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The Second Circuit Clears the Murk of *Gorsuch and Consumers Power* from the Esopus Creek

JOHN H. PAUL*

Part I—Introduction

New York City uses a billion and a half gallons of water a day, and there isn't a drinkable body of water within a day's walk of City Hall. The water that New Yorkers have drunk for generations comes every day from a hundred miles away, through the largest tunnel in the world, and is consistently among the best municipal water supplies in the world. This system has existed for more than a hundred years, has been nearly maintenance-free for most of that time, and inspires reverent talk from anyone who knows anything about it. But it isn't perfect.

For more than sixty years, the Shandaken Tunnel has drawn water from the muddy floor of the Schoharie Reservoir, carried it for seventeen miles under a range of hills, and deposited it into the Esopus Creek, one of the world's best trout streams. New York City, which owns and operates the Tunnel, has never made any effort to protect the stream from the muddy water that the City pours into it. Such an effort probably never occurred to anyone other than the fishermen and neighbors who lose the Esopus whenever the Tunnel operates, or at least never occurred to anyone until a coalition of those people brought a civil action under the Clean Water Act¹ ("CWA") to hold the City responsible for its actions, *Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*.²

This action probably could not have succeeded had it been brought much earlier, but the legal terrain had just undergone a significant change. The plaintiffs in *Catskill* brought their action the same year the United States Supreme Court decided two cases that seriously limited the law of judicial deference to an adminis-

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1. 33 U.S.C. §§ 1251-1387 (2000).

2. 273 F.3d 481 (2d Cir. 2001), *remanded to* 207 F. Supp. 2d 3 (N.D.N.Y. Jun 27, 2002).

tration's interpretation of an ambiguous statutory term. Since 1982, the Environmental Protection Agency ("EPA") had been afforded judicial deference to its interpretation of "discharge of pollutants" under the Clean Water Act—an interpretation suggesting that the release of one impounded navigable water into another could not be a discharge, and so could not trigger the CWA's requirement of a permit for such a release. In 2000, two of the Supreme Court's decisions put EPA's interpretation on a much different footing with courts, and led to the *Catskill* plaintiffs' success.

This casenote will discuss the statutes and cases bearing on the Second Circuit's decision of *Catskill*, and will examine *Catskill* to determine its reliability as authority for subsequent cases. Specifically, Part II will discuss the statutes and cases laying the foundation of the *Catskill* decision, addressing the law of judicial deference to administrative interpretation, and the meaning of "discharge of pollutants" under the CWA. Part III will discuss the facts, holding, and analysis of the Second Circuit's decision of *Catskill*. Part IV will contain a critical analysis of *Catskill*, identifying points of attack on it, and examining its solidity as authority. Part V concludes that *Catskill* is both sound authority and a fair summary of the law at the time of its decision. Part VI summarizes the outcome of the *Catskill* litigation and recent developments in a similar case in the Eleventh Circuit.

Part II—Statutes and Cases Pertaining to *Catskill*

A. Statutory Authority Bearing on *Catskill*

1. The Clean Water Act

The Clean Water Act ("CWA") is an ambitious and complex statute that states as its goal the restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters."³ Enacted in 1972, the CWA boldly proposed to eliminate all discharges of pollutants into navigable waters by 1985.⁴ It also listed the goal of protecting waters supporting fish propagation, and listed five policies that are for the most part aspirational challenges to states and future Congresses.⁵ The breadth and mostly unsupported sweep of the objectives section, however, should not obscure one's view of a powerful statute that for 29 years has bal-

3. 33 U.S.C. § 1251(a).

4. *Id.* § 1251(a)(1).

5. *Id.* § 1251(a).

anced, in Judge Walker's words, "a welter of consistent and inconsistent goals."⁶ An understanding of the *Catskill* case requires a sense of the Act that its plaintiffs sought to apply in defense of the Esopus Creek.

Section 301 contains the basic prohibition of the CWA, making unlawful "the discharge of any pollutant by any person," "except as in compliance with" section 301 and several other sections of the CWA.⁷ Compliance with sections 402 and 404, as required by section 301, means that anyone wanting to discharge pollutants must get a permit to do so.⁸ Sections 402 and 404, read together with subsection 301(e), make clear that the permit system, and consequently the enforceable prohibition of the CWA, apply only to "point sources."⁹ The CWA, as a federal statute, can only apply to the extent permissible under the Constitution, and in particular its authority derives from the Commerce Clause.¹⁰ It is therefore limited to regulating navigable waters. While specific enumerations of its elements vary, the CWA prohibits, in sum: 1) discharge of, 2) a pollutant, 3) from a point source, 4) to navigable waters, 5) without a permit.¹¹

The general definitions in section 502 are crucial to understanding the CWA's application to any particular circumstance. Section 502 illuminates the first four of the above elements, listing examples for point sources and pollutants,¹² defining navigable waters as "waters of the United States,"¹³ and, most pertinently to this casenote, defining discharge as "any addition."¹⁴

Section 309 outlines the methods for official enforcement of the CWA.¹⁵ Against permit violators or unpermitted dischargers of pollutants, EPA or a state with an approved permitting program can institute administrative penalties and orders, civil actions seeking legal and equitable remedies, or criminal actions in cases of at least negligent violations of enumerated CWA sec-

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

7. 33 U.S.C. § 1311(a) (2000).

8. *Id.* §§ 1342, 1344.

9. *Id.* §§ 1342, 1344, 1311(e).

10. *See, e.g., Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001).

11. 33 U.S.C. §§ 1311(a), 1362(12) (2000).

12. *Id.* § 1362(14) (defining "point source"); *Id.* § 1362(6) (defining "pollutant").

13. 33 U.S.C. § 1362(7).

14. *Id.* § 1362(12).

15. *Id.* § 1319.

tions.¹⁶ EPA must enforce against any known violation, at least to the extent of issuing an administrative order to comply with the violated section of the CWA.¹⁷ While authority to enforce the CWA lies primarily with EPA and the states, the CWA contains a provision enabling citizens to bring suit against section 402 permit violators or unpermitted dischargers, and also against EPA for failing to perform a non-discretionary duty.¹⁸

Much of the CWA is dedicated to the National Pollution Discharge Elimination System ("NPDES") permitting system,¹⁹ and to the standards that permits are to incorporate.²⁰ The CWA provides for states to establish permitting programs subject to the approval of EPA.²¹ Once a state's program is approved, the state assumes primary responsibility for issuing and enforcing permits.²² When a potential discharger of pollutants applies for a permit, either EPA or the state agency, depending on whether the state has an approved permitting program, writes a proposed permit that is made available to the public for comment.²³ After the comment period, the agency writes and publishes a final permit that must consider and respond to all comments received.²⁴ Every permit must be renewed at least every five years.²⁵

The central content of NPDES permits is a set of pollutant-specific effluent limitations, and discharge of a pollutant in excess of the pollutant's limitation in a permit is a permit violation. Each limitation is written to accord with published standards.²⁶ These standards are broken into two categories: technology-based standards and water-quality based standards.²⁷ EPA promulgates technology-based standards in nationwide regulations that are categorized by industry.²⁸ For each industry, the standards limit discharge of pollutants based on the best technology available for removal of those pollutants from the industry's effluent.²⁹ Stricter

16. *Id.*

17. 33 U.S.C. § 1319(a)(3) (2000).

18. *Id.* § 1365.

19. *Id.* § 1342.

20. *Id.* §§ 1312-1317.

21. *Id.* § 1342(b).

22. *Id.* § 1342(c).

23. 33 U.S.C. § 1342(b)(2)(B)(3) (2000).

24. 40 C.F.R. § 124.17 (2003).

25. 33 U.S.C. § 1342(b)(1)(B).

26. *Id.* § 1342(a).

27. *Id.* §§ 1311, 1313.

28. 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2)(A) (2000).

29. *Id.* §§ 1311(b)(2)(A), 1314(b)(2)(A).

standards apply to new facilities in each industry, waste treatment being cheaper and more effective when the facility is designed and built with certain waste treatment systems in mind.³⁰ As new facilities replace older ones in the industry, the average of the best available treatment technology will therefore improve, and over time standards will approach zero discharge of pollutants.

Water-quality based standards are promulgated by each state, rather than the EPA, and are specific to each waterbody in the state, with no regard to the nature of industries potentially discharging pollutants into that waterbody.³¹ For each waterbody, states designate a category of use, ranging from drinkable waters to waters one should not touch; each use category entails specific limitations on the amount of any pollutant in such water.³² The permits written to all dischargers of pollutants into a waterbody should in theory allocate discharge limitations among the dischargers so that the waterbody will not exceed levels of pollutants specific to its designated use.³³

All of the above standards, whether technology-based or water-quality based, are promulgated only after public notice and comment.³⁴ When a permit is written, the effluent limitations it contains will comply with the more stringent of either the technology-based or water-quality based standards specifically applicable to the discharger and the waterbody.³⁵

B. Case law bearing on the *Catskill* decision.

1. Judicial Deference to Administrative Interpretation of an Ambiguous Statute

Catskill and its brethren mark a change in courts' interpretations of "addition" of pollutants under the CWA. This is due largely to recent decisions in the United States Supreme Court regarding the amount of deference that courts owe to administrative statements of policy and statutory interpretation.³⁶ As we shall see, the Court's recently refined reading of the law on this

30. *Id.* § 1316(b)(1)(B).

31. *See generally id.* § 1313.

32. *Id.* § 1313(c)(2)(A).

33. *Id.* § 1313(d)(1)(C).

34. 33 U.S.C. § 1342(a) (2000).

35. *Id.* § 1342(a)(1)(A), (b)(1)(A).

36. *United States v. Mead*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000).

point has allowed a level of judicial inquiry once thought to be precluded.

The Court erected the landmark case in the law of judicial deference to agency interpretation in 1984, when it decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.³⁷ The *Chevron* Court established that where a “statute is silent or ambiguous with respect to the specific issue [under review], the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”³⁸ To determine permissibility, courts should decide whether the statute’s silence or ambiguity represents an explicit or implicit delegation of authority to the agency to elucidate that issue.³⁹ An explicit statutory gap “is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight [in courts] unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁴⁰ An implicit statutory gap likewise delegates authority to the agency to interpret the statute, and “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”⁴¹ This high level of deference to agency interpretations has come to be known simply as “*Chevron* deference.”

Chevron involved a challenge by the Natural Resources Defense Council (“NRDC”) to EPA regulations allowing certain states, in their implementation of the Clean Air Act (“CAA”),⁴² to define a “stationary source[]”⁴³ as an entire plant, possibly encompassing several discrete points of emission.⁴⁴ The consequence of this policy was that a plant might install new “pollution-emitting devices”⁴⁵ that did not individually conform to new source air quality standards, so long as the plant as a whole met its permitted emission limits.⁴⁶ After examining several sections of the CAA, the Court found the definition of “stationary source” ambig-

37. 467 U.S. 837 (1984).

38. *Id.* at 843.

39. *Id.* at 843-44.

40. *Id.*

41. *Id.* at 844.

42. Clean Air Act Amendments of 1970, 42 U.S.C. §§ 7401-7671q (2000).

43. *Id.* § 7502(c)(5).

44. *Chevron*, 467 U.S. at 840; 40 C.F.R. § 51.165(a)(1)(i)-(ii) (2002).

45. *Chevron*, 467 U.S. at 839-40.

46. *Id.*

uous,⁴⁷ and so addressed the issue of whether EPA's regulation was "based on a reasonable construction of the statutory term 'stationary source.'"⁴⁸ The Court concluded that: "the [EPA's] interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference. . . ."⁴⁹

In 2000, the Court decided two cases that conclusively limited the range of cases warranting *Chevron* deference. Before 2000, courts had recognized that not all forms of agency statements demanded absolute deference, and attempted to itemize elements of agency action that supported varying degrees of judicial deference.⁵⁰ The Court reined in and formalized this imprecise body of law first in *Christensen v. Harris County*,⁵¹ and then in *United States v. Mead Corp.*⁵²

Christensen announced that administrative constructions of a statute such as those contained in opinion letters, policy statements, agency manuals, and enforcement guidelines lack the force of law and do not warrant *Chevron* deference.⁵³ The Court suggested that the "force of law" necessary to invoke *Chevron* derives from formal APA-like procedures⁵⁴ and delegated law-making powers.⁵⁵ Agency statements carrying less than the necessary force of law "are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'"⁵⁶ This respect accorded to persuasive agency interpretation is commonly

47. See *id.* at 861 ("We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.")

48. *Id.* at 840.

49. *Id.*

50. Both before and after *Chevron*, courts gauged several factors, including consistency of interpretation, the care taken in formulating an interpretation, and the agency's expertise, in determining what deference was due an administrative statement of interpretation. See, e.g., *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (considering consistency); *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (considering expertise); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (considering care).

51. 529 U.S. 576 (2000).

52. 533 U.S. 218 (2001).

53. *Christensen*, 529 U.S. at 587.

54. *Id.* at 587 ("Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice and comment rulemaking.")

55. *Id.* ("[I]nterpretative rules and enforcement guidelines are 'not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers.'" (quoting *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991))).

56. *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

referred to as *Skidmore* deference, after the case that formulated the standard.⁵⁷

In *Christensen*, deputy sheriffs objected to the Harris County, Texas, Sheriff's policy of forcing deputies to take time off from work to redeem compensatory time that they had earned by working in excess of forty hours a week; such crediting of compensatory time is mandatory under the Fair Labor Standards Act ("FLSA").⁵⁸ Prior to adopting this policy, the county had written to the Department of Labor asking whether the Department thought the policy was permissible.⁵⁹ In an Opinion Letter, the Department of Labor responded that its position was that the policy was permissible if the deputies were informed of, and agreed to, the policy when they accepted overtime work.⁶⁰ Before the Supreme Court, the deputies argued that the Opinion Letter was entitled to *Chevron* deference, seeking to avoid the Court's conclusion that the FLSA itself did not prohibit the county's policy.⁶¹ If the Court had deferred to the Opinion Letter, the Letter's provision that prior agreement was necessary would have benefited the deputies.

The Court held that the Opinion Letter's interpretation did not command deference as an agency interpretation lacking the force of law.⁶² Deference would have been due to the Department of Labor's regulations, following *Chevron*, but in this case the Department's regulations did not speak directly to the issue.⁶³ This last point, raised by the United States as *amicus curiae* in the case, highlights an important feature of the law of judicial deference to administrative interpretation. An agency's interpretation of its own ambiguous term in a regulation does command deference in a court; this is so even when the interpretation does not carry the force of law.⁶⁴ *Chevron*, *Christensen*, and *Mead* apply to administrative construction of a statutory term that the administration is charged with enforcing—not to the administrative construction of regulatory terms promulgated in that enforcement.

57. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

58. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000).

59. *Christensen*, 529 U.S. at 580.

60. *Id.* at 580; Opinion Letter from Department of Labor, Wage & Hour Division, 1992 WL 845100 (Sept. 14, 1992).

61. *Christensen*, 529 U.S. at 586.

62. *Id.* at 587.

63. *Id.* at 587-88.

64. This deference is known as *Auer* deference, after *Auer v. Robbins*, 519 U.S. 452 (1997). See *Christensen*, 529 U.S. at 587-88.

As we shall see below, the Second Circuit relies principally on *Christensen* in determining whether deference is due to EPA's interpretation of 'addition' under the CWA in *Catskill*. The *Catskill* court does, however, cite *Mead*;⁶⁵ *Mead* is also a more complete discussion of the law of deference to agency interpretations.

In an eight-to-one ruling, the *Mead* Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."⁶⁶ The Court went on to observe that such a delegation of authority may be identified in the agency's power to conduct adjudications or notice and comment rulemaking, "or by some other indication of a comparable congressional intent."⁶⁷ *Mead* also gives *Skidmore* a hearty slap on the back by noting that even administrative interpretations that do not "bind judges to follow them . . . certainly may influence the courts facing questions the agencies have already answered."⁶⁸

The *Mead* Corporation imported day planners into the United States.⁶⁹ Empowered by 19 U.S.C. § 1500(b) to do so, the U.S. Customs Service classified *Mead*'s day planners as "bound diaries," and thereby subjected the planners to a four percent tariff.⁷⁰ Customs' classifications of imports take the form of Ruling Letters; these letters are binding only on the transaction at issue, are not subject to public notice and comment, may be modified without notice to anyone but the addressee, and should not be relied on by anyone but the addressee.⁷¹ *Mead* challenged Customs' interpretation of "bound diaries" as including day planners.⁷² Customs

65. See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001).

66. *Mead*, 533 U.S. at 226-27. A careful reader will notice that the word 'generally' has replaced *Chevron*'s "explicit or implicit" categories of delegation. The *Mead* Court backs away from *Chevron*'s distinction, looking instead for Congress's intent that the agency "be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Id.* at 229.

67. *Id.* at 277.

68. *Id.*

69. *Id.* at 244.

70. *Id.* at 254-55.

71. *Mead*, 533 U.S. at 223-24; see also 19 C.F.R. §§ 177.9(a)-(c) (2003); 19 U.S.C. § 1625(a) (2000).

72. *Mead*, 533 U.S. at 255.

invoked *Chevron*, raising the issue before the Court of whether the Ruling Letter deserved judicial deference.⁷³

The Court held that the Letter did not warrant *Chevron* deference, because both Customs' delegated authority to make rulings and its practice in making them fell short of a delegation to make rules carrying the force of law.⁷⁴ In particular, the Court noted that there was no notice and comment process in the rulings' creation, nor "any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."⁷⁵

The law that takes shape in these three cases, *Chevron*, *Christensen*, and *Mead*, can be stated with some assurance. Courts may not set aside an agency interpretation or construction of an ambiguous statutory term, once it appears that the agency interpretation carries the force of law and is the result of a congressional delegation to the agency to make rules of such force. While the Supreme Court avoids a direct equation of the requisite force of law with rulings promulgated, or adjudications conducted, pursuant to the Administrative Procedure Act ("APA"),⁷⁶ APA requirements are a fair test of whether an agency action will be afforded deference. In particular, public notice and comment prior to a ruling's finalization is a reliable hallmark of later deference in judicial review of the agency's action based on that ruling.

It is also important to note that *Christensen* and *Mead* do not invalidate *Chevron*'s holding at all. They merely limit its application to circumstances meeting the criteria present in *Chevron* itself. As Justice Souter noted in *Mead*, "*Chevron* . . . is a good example showing when *Chevron* deference is warranted, while [*Mead*] is a good case showing when it is not."⁷⁷ Following *Chevron*, *Christensen*, and *Mead*, *Catskill* is also a good case showing when deference is not warranted by an administrative interpretation of an ambiguous statutory term.

2. The Meaning of Addition

a. *Gorsuch and Consumers Power*

Until recently, two circuit court opinions suggested that a transfer of pollutants between waterbodies, through a man-made

73. *Id.* at 225-26.

74. *Id.* at 231-32.

75. *Id.* at 231.

76. Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000).

77. *Mead*, 533 U.S. at 237 n.18.

structure, was not an addition of pollutants under the CWA. However, three recent circuit court decisions, including *Catskill*, have come to the conclusion that such a transfer of pollutants is in fact an addition requiring a permit under the CWA. This rather abrupt change in consensus is due primarily to the change in standards of judicial deference to agency interpretation of a statute, as outlined above. This section will examine *National Wildlife Federation v. Gorsuch*,⁷⁸ *National Wildlife Federation v. Consumers Power Co.*,⁷⁹ *Dubois v. United States Department of Agriculture*,⁸⁰ and, briefly, *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*,⁸¹ to establish the context into which *Catskill* fits.

The D.C. Circuit decided *Gorsuch* in 1982, two years before *Chevron* laid the foundation for modern rules of judicial deference to agency policies. *Gorsuch* applied the extant law at the time, holding that courts must give great deference to the interpretation given an ambiguous statute by the officers or agency charged with its administration.⁸² Under such deference, “[t]he agency’s construction must be upheld if . . . it is ‘sufficiently reasonable,’ even if it is not ‘the only reasonable one or even the reading the court would have reached.’”⁸³ The D.C. Circuit stated that whether an interpretation truly qualified for such a high degree of deference could be determined by examining six characteristics of the agency’s formation of that interpretation.⁸⁴ The court enumerated these considerations as whether: 1) the agency was meant to have substantial discretion in administering the statute, as well as in defining its terms; 2) the agency made its interpretation contemporaneously with the passage of the statute; 3) the agency has consistently adhered to that interpretation; 4) construction of the statute is likely to require agency expertise; 5) Congress acquiesced to the agency interpretation by not amending the statute; and 6) the agency’s reasoning was thorough.⁸⁵ This list represents a summary of courts’ approach to determining deference before

78. 693 F.2d 156 (D.C. Cir. 1982).

79. 862 F.2d 580 (6th Cir. 1988).

80. 102 F.3d 1273 (1st Cir. 1996).

81. 280 F.3d 1364 (11th Cir. 2002).

82. *Gorsuch*, 693 F.2d at 166.

83. *Id.* at 171 (quoting *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)).

84. *Gorsuch*, 693 F.2d at 169.

85. *Id.*

Chevron.⁸⁶ Depending on how well each of these considerations was met by the agency interpretation, the *Gorsuch* court went on to say, deference could be “reduced,” and the actual degree of deference applied would be the result of case-specific evaluation of the agency’s interpretation.⁸⁷ One is left to wonder what less-than-complete deference really means—at what point is partial deference the same as the usual business of courts, weighing an argument?

In *Gorsuch*, the National Wildlife Federation (“NWF”) brought a CWA citizen suit claiming that EPA has a non-discretionary duty to require dam operators to secure NPDES permits.⁸⁸ In internal reports, a report to Congress, letters, and its briefs to the D.C. Circuit, EPA had taken the position that dam releases into downstream receiving waters do not constitute the ‘addition’ of pollutants, and that dams are non-point sources rather than point sources.⁸⁹ NWF’s challenge depended solely on the issue of “whether certain dam-induced water quality changes constitute the [addition of a pollutant under the CWA].”⁹⁰ Resolution of this question involved, of course, the sub-issue of whether EPA’s interpretation of ‘addition’ reasonably excluded dam releases, thereby warranting deference.⁹¹

The *Gorsuch* court concluded that in light of the above six considerations, and EPA’s expertise in particular, EPA’s interpretation of ‘addition from a point source’ merited deference if reasonable.⁹² The court then assessed the reasonableness of EPA’s interpretation, based on a statutory analysis of the CWA § 301 elements. Regarding the elements of ‘addition from a point source,’ the court found that “the language of the statute permits either [NWF’s or EPA’s] construction;”⁹³ if either was permissible, then EPA’s position was reasonable and so commanded the court’s deference.

86. See *id.* at 167 (discussing congressional delegation of administrative authority), 167 nn.31-33 (citing cases regarding consistency, contemporaneous construction, expertise, and congressional acquiescence), 168-69 (discussing thoroughness of interpretation).

87. See *id.* at 169-70.

88. See *id.* at 165 n.25.

89. See *Gorsuch*, at 164 n.21 (EPA 1973 Dam Report), 165 nn.26-27 (EPA Brief, EPA Reply Brief), 167 n.33 (EPA 1977 Report to Congress), 168 n.36 (Letter), 169 n.38 (Letter).

90. See *id.* at 161.

91. *Id.* at 161.

92. *Id.* at 170.

93. *Id.* at 175.

NWF argued that dams cause pollutants to enter reservoir waters, and conceded that such entry is from non-point sources.⁹⁴ Polluted water then passes through the dam and is thereby added to the receiving water from the point source of the reservoir outlet in the dam.⁹⁵ EPA argued, as the court recited:

[A]ddition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. In [EPA's] view, the point or nonpoint character of pollution is established when the pollution first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river).⁹⁶

EPA's reasoning in this argument is flawed, and arguably unreasonable, but the court accepted it without comment. The flaw lies in the characterization of 'pollution' as either 'point' or 'nonpoint.' These categories, however, apply to the source of pollution, not the pollution itself.⁹⁷ The court acknowledges this distinction, but in the context of its misguided discussion of "from" a point source as a distinct element of the CWA. EPA had argued that reservoir pollutants pass through, rather than being discharged from the point source of a dam.⁹⁸ The court refuted this argument by noting its inconsistency with EPA's regulations defining "discharge of a pollutant" to include "surface runoff which is collected or channeled by man."⁹⁹ "Thus, [the court pointed out,] EPA regulates the channel as a point source even though pollutants merely pass through it from land to navigable water."¹⁰⁰ Pollutants from a nonpoint source in one instance are discharged

94. *Id.* at 174. *Gorsuch* discusses in detail the nature of water quality changes that dams cause in reservoirs, including stratification of the reservoir into cold and warm layers, anoxia, and supersaturation. See generally *Gorsuch*, 693 F.2d at 156. Because these are effects of the dam's manipulation of water rather than substances introduced to the reservoir, the parties and the court accepted them as deriving from nonpoint sources. See *id.* at 161-65. Whether these water quality changes are pollutants added from a point source when they pass through the dam was the inquiry before the court. See *id.* at 165.

95. *Id.* at 174.

96. *Id.* at 175.

97. CWA § 301(a) prohibits discharge of a pollutant except in compliance with sections 301, 302, 306, 307, 318, 402, and 404. 33 U.S.C. § 1311(a) (2000). Section 301 then prescribes timetables for the promulgation of effluent limitations for "point sources" exclusively—not for point or nonpoint pollution. See *id.* § 1311(b).

98. *Gorsuch*, 693 F.2d at 175 n.58.

99. *Id.* at 175 n.58 (quoting 40 C.F.R. § 122.3 (1981) (internal citations omitted)).

100. *Id.*

into waters when they pass through a point source, under EPA's own regulations. It seems unreasonable to suggest that on this occasion pollutants from a nonpoint source retain the characteristic of their nonpoint provenance and so are not discharged.

Notwithstanding this fumble in the court's treatment of EPA's argument, it is important to note that in *Gorsuch* the court does not rule, *per se*, that dam releases are not an addition of pollutants to receiving waters. Rather, the D.C. Circuit found NWF's and EPA's arguments to be equally permissible under the court's reading of the CWA. The pre-*Chevron*, pre-*Christensen* law of deference that the *Gorsuch* court applied dictated that in such a circumstance, EPA's argument commanded deference, and EPA carried the day. The Sixth Circuit reinforced this blow to environmental litigants in *Consumers Power* in 1988, after *Chevron* but before *Christensen*.

The Sixth Circuit in *Consumers Power* followed *Chevron* in assessing whether EPA's construction of the CWA was permissible, and accordingly announced that it would defer to any reasonable interpretation held by EPA.¹⁰¹ Perhaps because of the novelty of the *Chevron* standard, or perhaps because the Sixth Circuit wanted to add value to the *Gorsuch* decision, the *Consumers Power* court conducted a more searching inquiry of EPA's position than was necessary to find it reasonable and permissible.

As in *Gorsuch*, *Consumers Power* was a citizen suit brought by the National Wildlife Federation.¹⁰² *Consumers Power* Company owned and operated a hydro-electric facility in Ludington, on the Eastern Shore of Lake Michigan. This facility operates by pumping water to a reservoir 400 feet above the level of Lake Michigan during hours of low-cost electricity, allowing the water to drive turbine generators on its return to the Lake during peak hours.¹⁰³ The reservoir is manmade, with a capacity of 27 billion gallons of water, and is fed by six penstocks, which are enormous tunnels between the pump/turbines and the reservoir.¹⁰⁴ When the pumps are drawing water, and again when the returning water drives the turbines, fish and other aquatic life are drawn through the pumps.¹⁰⁵ Predictably, many of these fish are killed

101. Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 584 (6th Cir. 1988).

102. *Id.* at 581.

103. *Id.* at 581-82.

104. *Id.* at 581.

105. *Id.* at 582.

and chopped up by the pumps, and released into Lake Michigan.¹⁰⁶ NWF claimed that Consumers Power's release of these dead and hacked up fish is an addition of pollutants to Lake Michigan, requiring a NPDES permit under the CWA. The court isolated the issue to be whether Consumers Power's release of water containing dead fish and fish parts was an 'addition' under the CWA.¹⁰⁷

EPA argued as *amicus curiae* in support of Consumers Power that an 'addition' of a pollutant requires the physical introduction of that pollutant "from the outside world."¹⁰⁸ The court accepted this interpretation of 'addition' as permissible and deferred to EPA's position, stating that "the Ludington facility's movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States."¹⁰⁹ To arrive at this holding, the court hewed close to *Gorsuch*, following *Gorsuch*'s reasoning on judicial deference even though it was outdated, and also digressing into extensive *dicta* in which the court seems to confuse the elements of 'addition' and 'point source.'¹¹⁰ To a degree, perhaps unnecessary in determining the reasonableness of EPA's position, the court averred that *Consumers Power* and *Gorsuch* were closely analogous.¹¹¹

By staking its holding so much on *Gorsuch*, the Sixth Circuit weakened its opinion. First, the *Consumers Power* court cited primarily to EPA's position statements in *Gorsuch*, rather than any introduced anew before the court. As we shall see, this leaves *Consumers Power* vulnerable to the same weaknesses as *Gorsuch* in a post-*Christensen* world—namely, that EPA's position statements do not carry the force of law. Second, the court's argument that dams are to be regulated as nonpoint sources under the CWA, in addition to being irrelevant to its 'addition' analysis, does not even pass the straight-face test. While the dam reservoirs at issue in *Gorsuch* credibly do become polluted through nonpoint sources

106. *Id.* at 582.

107. *Consumers Power*, 862 F.2d at 584.

108. *See id.* at 583-84 (citing *Gorsuch*, 693 F.2d at 175).

109. *Id.* at 581 (citing *Gorsuch*, 693 F.2d at 174-75).

110. *See id.* at 587-88.

111. *See id.* at 590 ("In our view, the Ludington facility is a dam for purposes of the CWA, since it is a 'structure that impounds water.'" (quoting 18 C.F.R. § 4.30(4)(1983); § 4.50(b)(1); § 4.91(c). All are Federal Energy Regulatory Commission regulations promulgated pursuant to authority delegated by EPA.)); *Id.* at 589 ("We find no useful distinction between these facilities [the Ludington facility and the dams at issue in *Gorsuch*] for purposes of interpreting section 402 of the Clean Water Act.").

such as runoff and temperature stratification, giant turbines chopping up fish are hardly the non-discrete and far-flung sources contemplated by the CWA's nonpoint source provisions.

Together, *Gorsuch* and *Consumers Power* seemed to establish that any pollutant created by or passing through a man-made facility was not added to the receiving water so long as the waters upstream and downstream of the facility were in some intuitive sense contiguous. Stressing this contiguity in finding EPA's position reasonable, the *Consumers Power* court concluded that, "[t]he water which passes through the Ludington facility never loses its status as water of the United States."¹¹² However, it is important to remember that, despite the courts' in-depth analysis of both cases, the true holding in both cases was that EPA's position—that such releases were not 'additions' under the CWA—warranted deference because it was a permissible and reasonable interpretation by the agency charged with implementing the CWA. This position was expressed solely in letters, reports, and court briefs. After *Christensen* and *Mead*, the basis for both courts' opinions was greatly weakened.

b. Law, Mokelumne and Dubois

Two Circuit Court cases that superficially appear analogous to both *Gorsuch* and *Consumers Power* nevertheless find an addition of pollutants even before *Christensen's* clarification of the law of judicial deference; this is due largely to the fact that EPA had promulgated a regulation that overrode its position on dam releases. *United States v. Law*¹¹³ and *Committee to Save Mokelumne River v. East Bay Municipal Utility District*¹¹⁴ both involved unpermitted discharges of polluted water from man-made impoundments that were part of treatment systems collecting mine runoff.¹¹⁵ Neither opinion dealt expressly with the issue of deference to the EPA policy that prevailed in *Gorsuch* and *Consumers Power*.¹¹⁶ Both courts did cite the EPA regulation defining

112. 862 F.2d at 589.

113. 979 F.2d 977 (4th Cir. 1992).

114. 13 F.3d 305 (9th Cir. 1993).

115. See *Law*, 979 F.2d at 978; *Mokelumne*, 13 F.3d at 306-07.

116. Judge Fernandez, concurring in the *Mokelumne* decision, felt that the impoundment there was analogous to *Gorsuch* and *Consumers Power*, but noted that EPA's own determination that the dam in *Mokelumne* was a point source precluded the deference granted in *Gorsuch* and *Consumers Power*. *Mokelumne*, 13 F.3d. at 310. Judge Fernandez did not cite exactly which determination he was talking about; if he

discharge of pollutants to include addition of surface runoff waters collected or channeled by man.¹¹⁷

Rather than acknowledging that EPA had two policies, one of which outranked the other, both courts adopted the gnarled logic of *Gorsuch* and *Consumers Power*. In those cases, EPA's position stated that 'addition' requires introduction of a pollutant from the outside world, and the outside world must mean the world outside of the navigable waters of the United States. So, there is no 'addition' of a pollutant when impoundment facilities "pass" polluted waters from "one body of navigable water . . . to another. . ." ¹¹⁸ To find 'addition' in *Law* and *Mokelumne*, both courts had to determine that the impounded waters were not waters of the United States.¹¹⁹ Once this was demonstrated, release of these waters to waters of the U.S. was plainly an addition from the outside world, requiring a CWA permit.

Without acknowledging this heritage of reasoning, the First Circuit took a step further from *Gorsuch* and *Consumers Power*. In *Dubois v. United States Department of Agriculture*, the court held that the transfer of water between two distinct waters of the United States is an 'addition' for the purposes of the CWA.¹²⁰ The court was able to entirely avoid the issues of judicial deference to agency interpretation because of the procedural nature of the case; the plaintiffs brought the case under the Administrative Procedure Act ("APA") as a judicial review of the issuance of a permit by the U.S. Forest Service ("USFS") to ski slope operators seeking to expand their facility in the White Mountain National Forest.¹²¹ The complaint claimed in part that issuance of the permit without the permittee's prior securing of a NPDES permit was arbitrary, capricious, and not in accordance with the law. Because the USFS is not the agency charged with enforcing the CWA, *Chevron* deference analysis did not apply.¹²²

was referring to 40 C.F.R. § 122.2, then he was confusing the issues of 'point source' and 'addition.' See *id.*

117. 40 C.F.R. § 122.2 (2002).

118. *Gorsuch*, 693 F.2d at 175; see also *Consumers Power*, 862 F.2d at 585-86.

119. *Law* does this well, by observing that the treatment system there fell within 40 C.F.R. § 122.2(g), which excludes waste treatment systems from "the waters of the United States." *Law*, 979 F.2d at 979. *Mokelumne*, however, cites the definition of "discharge" in 40 C.F.R. § 122.2 to support its conclusion that the impoundment there was not navigable water. *Mokelumne River*, 13 F.3d at 308.

120. *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996).

121. *Id.* at 1283.

122. See *id.* at 1285 n.15. Note also that this case was decided in 1996, well before *Christensen*.

Loon Corporation, the slope operators, pumped water from the East Branch of the Pemigewasset River uphill to Loon Pond to supply water for snowmaking equipment.¹²³ While Loon Pond was remarkably clean, the East Branch had historically been one of New England's most polluted rivers.¹²⁴ The plaintiffs claimed that pumping East Branch water into Loon Pond constituted an addition of pollutants from a point source without a permit, 'addition' being the only element contested by the parties.¹²⁵ The district court had held that this was not an addition, reasoning that because both the East Branch and Loon Pond are waters of the U.S., they are two parts of a "singular entity," so that addition is a logical impossibility.¹²⁶

The First Circuit, on the other hand, found that distinct bodies of waters of the U.S. are not a "singular entity," and held that Loon Pond and the East Branch were indeed distinct bodies of water, making the pumping of polluted East Branch water into Loon Pond an addition requiring a permit.¹²⁷ The court further deflated the lower court's "singular entity" bubble by declaring that waters pumped through pipes have left the "domain of nature," "are subject to private control," and have consequently "lost their status as waters of the United States."¹²⁸

The USFS argued that while transfer between unrelated waterbodies might require a permit, Loon Pond and the East Branch were related by their hydrological connection—Loon Pond drains into the East Branch. This, the USFS contended, negated the element of addition.¹²⁹ The court responded to this argument and to the district court's singular entity theory with a point that, remarkably, had not arisen in any of the prior cases discussed here. "[T]he transfer of water or its contents from the East branch to Loon Pond would not occur naturally."¹³⁰

c. Summary

When the Second Circuit decided *Catskill*, it faced two heavily wrought bodies of case law. *Christensen* and *Mead* had reined in

123. *Id.* at 1278.

124. "It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks." *Id.* at 1297.

125. *Id.* at 1280.

126. *Dubois*, 102 F.3d at 1296.

127. *Id.*

128. *Id.* at 1297.

129. *Id.* at 1298.

130. *Id.* at 1297.

Chevron, and opened up a new field of inquiry for courts addressing issues of ‘addition’ under the CWA. In short, where an administrative agency is congressionally charged with the implementation of a statute, that agency’s policies and interpretations are entitled to great respect in the courts insofar as they carry the force of law. This force of law derives from formal, APA-style rulemaking procedures such as public notice and comment or agency adjudication. Agency interpretations embodied in lesser forms such as policy memos, ruling letters, and litigation positions are entitled to respect only to the extent that they are persuasive.

While *Gorsuch* and *Consumers Power* had seemed to hold that the transfer of water between two bodies of waters of the United States cannot constitute an ‘addition’ of pollutants to the receiving water, these holdings were iterations of EPA’s policy that dam releases are not additions under the CWA, a policy the courts believed commanded deference.¹³¹ After *Christensen* and *Mead*, this policy turns out to warrant only the respect that persuasion merits, as it is embodied chiefly in internal reports, letters, and court briefs. And no court unconstrained by deference has given EPA’s position much respect; releases of polluted water into distinct bodies of cleaner water have been held to be additions requiring NPDES permits every time. Central to these courts’ analyses, however, is a point raised by EPA in its definition of ‘addition.’ Addition must be a physical introduction from the outside world. The outside world may include waters designated by regulation as sources of pollution; the outside world might also include distinctly separate bodies of navigable water. Separateness might be shown by the unlikelihood that one waterbody would ever naturally receive water from another.

Part III. Catskill Mountains Chapter of Trout Unlimited v. City of New York

The majority of New York City’s water comes from the Catskill Mountain Range, via either of two aqueducts: the Delaware Aqueduct or the Catskill Aqueduct. These aqueducts transport water from two sets of watersheds in the Catskills to the east side of the Hudson River, emptying there into reservoirs, from which the water again travels by aqueduct to the City. For more than sixty years the City has operated the Shandaken Tunnel, which carries water from the Schoharie Reservoir south to the Esopus

131. See *Consumers Power*, 862 F.2d 580; *Gorsuch*, 693 F.2d 156.

Creek, which in turn empties into the Ashokan Reservoir. Water from the Schoharie naturally drains north, down the northern slopes of the Catskills into the Mohawk River, which empties into the Hudson River. Because both the Mohawk and the Hudson are too polluted to drink, the only way for the City to avail itself of the potable water in the Schoharie was to tunnel under the mountains that separate the Schoharie from the Esopus Creek.

For a variety of reasons, the water in the Schoharie Reservoir often has a high content of suspended silt particles. In other words, it is muddy. The Esopus Creek, while subject to its own muddy spells, flows clear and cold much more often than the waters of the Schoharie watershed. The Esopus has traditionally been a premier trout fishery, drawing sport fishermen from all over the world. The Shandaken Tunnel empties into the Esopus via a spillway—a broad, flat concrete pad. Where the Tunnel empties into the Esopus, the Esopus abruptly changes from clear to an opaque reddish-brown, earning the Esopus the nickname “Yoo-hoo Creek” after the chocolate drink. The Esopus is then muddy and brown for the rest of its course to the Ashokan Reservoir.

The City has never treated the water flowing through the Shandaken Tunnel because the series of reservoirs between the Shandaken and the City act as a natural treatment system, where the silt eventually settles out. The Esopus, however, receives and carries all the silt from the Shandaken. As a result, the Esopus's quality suffers greatly; it cannot sustain a trout fishery downstream of the Tunnel. Not only does the silt make the Esopus unattractively turbid and unsafe for wading fishermen, but it also impairs trout's ability to see both prey and fishing lures. Moreover, the Schoharie Reservoir stratifies during the summer into a cold layer of water on the bottom of the reservoir, and a warm layer on top. By the end of the summer, the lower layer has usually been drawn out, and only trout-repellent warm water passes through the Shandaken tunnel into the Esopus.

In 2000, five plaintiffs filed a Clean Water Act citizen suit against the City in federal district court, claiming that the Shandaken's discharge into the Esopus Creek is an unpermitted discharge of pollutants into navigable waters of the U.S. from a point source.¹³² The complaint further alleged that because of the

132. The five plaintiffs were: Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc. See Cat-

discharge, the Esopus exceeded New York State water quality standards for turbidity and temperature.¹³³ The City responded with two motions to dismiss: first, under Federal Rules of Civil Procedure (“FRCP”) 12(b)(1) for lack of jurisdiction,¹³⁴ and second, under FRCP 12(b)(6) for failure to state a claim, on the grounds that the Shandaken does not “discharge” pollutants into the Esopus within the meaning of the CWA. The district court granted the City’s motion for failure to state a claim, finding as a matter of law that the Shandaken’s discharge was not an “addition.”¹³⁵

Before the Second Circuit, the City supported its contention that it does not add pollutants to the Esopus by citing *Gorsuch* and *Consumers Power*.¹³⁶ The Second Circuit thus became the first appellate court to evaluate whether EPA’s position on dam releases deserved *Chevron* deference after *Christensen* and *Mead*. The court held that the deference accorded in *Gorsuch* and *Consumers Power* was “unjustified,” because EPA’s interpretation of ‘addition’ was “never formalized in a notice and comment rulemaking or formal adjudication under the Administrative Procedure Act. . . .”¹³⁷ Citing *Mead*, the Second Circuit determined that EPA’s position warranted lesser (i.e.—*Skidmore*) deference; that it “should be followed to the extent persuasive.”¹³⁸ The court then announced that it did not find EPA’s interpretation persuasive.¹³⁹

skill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001).

133. *Id.* at 486.

134. As required by the CWA citizen suit provision, 33 U.S.C. § 1365(b), Plaintiffs had sent the City, EPA, and the New York Department of Environmental Conservation a Notice of Intent to sue (“NOI letter”) in November 1998. *Id.* at 484. This NOI letter notified the City of Plaintiffs’ claim that the Shandaken discharged suspended and settleable solids into the Esopus. *Id.* at 484. Plaintiffs’ complaint, however, alleged discharges of turbidity and heat, as well as suspended solids. *Id.* at 484-85. While the district court denied the City’s 12(b)(1) motion, the circuit court reversed, holding that Plaintiffs’ allegations of heat discharge were not reasonably inferable from the suspended solids notification; the claim of heat pollution was therefore dismissed. *Id.* at 488-89. However, because turbidity is a necessary consequence of suspended solids, the City was reasonably on notice of Plaintiffs’ claim of turbidity. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 488-89 (2d Cir. 2001). While there are lessons to be learned from this, and compelling questions of whether the NOI letter is a jurisdictional element to a citizen suit, these are beyond the scope of this casenote.

135. *Id.* at 485.

136. *See id.* at 489.

137. *Id.* at 489-90, 490 n.2.

138. *Id.* at 491.

139. *Id.*

In its analysis of the term 'addition,' the court begins with EPA's requirement of introduction from the outside world, and agrees with this position "provided that 'outside world' is construed as any place outside the particular water body to which pollutants are introduced."¹⁴⁰ The opinion then summarizes the conclusions of *Gorsuch* and *Consumers Power*, stating that in those cases the waters at issue were merely "recirculated," and notes that these conclusions rest on the assumption, unanalyzed here, that the destination waterbodies were "the same" as the source waterbodies, so that nothing is introduced from the outside world.¹⁴¹

In unhesitating language, the court then refutes the City's argument.

The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sediment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.¹⁴²

Note that EPA's interpretation of addition is preserved in this logic. Artificial diversion is the introduction EPA requires, and the "unrelated" source water is the outside world.

Part IV. Analysis of Catskill's outcome and logic.

The *Catskill* decision cheered many who had come to accept *Gorsuch* and *Consumers Power* as the lay of the land; however, potential litigants might respond more cautiously before relying on it in future cases. To ascertain its value as precedent, of course, one should examine whether it rests on solid ground.

140. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001).

141. *Id.* at 491-92 n.3 ("We need not and do not decide whether those courts were correct in accepting that the source and destination waters were identical and thus whether we would reach their conclusions if presented with the same facts.").

142. *Id.* at 492.

1. Judicial Deference to Administrative Interpretations

Catskill correctly applied the law of judicial deference to agency policies. In a case involving a formally promulgated regulation, *Chevron* displaced a multi-faceted inquiry designed to ensure a well-reasoned agency interpretation, with a more generalized inquiry based on finding congressional intent that the agency be charged with forming the interpretation. Subsequent decisions misread *Chevron*, however, to grant deference even to informal agency expression. *Christensen* and *Mead* restored logic to *Chevron*.

EPA's interpretation of addition as articulated in *Gorsuch*, and as denied deference by *Catskill*, took shape in very informal ways.¹⁴³ Indeed, a less formally adopted position could hardly request judicial deference in good faith. Given the statements of *Christensen* and *Mead*, *Catskill* had little choice but to deny deference to EPA.

The *Catskill* court may have overstepped existing law, however, when it seemed to limit derivation of the requisite force of law to interpretations adopted through APA procedures.¹⁴⁴ On the one hand, this does seem like a good rule. The APA forces the legislative actions of administrations into positions of accountability through public notice and comment, and through adjudicative procedures answerable ultimately to courts of the U.S. An administrative position adopted without procedural guarantees of accountability could be authored by a single appointed official and could affect millions of people without their representation in its formation. Such a policy that prevailed automatically, even in the Supreme Court, would subvert the Separation of Powers doctrine. These considerations were undoubtedly behind the requirement that administrative interpretations of statutes carry the force of law before warranting judicial deference. The *Mead* Court, nevertheless, rather pointedly stopped short of designating APA procedures as the sole indicator of a policy's force of law. The Second Circuit seems to recognize this by speaking more generally about

143. As noted above, the *Gorsuch* court cites most often to EPA's court briefs, which are drafted by Department of Justice attorneys, not the administrative experts imagined by the *Chevron* Court. To say that an agency position composed largely of the agency's litigation position is entitled to deference, unless unreasonable, is essentially to say that the agency cannot lose in court.

144. "[EPA's] position was never formalized in a notice and comment rulemaking or formal adjudication under the Administrative Procedure Act. . . ." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001).

"indicia" justifying *Chevron* deference, after noting EPA's failure to follow APA procedures.¹⁴⁵ However, the *Catskill* court's early equation of APA procedures with the force of law necessary to command judicial deference should not be relied upon too heavily.

Having rebutted the argument that EPA's position warranted *Chevron* deference, *Catskill* then claims to accord the EPA position what has been called *Skidmore* deference, saying that "the agency position should be followed to the extent persuasive."¹⁴⁶ The Second Circuit inherited a less-than-precise standard of deference in *Skidmore*, and applies it in kind. While *Mead* does refer to the *Skidmore* standard occasionally as "deference," *Mead* also uses or incorporates the words "respect," "persuasive force," and "weight."¹⁴⁷ Such consideration given to an argument, to the extent of its persuasiveness, hardly varies from the weight given to any argument. *Skidmore* deference is in practice no more than the normal opportunity to be heard, and the Second Circuit's nod to it should not be taken for more than exactly that.

One might argue that this is quickly apparent in *Catskill*, when the court immediately qualifies EPA's use of the term 'outside world' to mean "any place outside the particular water body to which pollutants are introduced."¹⁴⁸ Far from deferring in any real sense, the court claims to agree with EPA so long as EPA is saying what the court wants it to say; saying anything else would simply be unpersuasive. Given *Skidmore*'s flaccid requirements, however, such an approach does not overstep any bounds.

2. The Meaning of Addition

Free, then, to interpret "addition" according to its own logic, the court does so in a clear, logical, and applicable manner. Taking *Skidmore* at least so far as to start with EPA's interpretation of addition, the court makes more sense of that interpretation than EPA had. One should remember that the CWA's element is

145. See *id.* at 491 ("[A] position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference."), 490 ("If EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate.")

146. *Id.* at 491 (citing *Mead*, 533 U.S. at 233-37).

147. *Mead*, 533 U.S. at 233 (citing *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991)).

148. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001).

“discharge,” defined later in the CWA as “addition.”¹⁴⁹ EPA interpreted “addition” to mean “physical introduction from the outside world.”¹⁵⁰ However, EPA then defined “outside world” as “outside the navigable waters of the U.S.,” which invited the district court in *Dubois*, for instance, to conclude that all waters of the U.S. are a “single entity” such that the pumping of one uphill into another cannot be a “discharge” within the CWA, regardless of the one’s filth and the other’s purity.¹⁵¹

Returning to EPA’s serviceable concept of “physical introduction from the outside world,” *Catskill* reasons that one body of water cannot be added to itself, but anything outside that body may be. The court disagrees with “singular entity” thinking, be it in *Gorsuch* or *Dubois*’ district court, and holds itself responsible to the “ordinary meaning of the CWA’s text.”¹⁵²

This approach is in accord with the First Circuit’s decision in *Dubois*, which was the authority most closely on point for the *Catskill* court. *Dubois* had found Loon Pond and the East Branch not to be the “same,” as *Catskill* put it, primarily because water from the East Branch would never flow naturally into Loon Pond.¹⁵³ Likewise, *Catskill* emphasized that water from the Schoharie would never reach the Esopus Creek through natural channels. Two waters cannot be part of the “same” body of water if artificial diversion is necessary to make them mingle, and if one is diverted to flow into the other, addition under the CWA occurs.

The Second Circuit also takes the trouble of aligning *Catskill* with *Gorsuch* and *Consumers Power*. In those cases, the D.C. and Sixth Circuits, respectively, had found the movements of water at issue to be mere passage¹⁵⁴ or “movement or diversion,”¹⁵⁵ implicitly finding the receiving and source waters to be parts of the “same” bodies of water. Accepting these findings at face value, *Catskill* accords with both *Gorsuch* and *Consumers Power* as factually distinct. *Gorsuch* and *Consumers Power* dealt with impounded water released downstream; *Catskill* dealt with water diverted through a tunnel to a separate watershed.

149. 33 U.S.C. § 1362(12) (2000).

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

151. *Dubois*, 102 F.3d at 1296-97.

152. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001).

153. *Dubois*, 102 F.3d at 1297.

154. See *Gorsuch*, 693 F.2d at 165. This characterization is made in EPA’s argument to the court, to which the court ultimately defers.

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

This, however, raises the question of whether *Catskill* needed to address *Gorsuch* and *Consumers Power* in the detail that it did. The City invoked those cases as its primary defense, arguing that they were analogous to *Catskill* and that the court should therefore follow their deferential conclusions to hold that as a matter of law, the City did not add pollutants to the Esopus.¹⁵⁶ However, if *Catskill* was distinguishable on its facts from *Gorsuch* and *Consumers Power*, *Catskill* arguably could have formed its own interpretation of addition under the circumstances and entirely avoided the issues of whether deference to EPA was proper, and whether EPA's interpretation was persuasive.

There are a couple of possible explanations for why the *Catskill* court felt the need to respond in detail to the *Gorsuch* and *Consumers Power* decisions. First, *Catskill* is careful to point out that it accepts without deciding as correct *Gorsuch* and *Consumers Power*'s characterizations of their facts as involving contiguous source and receiving waters.¹⁵⁷ If the court had genuinely thought that those cases were decided correctly, it would not have needed to put them at arm's length so explicitly. This suggests that the court did not see their facts as truly distinguishable, requiring it to invalidate their foundations, and so, their authority.

Second, the court may have recognized that future courts would see an analogy in the facts that neither *Gorsuch* and *Consumers Power* nor *Catskill* relied on. All three cases focused on what should constitute the "outside world" for purposes of addition; in the process, they skirted the definition of "introduction" from that outside world. The concept of introduction, however, includes an "outside world"—nothing can be introduced to itself. At the time of this writing, one circuit court since *Catskill* has centered simply on finding introduction, conceived as "cause-in-fact of . . . release," to satisfy the CWA element of addition.¹⁵⁸ The *Catskill* court may have predicted that *Gorsuch*, *Consumers Power*, and *Catskill* could all be considered in this light, and thus felt the need to undermine the previous cases' authority.

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

157. *See id.* at 492 n.3 ("We need not and do not decide whether those courts were correct in accepting that the source and destination waters were identical and thus whether we would reach their conclusions if presented with the same facts.").

158. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002) ("We . . . conclude that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters.").

Part V. Conclusion

Whatever its reasons for addressing the issues of deference to EPA and of EPA's interpretation of addition, the Second Circuit has relegated *Gorsuch* and *Consumers Power* to the dustbins of history. *Christensen* and *Mead* strongly suggested that the deference accorded in those cases to EPA's informally adopted interpretation was improper; *Catskill* explicitly stated this to be so. Because the true holdings of those cases was that EPA's interpretation warranted deference, not that addition had not occurred, *Catskill*'s refutation of those holdings leaves no appellate court decision to support the proposition that transfer of polluted water between two navigable waterbodies is not an addition under the CWA. Anyone promoting that proposition has only EPA's informal interpretation as authority, and it is an interpretation formed largely during litigation specific to *Gorsuch*. Arguments to the contrary have the cogent reasoning of *Dubois*, *Catskill*, and now *Miccosukee*.¹⁵⁹

Part VI. Epilogue

Catskill has been decided on remand to the Northern District of New York, resulting in a penalty assessment against defendants of \$5.7 million dollars, as well as injunctive relief for plaintiffs. On June 4, 2002, the *Catskill* plaintiffs were granted summary judgment against defendants New York City and New York City Department of Environmental Protection, on the issue of whether defendants had discharged suspended solids and turbidity from the Shandaken Tunnel portal without a permit.¹⁶⁰ Thereafter, the court held a four-day trial on the issue of civil penalties and injunctive relief.¹⁶¹ Applying the civil penalty considerations under CWA § 309(d), the court found that the City had reasonably believed prior to the Second Circuit's decision that the City did not need a SPDES permit for the Shandaken Tunnel discharge.¹⁶² However, the court also found that the City had delayed overlong in applying for a permit after the Second Circuit's opinion.¹⁶³ Applying a "top-down" approach to penalty cal-

159. See generally *id.*

160. See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 207 F. Supp. 2d 3, 4 (N.D.N.Y. 2002).

161. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003).

162. *Id.* at 54.

163. *Id.*

culuation, and applying the maximum per-day penalty for every day of discharge after the defendants' reasonable delay in applying for a SPDES permit, the court subtracted "\$57,500,500 from the maximum allowable penalty to arrive at the final figure of \$5,749,000."¹⁶⁴ Plaintiffs' attorneys believe this to be the largest CWA penalty ever levied against a municipality.

The court also ordered the City to obtain a SPDES permit by August 6, 2004.¹⁶⁵ Because the permit issuing agency in New York, the New York State Department of Environmental Conservation ("DEC"), was not a party to the action at the time of trial, the court took the step of invoking the All Writs Act¹⁶⁶ to join the DEC as a third-party defendant.¹⁶⁷ The DEC is ordered to process the City's application and issue a permit within 18 months of the decision, or report to the court on why it does not believe it can do so.¹⁶⁸ In order for a permit to be issued, of course, the Shandaken Tunnel discharge will have to meet the water quality standards applicable to the Esopus. This may be the result that means the most to the fishermen who originally brought the case: the Esopus Creek may soon run as clear as it had for centuries before the City opened the Shandaken Tunnel.

Of greater bearing on the reliability of the decisions of the First and Second Circuits, in *Dubois* and *Catskill* respectively, is the fate of the Eleventh Circuit's decision in *Miccosukee*. The South Florida Water Management District, the defendant in the *Miccosukee* case, filed a petition for certiorari to the U.S. Supreme Court. The question presented was whether its pumping of drainage water containing primarily non-point source pollutants, from one side of a levee into the Florida Everglades, is an addition under CWA § 402.

The Supreme Court requested the United States Solicitor General to file an *amicus* brief on whether the Court should grant certiorari, and the Solicitor General filed that brief in May of 2003.¹⁶⁹ The Solicitor General's brief urged the Court not to grant certiorari "because [the] fact-specific decision [of the Eleventh Cir-

164. *Id.*

165. *Id.* at 55-56.

166. 28 U.S.C. § 1651(a) (2000).

167. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 55-56 (N.D.N.Y. 2003).

168. *Id.*

169. Brief of Amicus Curiae United States Solicitor General Theodore Olson et al., *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, No. 02-626, 71 U.S.L.W. 3320 (U.S. Oct. 21, 2002) (Petition for Certiorari).

cuit in *Miccusukee*] does not give rise to a conflict among the courts of appeals or otherwise present a question warranting this court's review."¹⁷⁰

Nevertheless, the Supreme Court granted certiorari, and will hear the *Miccusukee* case during its 2004 term.¹⁷¹ Depending on the scope of the Court's decision in *Miccusukee*, its treatment of this issue may call into question the viability of the *Catskill* decision. The facts in *Miccusukee* are arguably distinguishable from those of *Catskill* and *Dubois*. In *Miccusukee*, the division of watersheds is man-made—the Army Corps of Engineers having built a series of levees and canals to shunt south-flowing waters into the Everglades and away from subsequently developed land.¹⁷² Depending on the broadness of the Court's language, the Court's possible reversal of *Miccusukee* might not affect the holdings in *Catskill* and *Dubois*, where the separation of the relevant waterbodies is geological rather than man-made. This might be a fine line for later litigants hoping to rely on *Catskill* and *Dubois*, but on the other hand, the facts in *Miccusukee* are fairly narrow.¹⁷³

The above paragraph betrays a prediction regarding the Court's ruling. If that prediction is wrong, the Court's affirmance of the Eleventh Circuit's opinion in *Miccusukee* would leave undisturbed the fact that, in the Solicitor General's words, "no court of appeals has squarely considered and rejected the reasoning of [*Dubois* and *Catskill*]. . . ."¹⁷⁴ Under such an outcome, the decisions of *Dubois*, *Catskill*, and *Miccusukee* would stand as a persua-

170. *Id.*

171. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 2003 WL 21472806, 71 U.S.L.W. 3320 (June 27, 2003). Note that even the Solicitor General's brief suggests the Eleventh Circuit may have erred in *Miccusukee*: "[T]he lower court's characterization of the water control facilities at issue as creating distinct bodies of water for CWA purposes may be incorrect. . . ." Brief of Amicus Curiae United States Solicitor General Theodore Olson et al., S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, No. 02-626, 71 U.S.L.W. 3320 (U.S. Oct. 21, 2002) (Petition for Certiorari).

172. *Miccusukee*, 280 F.3d 1364, 1366.

173. For instance, the Solicitor General's *amicus* brief stopped short of suggesting that any flaw in the Eleventh Circuit's reasoning would apply to *Catskill* or *Dubois*. Brief of Amicus Curiae United States Solicitor General Theodore Olson et al., S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, No. 02-626, 71 U.S.L.W. 3320 (U.S. Oct. 21, 2002) (Petition for Certiorari).

174. Brief of Amicus Curiae United States Solicitor General Theodore Olson et al., S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, No. 02-626, 71 U.S.L.W. 3320 (U.S. Oct. 21, 2002) (Petition for Certiorari).

sive set of appellate court decisions holding the interbasin transfer of pollutants to be an addition under the Clean Water Act.