03-7203

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.,

Plaintiffs-Appellees-Cross-Appellants,

-against-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

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

RESPONSIVE SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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Dated: October 28, 2005

JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

-against-

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

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PRELIMINARY STATEMENT

On October 23, 2001, this Court ruled that New York City's (City's) transfer of polluted water from the Schoharie Reservoir to Esopus Creek via the Shandaken Tunnel was a "'discharge of a pollutant'" within the plain meaning of the Clean Water Act (CWA) and subject to permitting requirements. *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York,* 273 F.3d 481, 494 (2d Cir. 2001) ("Circuit Court") (quoting 33 U.S.C. § 1362(12)). On remand, the District Court ordered the New York City Department of Environmental Protection (DEP) and the New York State Department of Environmental Conservation (DEC) to complete the National Pollutant Discharge Elimination System (NPDES) permitting process by August, 2004. *See Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York,* 244 F. Supp. 2d 41, 57 (N.D.N.Y. 2003). The District Court also assessed $5.7 million in penalties against the City. *Id.* The City appealed to this Court, plaintiffs cross-appealed from the amount of the penalty, and the matter has been fully briefed since August, 2004.

On August 5, 2005, the Environmental Protection Agency (EPA) issued an internal EPA memorandum and attached it to the United States Intervenor's summary judgment brief in *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 02-CV-80309 (S.D. Fla. 2005) (attached hereto as Exhibit A). The memo purports to reject this Court's prior holding and posits that transfers of polluted

water from one water body to another do not require NPDES permits, as long as the water was not subject to "intervening" use. Memorandum from Ann R. Klee and Benjamin H. Grumbles to Regional Administrators re: Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 1, 3, 13 (Aug. 5, 2005) (attached hereto in Exhibit A). Subsequently, the City submitted a proposed Supplemental Brief and the EPA memo to this Court. This brief responds to the City's Supplemental Brief.

EPA's memo is not law; it is not a change in the law; it is not even a rule that could be entitled to meaningful deference. Further, the memo is based upon a deeply flawed assessment of the Clean Water Act. This Court should reject EPA's memo, and affirm its prior decision.

SUPPLEMENTAL ARGUMENT

I. The Second Circuit has already ruled on the issue discussed in the EPA memo, and there has been no change in the law since that time. Thus, the Second Circuit should follow its prior decision rejecting the very argument now advanced in EPA's memo.

A. Under the law of the case, there are neither cogent nor compelling reasons for the Second Circuit to consider the EPA memo.

As discussed in plaintiffs' principal brief in this appeal, the law of the case doctrine gives a court "discretion to reconsider its own prior rulings," but does not mandate reconsideration. *SCS Commc'ns., Inc. v. Herrick Co.,* 360 F.3d 329, 336 (2d Cir. 2004) (citation omitted). Under the doctrine, there should be "cogent" or

"compelling" reasons to reconsider. *United States v. Tenzer,* 213 F.3d 34, 39 (2d Cir. 2000) (citation omitted). Cogent and compelling reasons include an intervening change of controlling law, the availability of new evidence, and the need to correct clear error or manifest injustice. *Id.* at 39. EPA's memo is none of those things.

First, the memo is not law. *See Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (stating that interpretations such as those "contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law").[1] Contrary to the City's implicit contention, the EPA cannot reverse the Court of Appeals. Second, EPA's memo is not new evidence, as it does not address any of the facts alleged in the complaint or determined by the District Court. It more closely resembles a late amicus brief and reflects a position already taken by the United States in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 104 (2004). Third, as discussed in plaintiffs' principal brief and below, there is no need to correct this Court's prior decision. That decision was neither clearly erroneous nor manifestly unjust.

[1] Even if the Court were to decide that the EPA memo *is* an intervening change of controlling law and reverse itself, then it should nevertheless affirm the penalty

B. The EPA memo is not entitled to meaningful deference.

1. The EPA memo is not entitled to *Chevron* deference because it is not a rule and it was not developed through any formal adjudication or notice-and-comment period.

United States v. Mead Corp. made it clear that *Chevron* deference is only appropriate "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.*" 533 U.S. 218, 226-27 (2001) (emphasis added).[2] Similarly, interpretations that have not undergone "formal adjudication or notice-and-comment rulemaking . . . such as those in opinion letters . . . do not warrant *Chevron*-style deference. Instead, as this Court previously noted, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Christensen,* 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)) (other internal citations omitted); *see also Catskill,* 273 F.3d at 490-91 (Circuit Court). Even if EPA's memo were a rule, it would only deserve "considerable" deference *if* Congress had not spoken on the subject and *if* the agency

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judgment against the City: until the "change" in the law, the City was in violation of the Clean Water Act.

[2] There is no provision in the CWA delegating authority to EPA to re-define the term "addition" as used in the Act. *Compare with, e.g.,* 33 U.S.C. § 1314(a) ("[t]he Administrator . . . shall develop and publish . . . criteria for water quality").

interpretation were reasonable. *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44 (1984). As discussed in Section II, neither is the case here.

2. The EPA memo is not "entitled to respect" because it is not persuasive.

In *Skidmore*, the Supreme Court stated that the weight agency interpretations should be afforded depends upon "the thoroughness in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. The EPA "interpretation" fails the test. First, as discussed in Section II, its thoroughness and validity of reasoning are deficient. Second, it is not consistent with earlier pronouncements. The current "interpretation" argues that inter-basin transfers of unused water are not subject to the Clean Water Act. As the Supreme Court noted, however, several former EPA officials and the former Administrator, Carol M. Browner, filed an *amicus* brief in the *Miccosukee* case arguing that the EPA has previously decided that inter-basin transfers constitute "additions" under the CWA. *Miccosukee,* 541 U.S. at 107. The *Miccosukee* Court cited the brief as evidence refuting EPA's assertion that its "unitary waters" approach deserved deference as a "longstanding EPA view."[3] *Id.* Further, a 2002

[3] The former Administrator's brief in that case cited to an Office of General Counsel Opinion in which EPA decided that a transfer of navigable waters through

letter from the Administrator of EPA Region II to DEP mentions "the requirement for a valid State Pollutant Discharge Elimination System (SPDES) permit to discharge Hudson River water into the West Branch Reservoir, pursuant to the Clean Water Act." Letter from Jane M. Kenny to Joel A. Miele, Sr. of 3/14/02; *see also* Letter from Jane M. Kenny to Erin M. Crotty and Antonia C. Novello of 3/14/02 (both attached to Decl. of Karl S. Coplan in Supp. of Pls.' Mot. to Submit a Resp. Supplemental Br. as Exhibit B). Thus, EPA has indeed previously (and correctly) taken the position than an inter-basin transfer would require a permit. The letters did not state that the permit determination was contingent on whether the water was "treated" or "untreated," or "used" or "unused."

Finally, other factors undermine the persuasiveness of EPA's memo. It involves a highly political subject and was issued specifically for litigation purposes in Florida, surfacing as an attachment to a summary judgment motion. *See* United States Intervenor's Summ. J. Mot. in *Friends of the Everglades, supra.* Such litigation documents are entitled to even less deference than an ordinary

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an irrigation ditch required an NPDES permit. *Miccosukee,* 541 U.S. at 107 (citations omitted). The most recent EPA "interpretation" attempts to distinguish the earlier decision by noting that the former inquiry was whether the ditch was a point source, not whether an "addition" had occurred. Memorandum at 2 n.3. EPA's current argument only makes clear that the "addition" was assumed and was not in dispute. The current "interpretation" finally appears to accept the inconsistency when it states: "To the extent the 1975 Opinion, *In re Riverside Irrigation Dist.,* conflicts with this Agency interpretation with respect to water transfers, it is superseded." *Id.* at 3 n.3

agency interpretation would be. *See, e.g., Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004) ("'to carry much weight, an agency's interpretation must be publicly articulated at some time prior to the embroilment of the agency in litigation over the disputed provision'") (citation omitted); *Catskill,* 273 F.3d at 491 (Circuit Court) ("a position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference") (citations omitted). Though an interpretation advanced during litigation may be entitled to limited deference if it "reflect[s] the agency's fair and considered judgment on the matter in question," *Auer v. Robins,* 519 U.S. 452, 462 (1997), for reasons discussed below, the instant "interpretation" is not a "fair and considered judgment" and is not entitled to *Auer* deference.

II. The EPA memo is based upon a flawed assessment of the Clean Water Act.

EPA's memo insists that it utilizes an "holistic approach" to the Clean Water Act. Memorandum at 5. In other words, the EPA "interpretation" ignores the statutory language at issue in order to search for more favorable verbiage elsewhere in the statutory scheme. A true holistic assessment of statutory construction and case law shows that inter-basin transfers require NPDES permits when they release pollutants from one body of water to another.

A. The EPA memo purports to rely on the "statutory language and structure" of certain portions of the Act, but in fact ignores the statutory language.

1. The EPA memo ignores the plain meaning of the Act.

The memo claims that "no one provision of the Act expressly addresses whether water transfers are subject to the NPDES program." Memorandum at 5. Actually, the foundational provision of the Clean Water Act expressly prohibits "the discharge of *any* pollutant from *any* point source," unless otherwise in compliance with the Act. § 301, 33 U.S.C. § 1311(a) (emphasis added). The provision does not exempt water transfers, and nothing in its plain language suggests that water transfers fulfilling the prohibition *could* be exempt. Absent statutory authorization, EPA does not have the power to exempt categories of discharges from NPDES permitting requirements. *Cf. Natural Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1377 (D.C. Cir. 1977).

The CWA defines "discharge" to mean "*any* addition of *any* pollutant to navigable waters." 33 U.S.C. § 1362(12) (emphasis added). The plain meaning of "add" is "to unite or join to another or others so as to produce a greater number, quantity . . . ." *The Random House College Dictionary* 16 (Rev. ed. 1988). Simple math dictates that when polluted water is released into another water, the receiving water will then have a "greater number, quantity" of pollutants. The result is

unavoidable. Congress's use of the word "any" before addition shows it did not contemplate any exceptions from the plain meaning of the term "addition."

EPA's memo wrongfully brushes aside the plain meaning of section 301 by claiming that, because the statute does not define "addition," "'addition' should be interpreted in accordance with [selected] more specific sections of the statute." *See* Memorandum at 7. Instead, "as 'in all statutory construction cases,'" the analysis of section 301 should begin "'with the language of the statute.'" *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 124 S. Ct. 2466, 2477 (2004) (citation omitted). This Court recognized as much when it held that "none of the statute's broad purposes sways us from what we find to be the plain meaning of its text . . . that the textual requirements of the discharge prohibition in § 1311(a) and the definition of 'discharge of a pollutant' in § 1362(12) are met here." *Catskill*, 273 F.3d at 494 (Circuit Court).

2. The EPA memo ignores the purpose of the Act.

The memo does not even mention the purpose of the Clean Water Act, except to brush it aside as inconsistent with state and local programs that manage water quantity. *See* Memorandum at 5. The brush-off is hardly surprising, as EPA's memo would thwart 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).

The CWA is concerned with the addition of *pollutants*: "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The *source* of the pollutant is irrelevant and the Act's definition leaves no room for EPA's bizarre distinction between transfers of "used" water and transfers of "unused" water. In fact, many of the listed pollutants are *not* generally associated with "intervening industrial, municipal, or commercial use" assumed by EPA – *e.g.,* rock, sand, cellar dirt, garbage, biological materials, dredged spoil, sewage, munitions, discarded equipment. In effect, EPA is attempting to redefine "pollutant" for the purposes of water transfers, despite its claim that the "interpretation" does not address "any jurisdictional terms under the statute other than 'addition.'" Memorandum at 18. Where water transfers are concerned, EPA would have the term "pollutant" include only those resulting from intervening use of the transferred water.

Nothing about this artificial distinction, advanced by the agency charged with protecting our environment, serves to "restore [or] maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It does the opposite.

3. The EPA memo distorts the context of the Act.

Apparently recognizing that the plain meaning of section 301 includes inter-basin transfers as "additions" of pollutants, EPA's memo contends the Act should instead be interpreted in light of provisions "addressing the management of water resources." Memorandum at 5. In particular, it cites sections 101(g), 510(2), and 304(f) as authority for the proposition that water transfers should not be subject to the NPDES program. *See id.* at 5-6.

As discussed in plaintiffs' principal brief, two Supreme Court cases and the legislative history of the Act refute EPA's argument regarding those sections. *See* Pls.' Brief 31-45 (discussing *Miccosukee,* 541 U.S. 95; *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology,* 511 U.S. 700 (1994); 123 Cong. Rec. 39 (1977) (statement of Senator Wallop)). The EPA memo recognizes but dismisses *PUD No. 1*'s treatment of sections 101(g) and 510(2), and, misleadingly, quotes only one portion of the speech by Senator Wallop concerning 101(g). The memo quotes: "'[i]t is the purpose of this [provision] to insure that State [water]allocation systems are not subverted.'" Memorandum at 8 (citation omitted). The entire statement reads:

> Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. *Water quality standards and their upgrading are legitimate and necessary under this act. . . . It is not the purpose of this amendment to prohibit those incidental effects.* It is the purpose of this amendment to insure that State allocation systems are not

> subverted, and that *effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations*.

123 Cong. Rec. 39,170, 39,212 (1977) (statement of Sen. Wallop) (emphasis added).

Similarly, EPA's memo quotes only part of *Miccosukee*'s treatment of section 101(g). The memo states:

> The Court stated, "It may be that construing the NPDES program to cover such transfers would . . . violate Congress' specific instruction that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired' by the Act."

Memorandum at 14 (quoting *Miccosukee*, 541 U.S. at 108). The next sentence in *Miccosukee* stated:

> On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs.

541 U.S. at 108. Further, EPA's memo does not address various CWA provisions that counsel rejection of the "unitary waters" theory.[4] In sum, the EPA's distorted "interpretation" of the Act is anything but "fair and considered." *Auer,* 519 U.S. at 462.

[4] The provisions were highlighted in *Miccosukee* and discussed in plaintiffs' principal brief at 31-35.

B. The EPA memo rejects fundamental CWA principles that have been adopted by numerous courts, including the Supreme Court.

Established case law supports a distinction between "intra" and "inter" basin transfers under the Clean Water Act: "inter" basin transfers are subject to NPDES permitting, "intra" basin transfers are not. Contrary to this established case law, EPA's memo asserts that "inter" basin transfers are *not* subject to the CWA, *unless* they have been subjected to intervening use.

1. The EPA memo misconstrues *Gorsuch* and *Consumers Power*, which held only that NPDES permits are not required for *intra*-basin transfers.[5]

Though the memo claims that "[n]othing in this Agency interpretation affects EPA's longstanding approach to regulation of [intra-basin] discharges under section 402," Memorandum at 10 n.12, its reasoning actually suggests that both *Gorsuch* and *Consumers Power* were wrongly decided. Under EPA's rationale, the releases in *Gorsuch* and *Consumers Power* should have been subject to the Clean Water Act because they were subject to "intervening" use (dam, turbine facility). Instead, EPA attempts to have it both ways: 1) intra-basin transfers that create pollution are not subject to the CWA because they release into the same body of water, *even though* they were subject to intervening use; and 2) inter-basin

[5] For a thorough discussion of *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), plaintiffs respectfully refer the Court to plaintiffs' principal brief at 29-31.

transfers that add pollution from one body of water to another are not subject to the CWA, *unless* they were subject to intervening use. EPA thus whittles away the protections and the goals of the Clean Water Act.

2. The EPA memo improperly rejects *Dubois, Dague,* and this Court's prior decision in *Catskill*, which established that NPDES permits are required for *inter*-basin transfers.

As discussed in plaintiffs' principal brief, this Court properly recognized the important factual distinction between *Gorsuch/Consumers Power* transfers, and transfers between two water bodies. *See* Pls. Br. 30; *Catskill*, 273 F.3d at 492 (Circuit Court). The distinction is well-grounded in case law. *See, e.g., Dubois v. U.S. Dep't of Agric.,* 102 F.3d 1273, 1299 (1st Cir. 1996) (finding an addition where water was piped from a river to a pond); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (finding an addition where water was transferred from a pond to a wetland).

EPA's memo accuses this Court and the *Dubois* court of "focusing solely on the term 'addition'" and ridicules that approach as not "the better approach." Memorandum at 13. As mentioned above, the memo urges instead an "holistic" approach that, rather than being truly holistic, is an unbalanced focus on "water resource management" and the "overall division of responsibility between State and federal authorities under the statute." *Id.* With it, EPA brushes aside established case law and seeks to sweep the foundational, long-standing

prohibition of the Clean Water Act under the rug while simultaneously misrepresenting the statute's balance of state and federal authority.

3. The EPA memo misrepresents *Miccosukee*'s approval of the inter/intra-basin transfer distinction.

As discussed in plaintiffs' principal brief, *Miccosukee*'s reasoning follows the distinctions drawn between intra and inter-basin transfers, and quotes this Court's characterization of the distinction with approval. *See* Pls. Br. 30-31; *Miccosukee*, 541 U.S. at 106-10. EPA's memo claims that *Miccosukee* rejected *Dubois* and *Catskill* as "simplistic[]" when the *Miccosukee* Court suggested that whether two water bodies were meaningfully distinct would require consideration of many factors. Memorandum at 15. Specifically, EPA's memo disfavors the "but for/natural flow" test. *Id.*

In this respect, EPA's memo is misleading in many ways. First, *Miccosukee* did not question that the "but for/natural flow" test had value, and left it open on remand. *See Miccosukee*, 541 U.S. at 111. Second, the plaintiffs in *Miccosukee*, those who sought to protect the waters, advocated a "biological/ecosystem" test. *See id.* at 110. Third, EPA's memo completely ignores language in *Dubois* and *Catskill* focusing on the independent distinctness of the two water bodies. *See Dubois,* 102 F.3d at 1297 (stating that "the East Branch and Loon Pond are not the same body of water" and noting extreme pollution in the East Branch); *Catskill*, 273 F.3d at 492 (describing the water bodies as "utterly unrelated in *any* relevant

sense") (emphasis added). Furthermore, EPA's memo rather nebulously claims to "reflect[] EPA's consideration of [the *Miccosukee* Court's] concerns" regarding the "unitary waters" theory. Memorandum at 14 n.14. Apparently, EPA does not consider the Supreme Court's concerns to be particularly meritorious, as they are relegated to a footnote and dismissed.[6]

III. The City's suggestion in its Supplemental Brief, that this Court defer decision while EPA conducts a rulemaking process that could take at least three years, is unreasonable.

For the reasons discussed above, this Court should not reverse its prior decision. Further, the Court should not further delay this appeal pending rulemaking. The City is effectively seeking *Chevron* deference for a rule that has yet to be passed, and is suggesting that the EPA sits as a Court of Super-Appeals to review decisions of the Courts of Appeals. The average time for a rulemaking process, not including litigation, is three years. *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit,* 9 N.Y.U. Envtl. L.J. 60, 76-77 (2000). During that time, a stay would allow the City to continue polluting Esopus Creek in expectation of a rule that, even if promulgated after notice and comment, would, for the reasons discussed above, subsequently fail judicial review.

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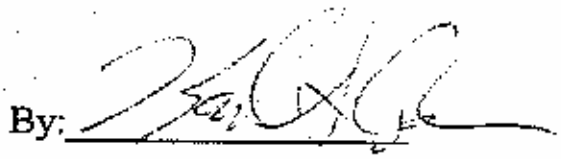
[6] For a discussion of the "unitary waters" theory and *Miccosukee*'s response to it,

CONCLUSION

For the above reasons, plaintiffs respectfully urge the Court to follow its prior decision and to reject the "interpretation" advanced in EPA's memo.

Dated: White Plains, NY
October 28, 2005

Respectfully submitted,

By: 

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