.C. § 1251(g) (setting the policy that Federal, State and Local agencies should cooperate to "prevent, reduce and eliminate pollution").

than Congress' failure to act.<sup>204</sup> Transferring water that contains pollutants from one body of water to another distinct body of water is certainly not a reduction of pollution. It is an addition of pollutants to the receiving body of water that requires an NPDES permit.<sup>205</sup>

*B. EPA's Water Transfers Rule is Untenable in Light of the CWA.*

Even accepting ambiguity in the statute, the EPA's interpretation is untenable when considered with the overriding policy and purpose of the CWA. In its 2005 Interpretation Paper, the EPA focused on Section 101(g), which states that it is Congress' further intent to "prevent, reduce, and eliminate pollution in concert with programs managing water sources."<sup>206</sup> The EPA interprets this as focusing on Congress' intent to leave nonpoint source pollution control to the states.<sup>207</sup> This is a valid point and is reinforced by the legislative history of the 1972 Act, stating that "[i]t is the Committee's intent to restore the balance of Federal-State effort in the program."<sup>208</sup> However, the Senate Report also states that "[t]he Federal Government as the custodian of the navigable waters has the responsibility to control affirmatively any discharges of pollutants into the navigable waters."<sup>209</sup> The report goes on to mention that the intent is for states to implement their own permitting program,<sup>210</sup> and once that is accomplished and approved by the EPA, then and only then should the Federal Government hand over control of discharges to the states. "If the Administrator finds that a State program is inadequate to mitigate his involvement he should not approve a State program."<sup>211</sup> By the EPA's own account, as of 2005, only Pennsylvania had implemented NPDES permits for transfers from one body of water to another.<sup>212</sup> Logic would suggest that the EPA should still be charged with regulating the discharges of pollutants from point sources. Regulation is not a state issue until a state

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204. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

205. Reagen, *supra* note 1, at 326–27 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2006) (*Catskill I*)).

206. *Agency Interpretation*, *supra* note 135, at 5–6.

207. *Id.* at 5–7.

208. S. REP. NO. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675.

209. *Id.* at 3737.

210. *Id.*

211. *Id.*

212. *Agency Interpretation*, *supra* note 135, at 4 n.6.

presents an approved NPDES system of its own for regulation. State responsibility is limited to nonpoint sources of pollutants and transfers are not nonpoint sources.<sup>213</sup>

The EPA's reliance on Section 101(g) is further flawed in that it was enacted as part of the Amendments in 1977. The Senate Report states that "the overall thrust and objectives of the program should not be abandoned, and . . . the correction required is modest at best."<sup>214</sup> The "overall thrust and objective" of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>215</sup> Allowing a point source to discharge pollutants into a navigable waterway would abandon that objective, and any interpretation leading to such a conclusion is untenable. Accepting, *ad arguendo*, the notion that all waters of the United States are a unitary whole would still allow the movement of pollutants around the system, which does nothing to "restore" the integrity of the Nation's waters. This result is an absurd conclusion and must be dismissed as impermissible.

From a jurisprudential standpoint, the very argument upon which the Water Transfers Rule is based failed time and time again prior to the Eleventh Circuit's ruling. The Second Circuit explicitly stated that the idea that two separate bodies of water could be considered the same so as to prevent any addition was unreasonable.<sup>216</sup> The Supreme Court of the United States called the idea that permits are only required when pollutants originate in point sources "untenable."<sup>217</sup> Even the EPA's own Interpretation Paper offers a contradiction of the Water Transfers Rule. In a footnote at the end of its paper, the EPA states that discharges of pollutants include point sources that do not generate pollutants themselves.<sup>218</sup> Because point sources are regulated by Section 402, and transfers are point sources, they too would fall under Section 402 and require NPDES permits when they discharge pollutants into a navigable water body. A theory that the courts called both "unreasonable" and "untenable" cannot pass the *Chevron* test for deference.

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213. See, e.g., *Miccosukee Tribe of Indians*, 541 U.S. at 105; *Catskill I*, 273 F.3d at 493; *Gorsuch*, 693 F.2d at 165.

214. S. Rep. No. 95-370 at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4328.

215. 33 U.S.C. § 1251(a) (2012).

216. *Catskill I*, 273 F.3d at 492.

217. Reagen, *supra* note 1, at 325–26.

218. *Agency Interpretation*, *supra* note 135, at 19 n.20.

*C. The Water Transfers Rule Fails to Protect the Louisiana Wetlands*

Current EPA guidelines have failed to solve the problems of coastal land loss and the dead zone in the Gulf of Mexico. Currently, states in the Mississippi River basin have no numerical water quality standards for phosphorus in rivers or streams or for nitrogen in any waters.<sup>219</sup> Additionally, most states do not attempt to limit nitrogen and phosphorus discharges in NPDES permits.<sup>220</sup>

Louisiana is now moving forward with plans to open a new diversion from the Mississippi River into the Louisiana wetlands. The Mid-Barataria diversion is scheduled to open in 2015 through funding provided by the BP payments.<sup>221</sup> This diversion, only one of ten proposed, would pump up to 250,000 cubic feet per second of water and sediment from the Mississippi River into the wetlands, along with all the nitrogen and phosphorus contained in the water.<sup>222</sup> In fact, the proposed diversions have the capacity to pump 50% of the Mississippi River's water into the wetlands.<sup>223</sup> Without regulation, these diversions could end up pumping polluted water into the wetlands at an unfettered rate.

Courts are recognizing the need for federal involvement in nonpoint source pollution control. Environmentalists recently won a small victory in the Eastern District of Louisiana.<sup>224</sup> The Gulf Restoration Network (GRN) requested that the EPA establish numeric water quality standards for the Gulf waters outside of state control and all waterways in states that do not already have numeric water quality standards. The EPA refused to do so and did not state a reason why.<sup>225</sup> The GRN relied on Section 303(c)(4) of the CWA, which states "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter," the Administrator "shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved."<sup>226</sup> Judge Zainey recognized the need for a federal role and ordered

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219. *Gulf Restoration Network v. Jackson*, No. 12-677, 2013 U.S. Dist. LEXIS 134811, at \*8 (E.D. La. Sept. 20, 2013).

220. *Id.* at \*8.

221. Mark Shleifstein, *Louisiana could begin building Mid-Barataria sediment diversion by late 2015*, THE TIMES-PICAYUNE, Sept. 19, 2013, at 6pp.

222. *Master Plan*, *supra* note 110 at 134.

223. *Id.* at 150.

224. *Gulf Restoration Network*, No. 12-677, 2013 U.S. Dist. LEXIS 134811, at \*31. This decision is currently on appeal to the Fifth Circuit.

225. *Id.* at 10-14.

226. *Id.* at 9.

the EPA to respond to the GRN's petition by conducting a necessity determination for new numerical water quality standards.<sup>227</sup>

The wetlands are a meaningfully distinct body of water under the Significant Nexus Test from *Riverside Bayview Homes*.<sup>228</sup> Some opponents of this position argue that but for the man-made levees and flood protection structures, the Mississippi River would naturally flow into the wetlands and disperse its water and sediment throughout the wetlands and the distributaries within. While it is true that the river would flow into the wetlands naturally, the wetlands currently should be considered meaningfully distinct from the Mississippi. "During the past two centuries the hydrology of the distributary zone was totally modified by the construction of flood levees and closing of key distributaries . . . . These structures isolated the river from its delta, causing an ongoing catastrophic collapse in the deltaic landscape, primarily wetlands."<sup>229</sup> Instead of regulating the wetlands under the conditions from 200 years ago, it makes more sense to regulate the wetlands based on their current condition.

Because the wetlands are meaningfully distinct, the Eastern District's ruling would also require establishing numerical water quality standards for the wetlands. If these established standards cannot be met through BAT, the EPA must then establish TMDLs for the wetlands. In order for any discharge of pollutants into the wetlands, the point source discharging the pollutants would require an NPDES permit to ensure that the TMDLs are met for the wetlands.

However, the Water Transfers Rule means that Louisiana can no longer rely on NPDES permits to help combat the spread of pollution into the wetlands through diversions.<sup>230</sup> The Rule allows northern states to contribute significantly more pollutants into the Mississippi River through simple transfers with no consequences for doing so. Louisiana, however, will deal with the consequences in the form of a more highly polluted Mississippi River that will exacerbate the growth of the Gulf dead zone every year. Through

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227. *Id.* at 30–31.

228. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

229. MISSISSIPPI RIVER/GULF OF MEXICO WATERSHED NUTRIENT TASK FORCE, GULF HYPOXIA ACTION PLAN 2008 FOR REDUCING, MITIGATING, AND CONTROLLING HYPOXIA IN THE NORTHERN GULF OF MEXICO AND IMPROVING WATER QUALITY IN THE MISSISSIPPI RIVER BASIN 3 (2008), *available at* [http://water.epa.gov/type/watersheds/named/msbasin/upload/2008\\_8\\_28\\_msbasin\\_ghap2008\\_update082608.pdf](http://water.epa.gov/type/watersheds/named/msbasin/upload/2008_8_28_msbasin_ghap2008_update082608.pdf), archived at <http://perma.cc/GM9C-GCD7>.

230. Reagen, *supra* note 1, at 324.

the diversions, these pollutants will invade the wetlands and degrade the plant life by a loss of soil strength. With weakened soil strength, plants are more vulnerable to storms and will become uprooted more easily. Additionally, the loss of the wetlands will endanger the livelihood of the fisherman who depend upon them as well as the communities that live further inland. The Water Transfers Rule weakens Louisiana's ability to protect its waters from pollution and prevents the NPDES program from protecting downstream states from out-of-state pollution that is beyond their control.<sup>231</sup> State nonpoint source regulations, Section 208 permits, do not protect Louisiana. As one commentator stated, "[A] well-designed monitoring program is essential to assess whether diversions are promoting marsh sustainability and to support adaptive management of diversions."<sup>232</sup>

#### IV. PROPOSED SOLUTIONS

Given the complexity of managing the Nation's waters and the differing needs in each region, it is impossible to perfectly cater to each region's needs with one solution. Likely, each region will need an individualized solution, but it is possible to come up with a general framework for each region to alter based on that region's specific needs and concerns. This Comment considers one proposed solution of a General Permit System designed for the problems in the western states and offers another solution that is more applicable to the country as a whole.

##### *A. General Permit Systems*

The western United States depends on a complex system of water transfers to get water to urban areas as well as agricultural zones that need water for irrigation.<sup>233</sup> Often these transfers carry water across state lines. Without uniform, federal NPDES standards in place, there could be different standards for different sections of the same transfer. Having to meet different standards along the way will increase the cost of the transfer system as well as make the transfer incredibly inefficient.

Reagen proposed a General Permit System that would cover all discharges for a single body of water or all point sources in a

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231. *Rapanos v. United States*, 547 U.S. 715, 777 (2006) (Kennedy, J., concurring).

232. TEAL ET AL., *supra* note 111, at 29.

233. Reagen, *supra* note 1, at 330.

complex diversion system, such as those out west.<sup>234</sup> A general permit system would balance the feasibility and efficiency sought in water pollution control with actual protection of waters.<sup>235</sup> It would also solve the problem of the expensive permitting process for some of the diversions, such as the Colorado-Big Thompson Project, which would cost over \$315 million in permit fees—more than twice the cost of the project itself.<sup>236</sup> A General Permit System would also reduce paperwork and create an easily administered pollution control system.<sup>237</sup>

However, this system does not solve the problems in Louisiana. Louisiana has an even more complicated system of waterways that lead to the wetlands and the Gulf. Considering all of these as a single body of water as would be necessary under a general permitting system would over-simplify the matter. History has shown that it is not always easy to determine what qualifies as a navigable waterway and what does not.<sup>238</sup> Issuing one general permit for the entire system of Louisiana wetlands would open the possibility of some sources contributing a disproportionate amount of pollutants, resulting in highly vulnerable weak links in the wetlands. Adding to the complexity, some of these sources may be underground and out of sight.<sup>239</sup> In sum, these general permit systems would not provide the same protection that individual NPDES permits would.

### *B. Water Quality Credit Trading Program*

“Water Quality Trading is an innovative, market-based approach that if used in certain watersheds can achieve water quality standards more efficiently and at [a] lower cost than traditional approaches.”<sup>240</sup> Water Quality Trading Programs

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234. *Id.* at 336.

235. *Id.* at 329.

236. *Id.* at 331–32.

237. *Id.* at 336.

238. *See, e.g.,* Rapanos v. United States, 547 U.S. 715 (2006) (in which the Court split 4-1-4, giving no rule on how to determine what waters fall under the CWA).

239. Kari Dequine Hardin, *New research: Ancient bayous pull water from the Mississippi, creating ‘missing river’*, THELENSNOLA.ORG (Sept. 5, 2013, 2:49 PM), <http://thelensnola.org/2013/09/05/new-research-ancient-bayous-pull-water-from-the-mississippi-creating-missing-river/>, archived at <http://perma.cc/Q3KJ-WJR9>.

240. ENVTL. PROT. AGENCY, OFFICE OF WASTEWATER MGMT, PERMITS DIVISION, No. 833-R-07-004, WATER QUALITY TRADING TOOLKIT FOR PERMIT WRITERS 4 (June 2009) [hereinafter TOOLKIT], available at <http://permanent>

(WQTPs) allow point sources, subject to NPDES permits, to purchase credits from upstream nonpoint sources to ease their cost of meeting the TMDLs for the body of water.<sup>241</sup> It is often cheaper for upstream nonpoint sources to implement controls over agricultural discharges than it is to control them later downstream at a single point source. The purchasing of credits allows point source permit-holders to lower their cost substantially while still maintaining pollution concentrations below the TMDLs established for the body of water.

Louisiana's Comprehensive Master Plan for a Sustainable Coast from 2012 (Master Plan) makes it clear that in Louisiana's view, it is "no longer a question of whether we will do large scale diversions, but how we will do them."<sup>242</sup> The Master Plan focuses on sediment diversions as opposed to freshwater diversions because the Coastal Protection and Restoration Authority views sediment diversions as "essential to sustaining coastal Louisiana."<sup>243</sup> Because it seems apparent that sediment diversions are inevitable at this point, it is essential to design a program that incorporates them into real reductions of pollutants in the wetlands.

Establishing a WQTP for the entire Mississippi River valley would benefit all states that lie along the Mississippi River and that have tributaries to the Mississippi. Under the proposed program, all states would work together to establish a joint association to monitor a credit exchange for nonpoint sources to sell their credits and point sources to purchase credits. Indeed, the CWA even encourages the establishment of such an exchange.<sup>244</sup>

In a credit exchange the nonpoint sources will generate pollutant load reductions using best management practices (BMPs) that go beyond their required reductions. These excess reductions can be sold as credits to the exchanges. The exchanges will then sell the credits to point sources for less than what it would cost the point sources to meet their water quality based effluent limits (WQBELs). These exchanges can be regulated by the EPA or

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.access.gpo.gov/LPS113622/LPS113622/www.epa.gov/npdes/pubs/wqtradingtool kit.pdf, archived at <http://perma.cc/JA66-9QST>.

241. *Id.*

242. *Master Plan*, *supra* note 110, at 150.

243. *Id.* at 106.

244. 33 U.S.C. § 1253(a) (2012). ("The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform State laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.").



vicariously by the association established by the states. The price of the credits and the ratio of how much pollution reduction will constitute a credit can be established by the newly created association as well.<sup>245</sup>

It is important for the EPA to consider a WQTP when establishing TMDLs for the Mississippi River and the wetlands. Given the recent *Gulf Restoration Network* decision from the Eastern District, it is probable the EPA will need to reestablish new effluent limits for the Mississippi River and subsequent TMDLs.<sup>246</sup> A Trading Program should be considered when establishing these new limits.<sup>247</sup>

Another important point is that the Credit Trading Program is not a substitute for the NPDES permits. The TMDLs and the NPDES permits are essential for the success of the Trading Program because they will act as the market drivers by creating a demand for the credits.<sup>248</sup> Without the permit requirements, the diversions will not have any reason to purchase the credits and subsequently the nonpoint sources further up the river will not have any reason to reduce their emissions with BMPs. The ultimate goal is to reduce the nutrient pollution in the Mississippi River in order to prevent an influx of harmful nitrogen and phosphorus into the wetlands.

This solution also addresses the issue of the states maintaining control over their own water regulation because the nonpoint source regulation under Section 208 will still be left to the states. Further, every state along the Mississippi River already regulates its own NPDES permits.<sup>249</sup> This solution allows states to maintain control over their water regulation while working with other states to produce desirable results for all states involved. The upriver states benefit in that their farmers can cheaply reduce their emissions with BMPs and then sell the generated credits for a profit. The downstream states benefit in that their point source permit holders can meet their permit limits by purchasing the credits for less than it would cost them to implement the reductions themselves. NPDES permit holders will still need to meet the

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245. A full discussion of how the credit ratios can be established is beyond the scope of this paper, but *see generally* TOOLKIT, *supra* note 240.

246. *See Gulf Restoration Network v. Jackson*, No. 12-677, 2013 U.S. Dist. LEXIS 134811 (E.D. La. Sept. 20, 2013).

247. TOOLKIT, *supra* note 240, at 20.

248. *Id.* at 8.

249. *National Pollution Discharge Elimination System: Specific State Program Status*, ENVTL. PROT. AGENCY, <http://water.epa.gov/polwaste/npdes/basics/NPDES-State-Program-Status.cfm>, archived at <http://perma.cc/V968-2VGB> (last updated Sept. 9, 2014).

required Technology Based Effluent Limits (TBELs) that are imposed on all point sources. Again, the Trading Program is not an end-run around responsibility for pollution emissions. The Trading Program is simply a means for point sources to achieve their established WQBEL when the TBELs fall short.

A WQTP could work for the western states as well; the entire Colorado-Big Thompson system could be governed by one trading association if all of the states are willing to work together. A WQTP also addresses the concern of costs by helping to regulate pollution in a cost-effective manner, thereby reducing the cost for everyone involved.

Establishing TMDLs for the Louisiana wetlands as meaningfully distinct bodies of water would require NPDES permits for any diversion that wishes to discharge pollutants from the Mississippi River. Because the diversions would need NPDES permits to meet the TMDLs, these point sources would be able to purchase credits from upstream nonpoint sources, shifting the burden of reducing the pollutants to the actual sources of those pollutants. Nitrogen and phosphorus concentrations will fall in the Mississippi River, and subsequently, fewer pollutants will flow into the wetlands. Obtaining an NPDES permit will be easier and cheaper for the proposed diversions because of the WQTPs. This solution produces a cost-effective way of producing real results and maintaining the health and integrity of the Nation's waters.

#### CONCLUSION

Instead of protecting the waters of the United States, the EPA put them in danger with the promulgation of the Water Transfers Rule. Allowing highly polluted water to enter clean water suitable for drinking through the simple use of a transfer is an abomination of the purpose and intent of the CWA. "If an 'addition . . . to navigable waters' occurs only at a pollutant's first entry into navigable waters, and never again when it is transferred to a different water body, then the NPDES program—the centerpiece of the Clean Water Act—would require no permit for a project to pump the most loathsome navigable water in the country into the most pristine one."<sup>250</sup> Even with this statement, the Eleventh Circuit erroneously gave deference to the Water Transfers Rule.

The Water Transfers Rule fails the *Chevron* test for deference because the wording of the statute is clear and unambiguous. The absence of the word "any" before "navigable waters" is

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250. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1226 (11th Cir. 2009).

inconsequential. As pointed out, “navigable waters” is a jurisdictional term and should not be over-analyzed. The substantive words of the statute are “any addition of any pollutant . . . from any point source.”<sup>251</sup> These words are clear and do not require further interpretation. Even assuming the EPA’s contention that the statute is ambiguous, the EPA’s interpretation is unreasonable in light of the stated purpose of the CWA. The Water Transfers Rule allows some waterways of the United States to become more polluted. It is beyond unreasonable to interpret an act entitled the *Clean Water Act* to allow for making water less clean.

Louisiana needs the protection that the Water Transfers Rule takes away. There needs to be protection of the wetlands. The wetlands provide important protection from hurricanes and are home to many different species of wildlife. Fishermen depend on the wetlands for their livelihood. The wetlands constitute a meaningfully distinct body of water and need to have TMDLs established to monitor the level of pollutants. Establishing TMDLs then requires NPDES permits for any discharge of pollutants into the wetlands so as to maintain the TMDL limit.

Once the sediment diversions are required to adhere to the TMDL established for the wetlands, the diversions (run by the state) will have an incentive to purchase Water Quality Credits from upstream nonpoint sources, thereby reducing not only the concentration of pollutants in the Mississippi River, but also the concentration of pollutants in the Louisiana wetlands. The Water Quality Credit Trading Program will produce a cost-effective reduction in pollution of the Nation’s waters.

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251. 33 U.S.C. §1362(12)(A) (2012).

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