Nos. 10-196 and 10-252

In the Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL., PETITIONERS

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, PETITIONER

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
ELLEN J. DURKEE
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

This case involves the application of 40 C.F.R. 122.3(i), a regulation issued by the Environmental Protection Agency in 2008 pursuant to its authority under the Clean Water Act (CWA). Section 122.3(i) provides that a transfer of water from one body of navigable waters to another without alteration or intervening use of the water is not subject to the CWA's National Pollutant Discharge Elimination System permitting program. The question presented is as follows:

Whether the court of appeals correctly held that Section 122.3(i) reflects a reasonable interpretation of the pertinent statutory language and therefore is entitled to deference under the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations and rules:

Statutes, regulations and rules—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 10-196

FRIENDS OF THE EVERGLADES, ET AL., PETITIONERS

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.

No. 10-252

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, PETITIONER

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 570 F.3d 1210.[1] The opinions of the district court (Pet. App. 41a-202a) are unreported.

[1] All references to the Pet. App. are to the appendix to the petition for a writ of certiorari filed in No. 10-196.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. Petitions for rehearing were denied on May 7, 2010 (Pet. App. 203a-204a). The petition for a writ of certiorari in No. 10-196 was filed on August 5, 2010. On August 3, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari in No. 10-252 to and including August 19, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to respond comprehensively, as a matter of national policy, to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. 1251(a). The CWA recognizes the responsibilities of individual States to protect water quality, see 33 U.S.C. 1251(b), and to manage water resources, including "the authority of each State to allocate quantities of water within its jurisdiction," 33 U.S.C. 1251(g). The CWA addresses the problem of water pollution through a multifaceted federal-state approach that includes provisions directed to research and related programs (33 U.S.C. 1251-1274), grants for construction of treatment works (33 U.S.C. 1281-1301), the establishment and enforcement of standards, including effluent and water-quality standards (33 U.S.C. 1311-1330), and the issuance of permits and licenses (33 U.S.C. 1341-1346).

Section 301(a) of the CWA prohibits "the discharge of any pollutant" except in compliance with other specified sections of the Act, including (as pertinent here) Section 402. 33 U.S.C. 1311(a). The Act defines the

term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The term "navigable waters," in turn, is defined to mean "the waters of the United States." 33 U.S.C. 1362(7).

CWA Section 402 creates the National Pollutant Discharge Elimination System (NPDES) permitting program. Section 402(a) provides that the Environmental Protection Agency (EPA) or a qualifying State "may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the Act]," so long as the discharge satisfies specified requirements. 33 U.S.C. 1342(a)(1). NPDES permits typically impose limitations on point source discharges by establishing permissible rates, concentrations, or quantities of specified constituents at the points where the discharge streams enter the waters of the United States. See 33 U.S.C. 1342(a)(1) and (2); see generally 40 C.F.R. Pts. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).

The CWA does not impose permit requirements for discharges from nonpoint sources such as runoff. Instead, the Act encourages the States to develop local programs, which may include techniques such as land-use requirements, to control nonpoint sources of pollution. See, *e.g.*, 33 U.S.C. 1288(b)(2)(F), 1314(f), 1329.

2. In 1948, Congress authorized the Central and Southern Florida Flood Control Project (Project). To implement the Project, the United States Army Corps of Engineers is charged with constructing a comprehensive network of levees, water storage areas, pumps, and canal improvements that would serve several purposes,

including flood protection, water conservation, and drainage. Flood Control Act, Pub. L. No. 80-858, 62 Stat. 1171, 1176; see *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 99-100 (2004) (*Miccosukee*). Respondent South Florida Water Management District (SFWMD) is the local sponsor and day-to-day operator of the Project.

Historically, during the rainy season, surface water of Lake Okeechobee would rise and then glide through the Everglades to Florida Bay, at a very slow pace due to the nearly flat topography, in a predominately southern direction through vast expanses of wetlands, sloughs, and shallow streams. Pet. App. 76a-78a, 174a. As a result of the Project, virtually the entire lake has become enclosed by a dike made of dredged materials. *Id.* at 72a-73a & n.17. As relevant here, three pump stations (known as S-2, S-3, and S-4) are embedded in the dike and occasionally move water, primarily for flood-control purposes, from manmade canals located south of Lake Okeechobee to the lake. The canals and lake are part of "the waters of the United States" within the meaning of the CWA. The water in the canals contains pollutants from runoff of surrounding agricultural, industrial, and residential areas. *Id.* at 4a. The pumps themselves do not add any pollutants. *Id.* at 5a.

3. a. In 2002, petitioners in No. 10-196 filed citizen suits in federal district court against SFWMD, alleging that SFWMD's operation of pump stations S-2, S-3, and S-4 without an NPDES permit violates the CWA. The two suits were consolidated, and petitioner in No. 10-252 intervened as a plaintiff. The United States and a private company intervened as defendants, and petitioners added SFWMD's executive director as a defendant. Pet. App. 5a, 54a-56a.

b. In 2003, the district court stayed proceedings in this case pending this Court's review of the Eleventh Circuit's decision in *Miccosukee Tribe of Indians* v. *SFWMD*, 280 F.3d 1364 (2002), vacated and remanded, 541 U.S. 95 (2004).

Like the present case, *Miccosukee* arose from a CWA citizen suit filed against SFWMD alleging that an NPDES permit is required for SFWMD's operation of a pump station (known as S-9) that is located within the Project and transports water from a canal to a wetland area called WCA-3. 541 U.S. at 100. The Eleventh Circuit held that an NPDES permit was required. 280 F.3d at 1368-1369. This Court granted SFWMD's petition for a writ of certiorari on the question "[w]hether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source." 541 U.S. at 104 (quoting Pet. at I, *Miccosukee*, *supra*). The United States, as amicus curiae, argued that the point source itself need not be the original source of the pollutant to trigger the NPDES permit requirement. *Id.* at 104-105. This Court agreed, explaining that the CWA term "point source" includes structures that do not themselves emanate or generate pollutants. *Ibid.*

The United States, however, raised an independent basis for concluding that the operation of S-9 did not require an NPDES permit. Relying on the CWA's language and structure, as well as EPA's longstanding practice, the United States argued that the transfer of water from one body of navigable waters to another without alteration or an intervening use is not an addition of pollutants to the waters of the United States that Congress intended to subject to the NPDES program. U.S. Amicus Merits Br. 15-28, *Miccosukee*, *supra*. This

Court did not pass on that argument, expressly leaving it open to the parties to raise on remand. 541 U.S. at 109, 112.[2]

On remand, the district court stayed the *Miccosukee* case pending resolution of the present case. *Miccosukee Tribe of Indians* v. *SFWMD*, 559 F.3d 1191, 1194 (11th Cir. 2009).

4. Following this Court's decision in *Miccosukee*, respondents (including the United States) pressed in this case the argument that the Court did not decide in *Miccosukee*—*i.e.*, that a transfer of water from one body of navigable waters to another does not require an NPDES permit. The district court rejected that contention and concluded that operation of pump stations S-2, S-3, and S-4 without an NPDES permit violated the CWA. Pet. App. 53a-202a.

In relevant part, the district court held that the CWA unambiguously requires an NPDES permit for a transfer of water containing pollutants from one body of navigable waters to another, even if the water is not altered or put to an intervening use. Pet. App. 154a-170a. The court noted that EPA had proposed a regulation clarifying that such water transfers are not subject to regulation under the NPDES permitting program. *Id.* at 168a; see 71 Fed. Reg. 32,887 (2006). The court found it unnecessary to determine the level of deference to accord EPA's interpretation, however, because it concluded

---

[2] The Court further held that an NPDES permit is not required to convey water within a single water body. *Miccosukee*, 541 U.S. at 109-110. Based on its determination that further development of the factual record was necessary to resolve whether the canal and WCA-3 are "meaningfully distinct water bodies," the Court vacated the Eleventh Circuit's judgment and remanded the case for further proceedings. *Id.* at 112.

that Congress clearly intended to require NPDES permits for water transfers. Pet. App. 169a-170a.[3] The district court subsequently granted an injunction requiring the executive director of SFWMD to apply for an NPDES permit. *Id.* at 41a-52a.[4]

5. While appeals from the district court's judgment were pending, EPA promulgated a final regulation providing that a water transfer—defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"—does not require an NPDES permit. 73 Fed. Reg. 33,697 (2008) (40 C.F.R. 122.3(i)). The water-transfer rule creates an exclusion for water transfers from the NPDES permitting regime. *Ibid.* The exclusion "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Ibid.* The final rule was nearly identical to the proposed rule that EPA had published two years earlier, which in turn had been based on an August 2005 interpretive memorandum by EPA reaching the same conclusion. 73 Fed. Reg. at 33,699.

---

[3] Respondents also contended that the canals and Lake Okeechobee are not meaningfully distinct water bodies and that water transfers between them thus do not require an NPDES permit. See note 2, *supra*. After a three-month bench trial, the district court found that the canals and lake are meaningfully distinct. Pet. App. 170a-177a. Based on the district court's findings of fact with respect to that issue, the court of appeals stated that it was "satisfied that the agricultural canals and Lake Okeechobee are meaningfully distinct water bodies." *Id.* at 10a n.4.

[4] The district court dismissed SFWMD from the case on Eleventh Amendment grounds. Pet. App. 178a-200a. The court of appeals dismissed petitioners' cross-appeal of that ruling as moot because the remedy petitioners sought applied equally against SFWMD's executive director. *Id.* at 6a-10a.

6. a. The court of appeals reversed. Pet. App. 1a-38a. In light of EPA's intervening regulation, the court of appeals applied the two-step framework described in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984), to determine whether a water transfer requires an NPDES permit. Pet. App. 10a-37a.

At step one of its *Chevron* analysis, the court of appeals applied "the traditional tools of statutory construction," including an examination of the CWA's text, structure, purpose, and legislative history, and determined that there are two reasonable interpretations of the term "discharge of a pollutant" as applied to water transfers. Pet. App. 25a-36a. Under one interpretation, the court stated, the term means "any addition . . . to [any] navigable waters," such that a water transfer constitutes a discharge because it adds a pollutant to the receiving body of water. *Id.* at 36a (brackets in original). Under the other interpretation, the court stated, the term means "any addition . . . to navigable waters [as a whole]," such that a water transfer does not constitute a discharge because the pollutant is already in the waters of the United States. *Ibid.* (brackets in original). The court concluded that both interpretations are plausible and that the statute therefore is ambiguous on the question whether a water transfer is a "discharge of a pollutant" that requires an NPDES permit. *Ibid.*

Proceeding to step two of *Chevron*, the court of appeals held that EPA's water-transfer rule is permissible and thus controlling. Pet App. 36a-37a. "Because the EPA's construction is one of the two readings we have found is reasonable," the court explained, "we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 844). The court added that, "[u]nless and until the

EPA rescinds or Congress overrides the regulation, we must give effect to it." *Id.* at 37a.

b. Petitioners filed petitions for rehearing and rehearing en banc. In its response to those petitions, the United States noted that EPA intends to reconsider the water-transfer rule. Gov't C.A. Reh'g Br. 15 (filed Oct. 9, 2009). On May 7, 2010, the court of appeals denied the petitions. Pet. App. 203a-204a.

DISCUSSION

The court of appeals correctly held that the CWA does not unambiguously resolve the question whether an NPDES permit is required for water transfers, and that EPA's 2008 regulation is a permissible construction entitled to *Chevron* deference. That decision does not conflict with any decision of this Court or of another court of appeals. Although the First and Second Circuits have held that an NPDES permit is required for water transfers, those cases were decided before EPA promulgated the water-transfer rule. The First and Second Circuits therefore had no occasion to apply the *Chevron* framework to EPA's 2008 regulation or to consider whether the agency's position reflects a reasonable interpretation of the statute. Moreover, as the government explained in its response to the rehearing petitions filed in the Eleventh Circuit, EPA is in the process of reconsidering its water-transfer rule. Accordingly, further review is not warranted at this time.

1. The decision of the court of appeals is correct. Under this Court's established two-step framework for reviewing an agency regulation that interprets a federal statute, a court first asks whether the statute directly speaks to the precise question at issue. If so, the court must give effect to the unambiguously expressed intent

of Congress. If not, the court proceeds to step two and asks whether the agency interpretation is a permissible construction of the statute. So long as it is reasonable, the agency regulation must be upheld. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). As the Eleventh Circuit held (Pet. App. 25a-37a), the CWA is ambiguous as to whether a water transfer is subject to the NPDES permit requirement, and EPA's 2008 rule is a permissible construction entitled to *Chevron* deference.

a. Under *Chevron* step one, a statute is ambiguous if, after application of the traditional tools of statutory construction, it is "capable of being understood in two or more possible senses or ways." *Chickasaw Nation* v. *United States*, 534 U.S. 84, 90 (2001) (citation omitted). That is the case here. Contrary to petitioners' contention (10-196 Pet. 16-29; 10-252 Pet. 13-20), the CWA does not unambiguously compel the interpretation that water transfers require an NPDES permit.

CWA Section 301(a) requires an NPDES permit for the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1311(a), 1362(12)(A). As relevant here, that phrase may reasonably be read in at least two different ways. As petitioners acknowledge (10-196 Pet. 18-19), the term "navigable waters," in ordinary usage, can refer either to "individual water bodies" or to "a collective whole." See Pet. App. 26a-27a. Similarly, the word "addition" is a general term that leaves discretion for the agency to interpret in this context. See, *e.g.*, *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (holding that EPA had discretion to define "addition").

On the one hand, the CWA refers in certain places to "*any* navigable waters," suggesting that the term "navigable waters" contemplates distinct water bodies. *E.g.*, 33 U.S.C. 1254(a)(3); 33 U.S.C. 1314(f)(2)(F) (emphasis added). In considering 33 U.S.C. 1362(12)(A) (defining the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source"), petitioners suggest that Congress's use of the prepositions "from" and "to" further shows that only the status of the receiving body of water matters. 10-196 Pet. 19. Under that reading, any discharge of pollutants to a navigable water body would constitute an "addition" to "navigable waters," even if the pollutant was merely transferred via water from another navigable water body.

On the other hand, the modifier "any" does not appear before "navigable waters" in Section 301(a). Moreover, the CWA defines "navigable waters" as "*the* waters of the United States." 33 U.S.C. 1362(7) (emphasis added). The absence of "any," combined with use of the definite article "the," supports the view that the term "navigable waters" in Section 301(a) refers to a unitary whole—*i.e.*, to all of "the waters of the United States" taken together. Under that interpretation, a water transfer is not a "discharge of a pollutant" because the pollutant is already part of "the waters of the United States" and therefore is not "add[ed]" to "the waters of the United States" by virtue of the transfer. Because the CWA's text does not unambiguously mandate either of the two competing constructions, the court of appeals correctly concluded (Pet. App. 25a-30a) that the text does not resolve the question whether an NPDES permit is required in this setting.

The broader statutory context, including the CWA's structure, purpose, and legislative history, does not alter that conclusion. See Pet. App. 30a-36a. Petitioners argue that because the CWA allows States to develop water-quality standards for individual bodies of water (33 U.S.C. 1313(c)(2)), and because water transfers could affect compliance with such standards in the receiving water body (33 U.S.C. 1313(d)), NPDES permits must be required. 10-196 Pet. 24-26 (citing *Miccosukee*, 541 U.S. at 107). Petitioners also contend (*id.* at 27) that allowing water transfers without NPDES permits would undermine the Act's purpose: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[5]

Petitioners, however, ignore other aspects of the CWA's regime that contemplate activities affecting the water quality of individual water bodies that arguably fall outside the scope of the NPDES program. In particular, Congress specified that "the authority of each State to allocate quantities of water within its jurisdic-

---

[5] Petitioners further argue (10-196 Pet. 23) that the Act's regulation of discharges of "dredged spoil" under the Section 404 permitting program, see 33 U.S.C. 1344, would be rendered "irrelevant" under EPA's interpretation because dredged spoil "inherently comes from" navigable waters. That argument lacks merit. Dredged spoil consists of material such as soil, sand, and vegetation excavated from the bottom of a waterbody or wet area. 40 C.F.R. 232.2; 33 C.F.R. 323.2(c); see *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). Such materials are not pollutants while in their original place; rather, they become pollutants only when they are excavated. Dredged spoil therefore is not "inherently" part of the waters of the United States, and Section 404 permits are still required for discharges of dredged material. As EPA made clear in promulgating the 2008 regulation, its water-transfer rule does not affect the Section 404 permitting program. See 73 Fed. Reg. at 33,703.

tion shall not be superseded, abrogated or otherwise impaired by [the Act]." 33 U.S.C. 1251(g). Section 304(f), which concerns nonpoint sources of pollution, discusses control of pollution from, *inter alia*, "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. 1314(f)(2)(F). Although such activities are not exclusively nonpoint source in nature, Section 304(f) is focused primarily on sources outside the scope of the NPDES program. 73 Fed. Reg. at 33,702. Accordingly, while the stated purpose of the CWA is to protect the waters of the United States, the Act does so within the framework of federal-state cooperation and not exclusively through operation of the NPDES permitting program.

Because the traditional tools of statutory construction do not unambiguously compel the conclusion that water transfers are subject to the NPDES permit program, the court of appeals correctly proceeded to step two of the *Chevron* analysis. Pet. App. 36a.[6]

b. Under *Chevron* step two, EPA's regulation is controlling "if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009); see *National Cable & Telecomms.*

---

[6] The CWA's legislative history reinforces the conclusion that the Act does not compel petitioners' interpretation. See 73 Fed. Reg. at 33,703; *Gorsuch*, 693 F.2d at 173 (finding strong signals in the legislative history that Congress "entrusted EPA with at least some discretion over which 'pollutants' and sources of pollutants were to be regulated under the NPDES program" and "generally intended that EPA would exercise substantial discretion in interpreting the Act").

Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (*Brand X*) (filling statutory gaps involves policy choices that agencies are better equipped to make than are courts); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) ("the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"). EPA's 2008 regulation reflects a permissible construction of the CWA that the government had previously endorsed both in prior litigation and in EPA's administrative practice. See, *e.g.*, U.S. Amicus Merits Br. 15-28, *Miccosukee*, *supra*; 73 Fed Reg. 33,699 (citing 2005 EPA legal memorandum and 2006 proposed rule); cf. *Gorsuch*, 693 F.2d at 173; *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). Moreover, the preamble to the current water-transfer rule sets forth in detail a reasoned explanation of how the CWA supports the agency's construction. See 73 Fed. Reg. at 33,700-33,706. The Eleventh Circuit therefore correctly explained that, whether or not the court would have adopted the same construction in the absence of an official agency position, EPA's interpretation is at least reasonable and is therefore entitled to deference under the principles announced in *Chevron*. Pet. App. 36a-38a.

c. Petitioners contend (10-252 Pet. 24-33) that according *Chevron* deference to EPA's regulation violates administrative-law and separation-of-powers principles because the regulation was promulgated during the course of this litigation and has influenced its outcome. That argument lacks merit. This Court has repeatedly held that regulations otherwise entitled to *Chevron* deference do not lose that entitlement simply because they were adopted during or in direct response to litigation. See, *e.g.*, *Smiley*, 517 U.S. at 740-741 (according *Chev-*

ron deference to a rule adopted after, and in direct response to, the lower court decision in that case; it "does [not] matter that the regulation was prompted by litigation, including this very suit"); *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002); *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984). In any event, as noted above (p. 14, *supra*), the position set forth in EPA's 2008 water-transfer rule is consistent with the agency's practice and policy preceding this litigation.

Nor is there merit in petitioners' contention (10-252 Pet. 24-27) that EPA's water-transfer rule loses its entitlement to *Chevron* deference simply because some lower courts previously had rejected the construction of the CWA that was set forth in that rule. In *Barnhart*, the agency's position had been rejected by other courts of appeals in decisions that preceded the promulgation of the regulation, and the agency's position had been rejected by the Fourth Circuit under *Chevron* step one based on that court's conclusion that the statutory language unambiguously precluded it. See 535 U.S. at 218-224; see also *Walton* v. *Apfel*, 235 F.3d 184, 191 n.10 (4th Cir. 2000), rev'd *sub nom. Barnhart* v. *Walton*, 535 U.S. 212 (2002). This Court nevertheless held that the statute was ambiguous, and it accorded *Chevron* deference to the agency regulation promulgated during the course of the litigation. *Id.* at 221. The Eleventh Circuit in this case was situated similarly to this Court in *Barnhart*. Here, the district court rejected the agency's position on the ground that the statute is unambiguous, Pet. App. 154a-170a, but the court of appeals reversed, concluding that the statute is ambiguous and that EPA's recently promulgated regulation is entitled to *Chevron* deference, *id.* at 1a-38a.

Petitioners' argument also cannot be reconciled with *Brand X*, *supra*. In that case, the court of appeals declined to apply *Chevron* to the agency's regulation because the court viewed itself as bound by its own contrary construction of the statute in a prior case. 545 U.S. at 982. This Court rejected that reasoning. It explained that judicial precedent could foreclose the subsequent agency interpretation only if the court in the prior case had held that the statute unambiguously required the competing construction. *Id.* at 982-985.

In this case, no binding precedent prevented the court of appeals from reviewing and upholding EPA's water-transfer rule under the two-step approach set forth in *Chevron*. The district court's decision in this case was not binding on the Eleventh Circuit. Further, the prior decisions of the First and Second Circuits on which petitioners rely, which held NPDES permitting requirements applicable to water transfers of the sort at issue, neither foreclosed EPA from adopting a contrary approach nor foreclosed the Eleventh Circuit from upholding the agency's interpretation. See *Dubois* v. *United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of N.Y.*, 273 F.3d 481 (2d Cir. 2001) (*Catskill I*); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of N.Y.*, 451 F.3d 77 (2d Cir. 2006), cert. denied, 549 U.S. 1252 (2007) (*Catskill II*). As discussed further below (pp. 19-20, *infra*), the First and Second Circuits had no occasion to address the precise question presented here—*i.e.*, whether EPA's 2008 regulation survives appropriately deferential review under the two-step *Chevron* framework—because those cases were decided before that regulation was promulgated. In any event, those deci-

sions were not binding on the Eleventh Circuit in this case.

There is likewise no merit to petitioners' related contention (10-252 Pet. 28-33) that the decision below conflicts with *United States* v. *Klein*, 80 U.S. 128 (1871). In *Klein*, this Court addressed a federal statute mandating that a presidential pardon be treated as proof that the pardoned individual had given aid or comfort to the Civil War rebellion. The Court held that the law was unconstitutional because it purported to prescribe rules of decision in a case pending before the judiciary, and because it impaired the effect of a pardon, thereby infringing on the constitutional authority of the executive. *Id.* at 146-148. Since *Klein*, however, the Court has recognized that Congress may change the applicable law during and in response to litigation, and that such amendments may validly affect the outcome of pending lawsuits, so long as Congress does not direct a court to make specific factual findings or to reach a specific result in a pending case. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438-439 (1992); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("Whatever the precise scope of *Klein*, * * * later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'") (quoting *Robertson*, 503 U.S. at 441).

Klein is inapposite here for several reasons. First, *Klein* pertains to congressional legislation, and no intervening legislation is involved in this case. Rather, in promulgating the water-transfer rule, EPA exercised well-recognized agency authority (see p. 15, *supra*) to clarify ambiguous statutory terms whose meaning is at issue in pending litigation. Second, EPA's water-transfer rule is a regulation of general applicability that does

not mandate particular factual findings or specific results in this or any other case. Third, EPA's promulgation of the water-transfer rule did not have the effect of "usurping" the judicial function of the court of appeals. 10-252 Pet. 31-33. Before deferring to the regulation under *Chevron*, the court of appeals held, based on its own analysis of the statute, that the CWA is ambiguous on the question presented and that the district court erred in concluding otherwise.

As this Court has explained, deference to agency regulations is appropriate because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866. In this case, the CWA's overall scheme indicates that Congress intended to vest EPA with significant discretion, and the water-transfer rule is a permissible exercise of that discretion. Thus, rather than vindicating separation-of-powers principles, acceptance of petitioners' position would improperly shift from the agency to the courts the primary responsibility for resolving ambiguities in the CWA's text.[7]

2. a. Contrary to petitioners' contention (10-252 Pet. 8, 10-11), the decision of the court of appeals does not conflict with this Court's decision in *Miccosukee*. In *Miccosukee*, this Court held that a discharge subject to NPDES permitting requirements may occur even when

---

[7] Although EPA promulgated the final water-transfer rule after initial briefing in the court of appeals had been completed, petitioners could have raised their separation-of-powers objections in their petitions for rehearing and rehearing en banc. They did not do so. This Court ordinarily does not consider issues neither raised before nor considered by the lower courts. See, *e.g.*, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (collecting cases).

the relevant point source is not itself the source of the pollutant. 541 U.S. at 104-105. The Court declined, however, to decide the separate question whether water transfers from one body of navigable waters to another require NPDES permits, and instead expressly left that issue open to be raised on remand. *Id.* at 109 ("[W]e decline to resolve it here. * * * [T]he unitary waters argument will be open to the parties on remand."); *id.* at 112 ("[T]he Government's broader 'unitary waters' argument is open to the District on remand."). The Court also noted the absence of any EPA administrative document to which deference could be accorded. *Id.* at 107. The Court thus had no occasion to consider, let alone resolve, the *Chevron*-based issues decided below.

b. The Eleventh Circuit's decision does not conflict with any decision of another court of appeals. As noted above, the First and Second Circuits have held that NPDES permits were required for particular water transfers. See *Dubois*, *supra*; *Catskill I*, *supra*; *Catskill II*, *supra*. Because those cases were decided before promulgation of EPA's water-transfer rule, however, the courts did not approach the issue through the lens of *Chevron*. To the contrary, the First and Second Circuits specifically stated that the *Chevron* framework was inapplicable because there was no formal EPA interpretation potentially entitled to *Chevron* deference. *Catskill I*, 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference * * * might be appropriate."); *Catskill II*, 451 F.3d at 82, 83 n.5 (EPA guidance memorandum not in form entitled to *Chevron* deference); *Dubois*, 102 F.3d at 1285 n.15 (*Chevron* "does not apply * * * because we are not reviewing an agency's interpretation of the statute that it was directed to enforce.");

see also *Miccosukee Tribe of Indians* v. *SFWMD*, 280 F.3d 1364, 1367 n.4 (11th Cir. 2002) (court could "ascertain no EPA position * * * to which to give *any* deference, much less *Chevron* deference"), vacated and remanded, *Miccosukee*, 541 U.S. at 107, 109.

As discussed above (p. 16, *supra*), this Court has held that a court must defer to a regulation otherwise entitled to *Chevron* deference, even if it is inconsistent with the court's own prior statutory interpretation, unless the prior decision was based on the unambiguous terms of the statute. See *Brand X*, 545 U.S. at 982-985. In neither *Dubois* nor the *Catskill* cases did the court of appeals hold that the CWA unambiguously requires an NPDES permit for a water transfer. See *Catskill I*, 273 F.3d at 490; *Catskill II*, 451 F.3d at 82, 83 n.5; *Dubois*, 102 F.3d at 1285 n.15. Accordingly, under *Brand X*, the question whether EPA's water-transfer rule is valid remains open in the First and Second Circuits. As the Eleventh Circuit explained, the courts in *Dubois* and the *Catskill* cases "decided only how best to construe the statutory language—not whether that language is ambiguous and could reasonably be construed another way." Pet. App. 24a. On the latter question, which is the only one that matters in light of EPA's 2008 rule, there is no conflict among the courts of appeals.

3. In its response to petitioners' rehearing petitions in the court of appeals, the government explained that EPA intends to reconsider its current water-transfer rule. Gov't C.A. Reh'g Br. 15. If EPA ultimately decides to change the rule, any tension among the aforementioned cases presumably would be eliminated. The

possibility of such a change provides an additional reason for this Court to deny review.[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
ELLEN J. DURKEE
Attorney

OCTOBER 2010

[8] To be sure, if EPA promulgates a regulation that requires NPDES permits for water transfers between distinct bodies of navigable waters, that regulation may be challenged in court. At the present time, however, any dispute as to the permissibility of such a regulation is purely hypothetical. This case would be an inappropriate vehicle to decide whether EPA could lawfully issue a different water-transfer rule that it has not actually promulgated.