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CONCERNING *CATSKILL*: MISSED OPPORTUNITY, BROKEN PRECEDENT AND THE PLIGHT OF AMERICAN WATERS

CHASE COREY*

ABSTRACT

As society progresses and the population grows, uninhibited and unregulated pollution has become a pressing dilemma for current and future generations. Whether it is plastic on the beaches, oil in the oceans, or smog in the air, modern citizens of the Earth face a daily onslaught of visible consequences from the actions of polluters. But what about the not so visible consequences? Every day there is pollution occurring at a microscopic level, yet many are unaware of its presence. This infinitesimal issue is nutrient pollution, and despite its diminutive cause, it is deeply affecting one of the world's most vital resources: water. With the Second Circuit's reversal of the *Catskill Mountains* decision and the Supreme Court's denial of certiorari, the chance to kill a nutrient-pollution-enabling EPA rule may have slipped through America's fingers for the foreseeable future.

INTRODUCTION

What is thick, green, and causes side effects including rashes, illness, respiratory problems, and neurological issues?¹ If you guessed algae, then you have probably already heard of the outbreaks that have plagued the United States for years; fouling bodies of water throughout the country with startling frequency.² Although the recent increase in algal outbreaks can be attributed to a variety of factors, the main culprit according to the Environmental Protection Agency ("EPA") is nutrient

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¹ *Nutrient Pollution, The Effects: Human Health*, EPA, <https://www.epa.gov/nutrientpollution/effects-human-health> [<https://perma.cc/TCB6-JQBG>] (last updated Apr. 15, 2019).

² *Map of Reported Algae Blooms 2010–Present*, ENVTL. WORKING GROUP, https://www.ewg.org/interactive-maps/2019_algal_blooms/map/ [<https://perma.cc/W258-D6QM>] (last visited Dec. 3, 2019).

pollution from human activity.³ The National Ocean Service describes nutrient pollution as a “process where too many nutrients, mainly nitrogen and phosphorus, are added to bodies of water and can act like fertilizer, causing excessive growth of algae.”⁴ This form of pollution “makes the [algae] problem worse, leading to more severe blooms that occur more often.”⁵ Despite this, the EPA continues to endorse a theory that arguably exacerbates the nutrient pollution problem, and the agency remains stalwart in its refusal to address any issues stemming from their support of a potentially harmful train of thought.

The EPA’s rationale derives from the unitary waters theory, which “is the EPA’s position that when Congress enacted the [Clean Water Act] it intended that all waters within the borders of the United States be regulated as one big body of water.”⁶ Differing physical, chemical, and biological integrities are irrelevant; by the logic of the theory, one could “transfer[] dirty water from a city lagoon into a pristine mountain stream . . . [without adding] a toxic or pollutant to the stream.”⁷ The modern positions both for and against the theory are best illustrated by analogy, and the fictional situation that follows is an expanded version of the Eleventh Circuit’s helpful explanation.⁸

A man stands in a room. To his left sits a bucket, containing four marbles. To his right is another bucket, this one with nothing inside of it. Directly in front of the man is a sign, with words that state “Do Not Add Marbles to Buckets” in bold lettering. After considering the instruction in front of him, the man removes two marbles from the bucket on his left. He looks at the sign instructing him to not add marbles to buckets, and proceeds to drop two marbles into the empty bucket on his right. Three observers, after witnessing what has occurred, debate the disobedience of the man; has he added marbles to buckets against the instruction of the sign? The first observer contends that the man has disobeyed instructions. Clearly an addition has occurred, because there are now two marbles in a bucket where there had been none before. The second observer disagrees,

³ *Nutrient Pollution, Sources and Solutions*, EPA, <https://www.epa.gov/nutrientpollution/sources-and-solutions> [<https://perma.cc/T73Q-4HP4>] (last updated Feb. 4, 2019).

⁴ *What is nutrient pollution?*, NAT’L OCEAN SERV., <https://oceanservice.noaa.gov/facts/nutpollution.html> [<https://perma.cc/6TMZ-LD7B>] (last updated Oct. 22, 2019).

⁵ *Nutrient Pollution, Harmful Algal Blooms*, EPA, <https://www.epa.gov/nutrientpollution/harmful-algal-blooms> [<https://perma.cc/2CWY-KMG6>] (last updated July 17, 2019).

⁶ Heidi Hande, *Is the EPA’s Unitary Waters Theory All Wet?*, 6 WYO. L. REV. 401, 403 (2006).

⁷ *Id.* at 404.

⁸ *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009).

and believes that no addition has occurred: there were four marbles in buckets before, and there are four marbles in buckets now. The third observer notes the rationality of both positions, but refuses to explicitly state whether or not there has been an addition of marbles to buckets.

This analogy and its cast of characters should ring a bell to those familiar with the unitary waters theory and harken them to the relevant debate presented by the vignette: did the man add marbles to buckets? After revealing who the characters represent, the real debate becomes clearer. The buckets represent the waters of the United States; the marbles symbolize pollutants. The sign forbidding the addition of marbles also plays a role by representing government regulation, specifically the Clean Water Act (“CWA”). However, the most important characters for the purposes of this Note are the three observers. The first observer is representative of environmentalists, helplessly witnessing the addition of marbles despite the sign’s instructions. The second observer is the EPA, arguably employing semantics in order to claim that the man’s actions are not an addition. The third observer represents the courts, focusing only on the rationality of each argument, apparently without care for which side presents the most environmentally effective approach.

This Note’s purpose is to present an argument as to why the denial of certiorari in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill or Catskill Mountains)*, was not only a mistake but also a missed opportunity to prevent the Water Transfers Rule from further harming American waters. The Note will do so through legal and policy arguments, exhibiting the potential doctrinal benefits of a reversal in *Catskill* as well as the environmental effects an unbridled Water Transfers Rule could exacerbate. The Note will begin by tracing a modern timeline of the unitary waters theory with the intent of showcasing the path leading to the *Catskill* holding. It will then move into a general discussion of the Supreme Court’s denial of certiorari, arguing that *Catskill* was ripe for reconsideration. In its analysis of that argument, the Note will discuss the problematic *Chevron* standard while weighing various routes to certiorari that the Supreme Court could have utilized but failed to consider. The Note will then provide two arguments the Court could have rationally presented in order to reverse. The first argument will utilize the legal landscape of agency deference to exhibit the necessity of an alternative standard to *Chevron*, especially in fact-sensitive rule-making that necessitates scientific analysis. The second argument is one of policy and will examine the potential unintended consequences of the *Catskill* holding via an illustration of the national environmental problem that the Water Transfers Rule presents.

I. THE DEVELOPMENT OF THE UNITARY WATERS THEORY

The EPA and other governmental entities are frequently in the cross-hairs of environmental lawsuits due to their endorsement or support of various rules, and the Water Transfers Rule is no exception. The rule's story begins with the development of the unitary waters theory, starting chronologically with *Chevron, U.S.A., Inc. v. Natural Resources Council, Inc. (Chevron)*, a 1984 case that has factored heavily into the development of modern agency rule-making.⁹ The theory's story continues with post-*Chevron* courts free to consider the efficacy of the theory in the absence of a promulgated rule, resulting in a pattern of rejection by lower courts and a refusal to grant certiorari by the Supreme Court.¹⁰ This environmentally positive trajectory was directly altered by the promulgation of the Water Transfers Rule, which interpreted the CWA's National Pollutant Discharge Elimination System's ("NPDES") permitting process to explicitly exclude water transfers.¹¹ This essentially codified the unitary waters theory and forced courts beholden to the Supreme Court's *Chevron* deference framework to align with the EPA viewpoint expressed by the rule,¹² no matter their opinion of its efficacy. *Friends of the Everglades v. South Florida Water Management District (Friends of the Everglades)* exhibits judicial reluctance to accept the unitary waters theory and lays the analytical groundwork for future Water Transfers Rule consideration.¹³ The *Catskill* case, which consolidated nationwide challenges to the much maligned EPA decree,¹⁴ solidified judicial acceptance of the rule, snatching away a much needed victory for environmental protection. The complicated history of the Water Transfers Rule laid the foundation for future Supreme Court consideration, and despite the denial of certiorari,¹⁵ understanding the judicial path that eventually resulted in *Catskill* is crucial. The cases preceding *Catskill* exhibit a legal web that has only become more tangled in recent years, while also providing

⁹ E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 2 (2005).

¹⁰ S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 109–10 (2004).

¹¹ 40 C.F.R. § 122.3(i) (2008).

¹² Water Transfers Rule, 73 Fed. Reg. 33,697, 33,700 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

¹³ *Friends of the Everglades*, 570 F.3d at 1218.

¹⁴ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017).

¹⁵ *Water Sector Win: U.S. Supreme Court Declines to Review Water Transfers Rule*, NAT'L ASS'N CLEAN WATER AGENCIES (Feb. 27, 2018), <https://www.nacwa.org/news-publications/news-detail/2018/02/27/water-sector-win-u.s.-supreme-court-declines-to-review-water-transfers-rule> [<https://perma.cc/CE8B-E46R>].

a helpful timeline of the Water Transfers Rule and the theory that drives it. Both are essential to an examination of the Court's missed opportunity in *Catskill* and help to exhibit the overall irrationality of the EPA narrowing the CWA's scope.

A. *Chevron v. National Resources Defense Council*

The *Chevron* case is an incredibly important administrative law decision. However, the finer details of its holding and factual background are unnecessary at the moment. A general overview will suffice for the purposes of this Note, but the importance of the *Chevron* decision to the *Friends of the Everglades* and *Catskill* cases discussed below cannot be understated.

Chevron involved a challenge to EPA regulations promulgated in 1981, which dealt with the interpretation of the terms in the Clean Air Act Amendments of 1977.¹⁶ The case's catalyst was an assertion that the promulgated regulations were contrary to law and that they involved an impermissible construction of the statutory terms found in the Clean Air Act Amendments.¹⁷ The key portion of the *Chevron* case lies not in its facts but in the analysis utilized by the Court to resolve the issue presented.

In holding that the EPA's definition was a permissible construction of the statute, the Court set forth a two-part test for analyzing the viability of an agency's legislative interpretation.¹⁸ When confronted with a challenge to an agency's statutory construction, a court must ask two questions: the first is whether or not Congress has directly spoken to the issue.¹⁹ If a statute is ambiguous or does not speak to the issue, the court must then ask the second question: whether the agency's interpretation is based on a permissible construction of the statute.²⁰ This two-part inquiry has led to an interpretive framework known as *Chevron* deference, an analysis that accords agencies and their rules great power within the gaps left by statutory uncertainty. If Congress has not spoken directly to an issue or if a statute is ambiguous, *Chevron* deference allows the agency regulations to control provided they are not "arbitrary, capricious, or manifestly contrary to the statute."²¹ The *Chevron* holding barred courts

¹⁶ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

¹⁷ *Id.* at 842–43.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 843.

²¹ *Id.* at 844.

from rejecting an agency opinion despite its inefficacy, stating that “[w]hen a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice . . . the challenge must fail.”²² This incredibly low bar for deference has greatly increased the difficulty of agency rule challenges in the post-*Chevron* era, resulting in environmental groups facing an uphill battle when met with the presence of a promulgated EPA regulation. In the absence of a promulgated rule, the challenger to an agency interpretation has a far easier route to reversal, as seen in *Miccosukee Tribe of Indians v. South Florida Water Management (Miccosukee Tribe)*.²³

B. *Miccosukee Tribe v. South Florida Water Management*

In 1999, the Miccosukee Tribe of Indians of Florida alleged that the pumping practices of the South Florida Water Management District had resulted in an increase in nutrient pollution.²⁴ The tribe stated that the increased nutrient levels were causing “degradation not only in the water quality but in plant materials, soils, animal habitat and biological life,” as well as “long term and perhaps permanent damage to the Everglades system.”²⁵ The claim focused on the NPDES program and whether or not a permit was required for a pumping system that “merely passes water between two parts . . . of United States water.”²⁶

The pumping system in question collected ground water and rain-water runoff, then deposited it into the “C-11” canal; the canal’s companion pumping station, “S-9,” pumped water from the canal into wetland habitats in order to prevent flooding of populated areas around the C-11 basin.²⁷ The tribe filed suit under the CWA, which prohibits the discharge of pollutants unless such discharge is done in compliance with the CWA.²⁸ The CWA defines discharge of a pollutant as “any addition of any pollutant to navigable waters from any point source,”²⁹ and defines a point source as “any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged.”³⁰

²² *Chevron*, 467 U.S. at 866.

²³ See discussion *infra* Section I.B.

²⁴ *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 1999 WL 33494862, at *1 (S.D. Fla. Sept. 30, 1999).

²⁵ *Id.*

²⁶ *Id.* at *2.

²⁷ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

²⁸ See *Miccosukee Tribe*, 1999 WL 33494862, at *1.

²⁹ 33 U.S.C. § 1362(12)(A) (2012).

³⁰ 33 U.S.C. § 1362(14) (2012).

In consideration of the NPDES permit issue, the Supreme Court discussed whether or not the canal that water was being pumped out of was a distinct body of water. This analysis drifted into a discussion of the “unitary waters” approach, under which the S-9 pump station would not need an NPDES permit in order to operate.³¹ The South Florida Water Management District suggested that the Court adopt the “unitary waters” approach due to “a longstanding EPA view that the process of ‘transporting, impounding, and releasing navigable waters’ cannot constitute an ‘addition’ of pollutants to ‘the waters of the United States.’”³² The Court rejected this proposal, pointing out that the government had not “identif[ied] any administrative documents” espousing that position and citing an amicus brief by former EPA officials, which stated that the agency had once reached a directly contrary conclusion.³³

The Court declined to interpret the unitary waters theory due to a lack of evidence that the EPA actually believed it to be the best approach to the CWA.³⁴ Instead, the Court remanded for interpretation by the lower court as to whether or not the C-11 canal and the reservoir it pumped into were distinct bodies of water, leaving the “unitary waters” approach open on remand.³⁵ This brief foray into the theory by the Supreme Court was a short-lived victory for environmental groups. The Court’s refusal to address the unitary waters approach provided the EPA with a window of time within which it was able to clarify its position and solve the inadequacies posited by the Court, resulting in the eventual promulgation of the Water Transfers Rule.

C. *The Water Transfers Rule*

The Water Transfers Rule was initially catalyzed by the implementation of the CWA, “the principal federal law regulating water pollution in the United States.”³⁶ The Act’s primary goal is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁷ The NPDES permitting program is one of the key portions of the CWA and aims to provide clean water to America’s citizens via a permitting

³¹ See *Miccossukee Tribe*, 541 U.S. at 106.

³² *Id.* at 107.

³³ *Id.*

³⁴ *Id.* at 109.

³⁵ *Id.*

³⁶ Chris Reagen, Comment, *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 U. COLO. L. REV. 307, 311 (2011).

³⁷ 33 U.S.C. § 1251(a) (2006).

system for various water-related activities.³⁸ The CWA has been assisting with pollution regulation since its 1972 implementation,³⁹ but the decades between then and now have not been free of conflict.

As the analogy described above illustrates,⁴⁰ a disagreement has arisen as to what constitutes an addition under the permitting system. The CWA never defines the word “addition,”⁴¹ and this has resulted in widespread confusion as to what the intent of the CWA actually was in regard to the regulation of various sources of pollution. Due to this ambiguity, two interpretations of the CWA’s intent have reared their heads: the unitary waters theory and the traditional approach.⁴² The unitary waters theory opines that the navigable waters of the United States are one large body of water; this results in an NPDES permit only being required “when a pollutant first enters the water from a point source . . . [and not] when polluted water is transferred between bodies of water.”⁴³ Alternatively, the traditional approach considers the waters of the United States to be separate and would require an NPDES permit, not only for point source discharges but also for water transfers between meaningfully distinct bodies of water.⁴⁴

Prior to 2008, courts consistently chose to apply the traditional approach over the typically maligned unitary waters theory.⁴⁵ Recognizing this trend, the Bush-era EPA (which endorsed the unitary waters theory) promulgated the Water Transfers Rule, explicitly excluding water transfers from regulation under the NPDES permitting program.⁴⁶ The Rule’s rationale section states that “water transfers convey one water of the U.S. into another,” resulting in what is essentially a codification of the unitary waters theory.⁴⁷ This embrace of the theory has taken the legs out from under the NPDES permitting system, opening “a regulatory

³⁸ Reagen, *supra* note 36, at 311–15 (explaining the NPDES permitting program and the CWA’s definition of addition).

³⁹ *Id.* at 311.

⁴⁰ *See supra* Introduction.

⁴¹ *See* 33 U.S.C. § 1362 (2012).

⁴² Reagen, *supra* note 36, at 314.

⁴³ *Id.*

⁴⁴ *Id.* at 314–15 (citing Priscillia de Muizon, Comment, “*Meaningfully Distinct*” Waters, *the Unitary Waters Theory, and the Clean Water Act: Miccosukee v. South Florida Water Management District*, 32 *ECOLOGY L.Q.* 417, 446–48 (2005)).

⁴⁵ *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217–18 (11th Cir. 2009).

⁴⁶ 40 C.F.R. § 122.3(i) (2008).

⁴⁷ Water Transfers Rule, 73 Fed. Reg. at 33,702.

hole in the CWA that jeopardizes the quality of the Nation's waters."⁴⁸ The presence of a promulgated rule also had a noticeable effect on judicial decisions related to the CWA, drastically shifting the weight of authority from widespread endorsement of the traditional approach⁴⁹ to reluctant acceptance of the unitary waters theory.⁵⁰

D. Friends of the Everglades

The shift in judicial opinion of the Water Transfers Rule is best presented by exploring a post-promulgation challenge to the South Florida Water Management District's pumping practices. Similar to the issue in *Miccosukee Tribe*, the challenge in the *Friends of the Everglades* case revolved around a system of canals.⁵¹ The canals had been dug to collect rainwater and runoff from sugar cane fields and contained "a loathsome concoction of chemical contaminants including nitrogen, phosphorous, and un-ionized ammonia."⁵² The water in these canals was then channeled through pumping stations, which deposited the toxic liquid directly into Lake Okeechobee at a rate of "more than 400,000 gallons per minute."⁵³

After describing the facts of the case, the court analyzed precedent exhibiting the lack of support for the unitary waters theory.⁵⁴ The court set forth a litany of previous decisions rejecting the theory, stating that it "has struck out in every court of appeals where it has come up to the plate."⁵⁵ Despite this promising opening, the court noted the key change that has occurred since the line of cases rejecting the unitary waters theory: promulgation of the Water Transfers Rule.⁵⁶ As the first court to consider whether the EPA's rule required *Chevron* deference,⁵⁷ the Eleventh Circuit launched into a lengthy statutory analysis. This led to a conclusion that the statute was indeed ambiguous and that the EPA's reading was a permissible interpretation of the statutory language.⁵⁸ Following

⁴⁸ Reagen, *supra* note 36, at 315.

⁴⁹ See *supra* Section I.B.

⁵⁰ See discussion *infra* Sections I.C, I.E.

⁵¹ *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1217–18.

⁵⁵ *Id.* at 1217.

⁵⁶ *Id.* at 1218.

⁵⁷ *Friends of the Everglades*, 570 F.3d at 1218.

⁵⁸ *Id.* at 1227–28.

Chevron's mandate, the court deferred to the agency interpretation, closing its opinion by stating that “until the EPA rescinds or Congress overrides the regulation, we must give effect to it.”⁵⁹

What appears to be a judicial call for help at the close of the opinion remains unanswered by both the EPA and Congress, resulting in the first judicial affirmation of the unitary waters theory from a court that admittedly feared the environmental implications of its own decision.⁶⁰ The *Friends of the Everglades* court has been decried for finding “ambiguity where none exists,”⁶¹ but a denial of certiorari by the Supreme Court in November of 2010 solidified its finding of ambiguity and overall holding.⁶² Regardless of the validity of its reasoning, the opinion was landmark in its application of *Chevron* deference to the Water Transfers Rule. As nationwide challenges to the rule itself began to pile up (eventually coalescing in New York),⁶³ those campaigning against the EPA's promulgated regulation steeled themselves for the remainder of the war despite their pivotal loss in the *Friends of the Everglades* battle.

E. Catskill Mountains

After the codification of the Water Transfers Rule in 2008, multiple parties filed rule challenges in various courts; cases filed in circuit courts were consolidated in the Eleventh Circuit, and cases in district courts were stayed pending the resolution of the Eleventh Circuit challenges.⁶⁴ About three years after the *Friends of the Everglades* decision, the Eleventh Circuit dismissed the rule challenges on a jurisdictional issue, and the stayed cases in district courts were allowed to proceed.⁶⁵ Intervenor-plaintiffs and intervenor-defendants swept in, eventually resulting in a lengthy list of litigants seeking either to uphold or destroy the Water Transfers Rule.⁶⁶ The district court granted the plaintiffs' motion for

⁵⁹ *Id.* at 1228.

⁶⁰ *Id.* at 1226 (stating that “[t]hese horrible hypotheticals are frightening enough that we might agree with the Friends of the Everglades that the unitary waters theory does not comport with the broad, general goals of the Clean Water Act.”).

⁶¹ Patrick Parenteau & Laura Murphy, *What a Long Strange Trip It's Been: The Saga of EPA's Water Transfers Rule*, 31 NAT. RESOURCES & ENV'T 16, 18 (2016).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 506 (2d Cir. 2017).

⁶⁶ *Id.*

summary judgment, using *Chevron*'s step two to strike down the Water Transfers Rule as an unreasonable interpretation of the CWA.⁶⁷ This environmental victory was unfortunately short-lived, as the defendants appealed to the Second Circuit in an attempt to save the sinking EPA rule.

In a lengthy opinion, the Second Circuit reviewed the lower court's application of *Chevron* to the Water Transfers Rule, ultimately coming to a devastating decision for environmental groups. After a section concluding that the CWA is ambiguous enough to require analysis under *Chevron*'s step two, the court launched into an opinion that exhibited reluctance to reach its inevitable holding. The court introduced its step two analysis with a pointed statement about the efficacy of the Water Transfers Rule, opining that "although we might prefer a different rule more clearly guaranteed to reach the environmental concerns underlying the Act, *Chevron* analysis requires us to recognize that our preference does not matter."⁶⁸ The remaining pages of the opinion are replete with similar statements showcasing the court's attempt to buttress its holding with alternative pollution prevention plans, suggestions that states utilize other statutes to regulate water transfers, and the provision of various ideas to help combat the "potentially negative water quality impacts of water transfers."⁶⁹ A vigorous dissent provides a variety of arguments against the majority's rationale, but none are convincing enough to dissipate the impact of *Chevron*'s low bar.⁷⁰ To the dismay of the plaintiffs, the court's deference to the EPA and ultimate reversal in the case reinstated the Water Transfers Rule.⁷¹ A final opportunity to take down the destructive EPA regulation loomed large, as an abundance of briefs and petitions were sent to the highest court in the country.

That opportunity never came to fruition, as the plaintiffs' petition to the Supreme Court of the United States for a writ of certiorari was denied on February 26, 2018.⁷² The *Catskill* holding in its current form enables the Water Transfers Rule to continue polluting the nation's waters, and the Supreme Court's refusal to hear the case potentially signals the end of direct challenges to the rule itself. The case presented the perfect

⁶⁷ *Id.*

⁶⁸ *Id.* at 520.

⁶⁹ *Id.* at 529–30.

⁷⁰ *Id.* at 533–47.

⁷¹ *Catskill*, 846 F.3d at 533.

⁷² *Docket Files*, SUP. CT. U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-418.html> [<https://perma.cc/MM35-K39W>] (last visited Dec. 3, 2019) [hereinafter *Docket Files*].

opportunity for the Court to determine whether water transfers should be subject to NPDES permitting requirements and to solve the long-standing question of whether deference should be accorded to agency preference in the absence of factual analysis. In denying certiorari, the Court leaves in place a pollution-enabling rule while validating the unitary waters theory. The theory could cripple the CWA, and the rule runs directly contrary to the goals of the legislation it purports to align with. A discussion of the Court's decision follows, providing a vehicle through which the contradictory nature of the Water Transfers Rule can be exhibited, and the Court's erroneous denial of certiorari can be explored.

II. THE COURT'S MISSED OPPORTUNITY

Centuries ago, James Madison prophetically described a modern fear: “[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”⁷³ Although Madison was likely unsure of exactly what form this accumulation of powers would take, he foresaw the danger of vesting so much responsibility within a single entity. In the post–New Deal era of agency deference and *Chevron* balancing, Madison's fear may have come to pass, as an unelected and unaccountable litany of agencies make crucial decisions without fear of repercussion.⁷⁴ This “headless fourth branch”⁷⁵ of government could prove Madison correct, as “an administrative state of sprawling departments and agencies [governs] with increasing autonomy and decreasing transparency.”⁷⁶ These agencies and departments have grown exponentially,⁷⁷ leading to more agency power and “a larger practical impact on the lives of citizens than all the other branches combined.”⁷⁸ The overall constitutionality of the administrative state is

⁷³ THE FEDERALIST NO. 47 (James Madison).

⁷⁴ Ken Cuccinelli, *The Bureaucracy—The Unaccountable Fourth Branch Of Government*, INV’R’S BUS. DAILY (July 13, 2016), <http://www.freedomworks.org/content/bureaucracy-unaccountable-fourth-branch-government> [<https://perma.cc/H2VM-77DA>].

⁷⁵ Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 451 (2006).

⁷⁶ Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.e89428c26f3e [<https://perma.cc/9VU4-X4RQ>].

⁷⁷ U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-215, RECENT TRENDS IN FEDERAL CIVILIAN EMPLOYMENT AND COMPENSATION 6 (2014).

⁷⁸ Turley, *supra* note 76.

beyond the scope of this Note, but the constitutional implications play a key role in *Catskill*'s argument for certiorari. The following section discusses why the Court was wrong to deny certiorari in the *Catskill* case and presents a variety of pressing questions the Court had an opportunity to answer. A subsequent section argues that the Court should have reversed had they decided to review and will exhibit the necessity of reversal from both an administrative law perspective and a policy perspective.

A. *An Argument for Certiorari: The Chevron Problem*

Touted by some as the potential death of the Water Transfers Rule, District Judge Kenneth Karas's 2014 holding was a beacon of hope for those who opposed the EPA's controversial promulgation.⁷⁹ When Karas's holding was reversed by the Second Circuit (over a vigorous dissent),⁸⁰ legal minds immediately went to certiorari. In February of 2018, after the emotional ups and downs of an arduous legal battle, environmental advocates knew their journey was at its close as they read two words: petition denied.⁸¹ Given the conservative leanings of the Court even prior to the confirmation of controversy-plagued Justice Kavanaugh,⁸² some may have seen this case as a vehicle to begin chipping away at an oversized administrative state.⁸³ Others saw the *Catskill* case for what it was on the surface: a challenge to an EPA rule grounded in economic policy rather than science.⁸⁴ However, the true identity and opportunity of *Catskill* lies somewhere in the middle, where it exists as not only a challenge to scientifically unsound Bush-era rule-making, but as an opportunity to reexamine one of the administrative state's most powerful and controversial weapons: *Chevron* deference.

⁷⁹ Robert M. Olian, *Ashes to Ashes; Waters to Waters—The Death of EPA's Water Transfer Rule?*, AM. C. ENVTL. LAW. (Apr. 8, 2014), <http://www.acoel.org/post/2014/04/08/Ashes-to-Ashes;-Waters-to-Waters-%E2%80%93-The-Death-of-EPA%E2%80%99s-Water-Transfer-Rule.aspx> [<https://perma.cc/S3JW-9TFW>].

⁸⁰ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 533–47 (2d Cir. 2017).

⁸¹ *Docket Files*, *supra* note 72.

⁸² Adam Liptak & Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html> [<https://perma.cc/S5MF-XL7W>].

⁸³ PETER J. WALLISON, *JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE* (2018).

⁸⁴ Lawrence Hurley, *U.S. Supreme Court Rejects Challenge to EPA Water Regulation*, REUTERS (Feb. 26, 2018), <https://www.reuters.com/article/us-usa-court-water-idUSKCN1GA1V4> [<https://perma.cc/58KM-498Y>].

In *SAS Institute Inc. v. Iancu*, Justice Gorsuch hinted at the possibility of future reconsideration of agency deference, stating that “whether *Chevron* should remain is a question we may leave for another day.”⁸⁵ With the Court apparently “teeing up a debate on the future of *Chevron*,”⁸⁶ the denial of *Catskill*'s petition for certiorari becomes ever more befuddling. Given the public's belief in partisan division on the Court and an increased number of split decisions in recent years,⁸⁷ current Justices should have jumped at the potential for a unanimous opinion that could have served the partisan leanings of both sides in a constitutional fashion. With *Catskill*, the opportunity was ripe to cater to the conservative goal of decreasing agency power; on the left, Justices could have tempered the inevitable blow to agencies, encouraging a level of restraint that may not be present in a future overturning of *Chevron*.⁸⁸

Aside from the bipartisan potential that *Catskill* presented, *Chevron* deference in and of itself is concerning to some, especially in the realm of scientifically delicate environmental rule-making. As discussed above,⁸⁹ *Chevron* analysis consists of two steps, starting with a determination of whether or not the statute in question is ambiguous.⁹⁰ If this threshold question is answered in the affirmative, the court then moves to step two: whether the agency's interpretation is based on a permissible construction of the statute.⁹¹ The first step of *Chevron* is very flexible, “creating a relatively large window for ambiguity”⁹² that results in various determinations of what constitutes an unclear statute; there is no rule for what a court could or could not find ambiguous.⁹³ This broad brush of ambiguity is further widened by an agency's ability to essentially fill in the blanks when a statute is silent on an issue.⁹⁴ Some have observed that in practice, this first step amounts to nothing: “if an agency's construction of the statute

⁸⁵ *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

⁸⁶ John C. Brinkerhoff Jr. & Daniel B. Listwa, *Deference Conservation—FOIA's Lessons for a Chevron-Less World*, 71 STAN. L. REV. ONLINE 146, 146 (2018).

⁸⁷ Lucas Rodriguez, *The Troubling Partisanship of the Supreme Court*, STAN. POL.: US POL. (Jan. 7, 2016), <https://stanfordpolitics.org/2016/01/07/troubling-partisanship-supreme-court/> [https://perma.cc/45WH-VNBS].

⁸⁸ See discussion *supra* Part II.

⁸⁹ See discussion *supra* Section I.A.

⁹⁰ Caitlin Miller, *The Balancing Act Between Chevron Deference and the Rule of Lenity*, 18 TEX. TECH. ADMIN. L.J. 193, 198 (2017).

⁹¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

⁹² Miller, *supra* note 90, at 198.

⁹³ Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2091 (1990).

⁹⁴ *Chevron*, 467 U.S. at 843.

is ‘contrary to clear congressional intent’ . . . then the agency’s construction is a fortiori not ‘based on a permissible construction of the statute.’”⁹⁵

The apparent weakness of *Chevron*’s initial step could be deemed negligible were the second prong strong enough to defend against the shortcomings of the earlier analysis. However, the second step of *Chevron*’s determination is arguably even weaker—and thus more dangerous—than the first. Up to 2008, in cases where *Chevron* was invoked by the court, agencies won deference 76.2 percent of the time, a noticeably higher chance of victory than the agency win rate in non-*Chevron* cases, which sat at 68.2 percent.⁹⁶ This increased chance of agency deference correlates with the change *Chevron*’s holding worked within the EPA and the alteration of the “dynamics inside agencies.”⁹⁷ Administrative leadership recognized the strength of *Chevron* and almost immediately began to internally redefine the scope of agency power, which “opened up and validated a policy-making dialogue within agencies about what interpretation the agency should adopt for policy reasons”⁹⁸ This internal shift from legitimate statutory interpretation to potential statutory circumvention has turned agencies into a quasi-Congress, formulating policy and “filling any gap left, implicitly or explicitly,”⁹⁹ by the legislative bodies. This newfound power is exponentially increased by the interpretation of *Chevron* within the lower courts, where the holding has been “read . . . as a strong signal . . . that courts should not interfere with agency interpretations.”¹⁰⁰ These deferential lower courts liberally apply *Chevron*, habitually defer to agencies, and routinely allow even legally shaky agency interpretations to prevail.¹⁰¹

In this era of near-automatic lower court deference and increasing concern over the growth of the administrative state, a split among courts

⁹⁵ Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

⁹⁶ William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1122 (2008) (stating that the increased rate of agency deference is due to courts citing *Chevron* only when the majority is prepared to uphold agency action). *But see* Philip Dane Warren, *The Impact of Weakening Chevron Deference on Environmental Deregulation*, 118 COLUM. L. REV. ONLINE 62, 63 (2018) (describing the Court’s application of *Chevron* in the modern era as a “norm of deference to agency interpretations of statutes”).

⁹⁷ Elliott, *supra* note 9, at 11–12.

⁹⁸ *Id.* at 12.

⁹⁹ *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

¹⁰⁰ Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 95 (1994).

¹⁰¹ Eskridge Jr. & Baer, *supra* note 96, at 1122.

invoking a controversial deference standard looked like a tantalizing opportunity. However, the Supreme Court (despite its now decidedly conservative majority) is unlikely to overturn *Chevron* outright.¹⁰² As recently as June 2019, the Court refused to overturn an agency-strengthening precedent known as *Auer* deference,¹⁰³ a doctrine giving deference to an agency's reasonable interpretations of its own genuinely ambiguous regulations.¹⁰⁴ Although *Auer* survived, it did not do so unscathed; the Court placed new limitations and requirements on an agency seeking *Auer* deference,¹⁰⁵ and this limiting approach could hint at *Chevron*'s possible fate. "[T]he shift of votes [on the Court] suggests that the Court may begin to apply a less robust form of *Chevron* deference,"¹⁰⁶ even though a ruling directly overturning the case is unlikely.¹⁰⁷

With the weight of analysis leaning towards the current Court's majority possessing a desire to chip away at *Chevron*'s longstanding foundation, and the recent reconsideration of another form of deference, the denial of certiorari in *Catskill* continues to confuse.¹⁰⁸ *Catskill* split in the lower courts and invoked *Chevron* to support an agency rule with little fact-finding behind it; the implementation of which potentially runs manifestly contrary to the goals of the statute it derives from.¹⁰⁹ With *Chevron* potentially poised to take a significant blow from the legislative branch¹¹⁰ at the time *Catskill* petitioned for certiorari, the case as described presented an ideal scenario for weakening an increasingly unpopular precedent. The Court should have granted certiorari, not only for the greater environmental good that invalidating the Water Transfers Rule could have provided, but also to catalyze the inevitable weakening *Chevron*

¹⁰² Warren, *supra* note 96, at 63.

¹⁰³ Tucker Higgins, *Supreme Court decision keeps 'Auer deference,' which strengthens power of government regulators*, MSN MONEY (June 26, 2019), <https://www.msn.com/en-us/money/markets/supreme-court-refuses-to-overturn-auer-deference-precedent-that-strengthens-the-power-of-government-regulators/ar-AADsrfrw> [https://perma.cc/9X3U-CMFU].

¹⁰⁴ *Auer v. Robbins*, 519 U.S. 452, 453 (1997).

¹⁰⁵ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416–17 (2019); *see also* Adam Liptak, *Supreme Court Limits Agency Power, a Goal of the Right*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/supreme-court-agency-power.html> [https://perma.cc/2FPP-4US2].

¹⁰⁶ Warren, *supra* note 96, at 63.

¹⁰⁷ *Id.*

¹⁰⁸ *Kisor*, 139 S. Ct. at 2416–17.

¹⁰⁹ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d. 492, 504–06 (2d Cir. 2017).

¹¹⁰ H.R. 76, 115th Cong. (1st Sess. 2017) (containing a proposition that would require *de novo* review of statutory provisions, effectively removing automatic agency deference in favor of a factual analysis).

must endure in order to preserve necessary checks on agency power. In this era of policy for the sake of politics, it has become ever more important to rein in the administrative state during its attempts to legislate in the absence of proper analysis. *Catskill* provided a vehicle within which a variety of promising possibilities existed, and the Court's mistake is the country's loss.

B. An Argument for Reversal

Having made clear that the Court's denial of certiorari was a mistake on multiple levels,¹¹¹ another step of analysis involves a look at the Court's options for reversal had it decided to review the case. In the following sections, this Note will describe two routes to reversal that the Court could have taken, both of which have beneficial implications far beyond this lone case. First, the Court could have decided that *Chevron's* standard is not stringent enough and that a new standard must be created to rein in agency deference and require fact-finding beyond the minimal level currently acceptable for wide-ranging, policy-altering agency rules. Second, the Court had an opportunity to perform an analysis of the ruling's real-world impact and look to currently affected areas of the United States in order to overturn the Water Transfers Rule as running contrary to the intent of the CWA. Although the Court ultimately decided that neither argument was pressing enough to warrant certiorari,¹¹² a deeper dive into the two potential paths showcases the need for change in regard to agency deference and the environmental necessity of Water Transfers Rule invalidation.

1. *Chevron's* Alternative

With the Supreme Court hinting at reanalysis¹¹³ and the legislative body nipping at its heels,¹¹⁴ *Chevron's* stranglehold on the administrative sphere appears to be loosening.¹¹⁵ However, renewed criticism of *Chevron* is blind to the consideration that the holding in its infancy was

¹¹¹ See discussion *supra* Section II.A.

¹¹² *Docket Files*, *supra* note 72.

¹¹³ *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

¹¹⁴ See *supra* text accompanying note 103.

¹¹⁵ Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 149 (2012) (citing Marianne Kunz Shanor, *Administrative Law: The Supreme Court's Impingement of Chevron's Two-Step*, 10 WYO. L. REV. 537, 542 (2010)).

not the troubling grant of power it is infamous as today.¹¹⁶ Instead, it was a relatively unremarkable case not viewed nor intended as a departure from precedent.¹¹⁷ Judicial confusion and the elevation of its significance by subsequent cases¹¹⁸ created what amounts to a “mandate for judicial acquiescence”¹¹⁹ and resulted in a well-intentioned doctrine surviving long enough to see itself become a villain. *Chevron*’s detriments (and benefits) are too ingrained in our administrative consciousness to be kicked to the curb completely; “at least some variant of *Chevron* deference [is] . . . essential to guide and assist courts from intruding too deeply into a policy sphere for which they are ill-suited.”¹²⁰ A potential answer lies in blending *Chevron* deference with a more stringent standard, one with the ability to give *Chevron*’s much maligned step two some desperately needed teeth.

The most appealing option for a new, blended analysis is the incorporation of a “reasoned decision-making”¹²¹ requirement. Known as the *Chevron—State Farm* conceptual framework,¹²² this combination of analyses allows for statutory interpretation to be governed by *Chevron* and leaves step one of the so called “*Chevron* Two Step” untouched.¹²³ The change occurs at the second step of the analysis, where the framework would require agencies to provide “factual support and reasoned explanation to support policy-based choices.”¹²⁴ This would result in a revival of judicial control over agency policy, ensuring that the agencies themselves have engaged in reasoned decision-making while still allowing for “discretion and flexibility.”¹²⁵ Requiring agencies to justify their decisions with factual support prevents judicial acquiescence to agency decisions that may be legally sufficient as a statutory interpretation yet stem from nothing more than partisan policy.¹²⁶

The importance of this framework’s application to the *Catskill* case is immediately apparent. The district court in *Catskill* actually

¹¹⁶ Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1399 (2017).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1400.

¹¹⁹ Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2363 (2018).

¹²⁰ Bednar & Hickman, *supra* note 116, at 1398.

¹²¹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

¹²² Sharkey, *supra* note 119, at 2363.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 2364.

¹²⁶ *Id.* at 2365.

incorporated *State Farm* into its analysis of the Water Transfers Rule,¹²⁷ resulting in the conclusion that the EPA's promulgated rule was arbitrary and capricious due to its failure to provide a reasoned explanation.¹²⁸ Although the district court's application of *State Farm* at *Chevron*'s step two resulted in reversal,¹²⁹ the Supreme Court had the ball teed up for a marked improvement to broken precedent yet neglected to swing. Deeper analysis further exhibits the necessity of some sort of factual standard in agency decision-making. Completely missing from the EPA's argument is any "fact finding, critical analysis, [or] policy considerations."¹³⁰ The EPA ignored "uniform federal circuit court precedent . . . [that] requires a NPDES permit for the transfer of polluted water into a clean water body."¹³¹ The agency even explicitly stated that the Water Transfers Rule was based on "legal interpretation rather than a scientific or factual analysis of the costs or benefits of NPDES permitting."¹³² There was no weighing of costs or benefits, no balancing of policy considerations, no research on environmental, health, or economic harms, and no scientific analysis of water transfers.¹³³ The EPA emphatically explained that the Water Transfers Rule was based on nothing more than "Congress's goal of avoiding undue interference" with the states' ability to regulate their own water.¹³⁴ This amounts to an admission that neither science nor facts played a role in the EPA's decision;¹³⁵ in the era of *Chevron*, the EPA was confident that its statutory analysis alone would suffice.¹³⁶

If there ever was a prime example of the need for an incorporation of *State Farm*'s "reasoned decision-making" requirement, *Catskill* certainly fits the mold.¹³⁷ The EPA's blatant rejection of any sort of factual analysis¹³⁸

¹²⁷ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500, 553 (S.D.N.Y. 2014).

¹²⁸ *Id.* at 551.

¹²⁹ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 523–24 (2d Cir. 2017).

¹³⁰ Sharkey, *supra* note 119, at 2372.

¹³¹ Brief of Plaintiffs-Appellees at 14, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017).

¹³² *Id.* at 71.

¹³³ Sharkey, *supra* note 119, at 2372.

¹³⁴ Brief of Defendants-Appellants at 27, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017).

¹³⁵ Sharkey, *supra* note 119, at 2373.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2369–73 (presenting the *Catskill* case as a "vivid illustration" of the need for applying the *Chevron—State Farm* framework).

¹³⁸ *Id.* at 2372.

combined with its total reliance on statutory interpretation¹³⁹ signals its recognition of the significant advantage *Chevron* provides to agencies in litigation. This “policymaking via rule-making” has coalesced with preference for legal analysis over factual analysis¹⁴⁰ and created an EPA that is clearly aware of its own power to alter policy without the hindrance of science. It appears that *Catskill* may have merely been a test for what the EPA could get away with in the absence of fact-finding. A new proposed rule¹⁴¹ picks up where the Water Transfers Rule left off, narrowing the definition of “waters of the United States” and further chipping away at the foundation of the CWA.¹⁴² Were it not for the Court’s denial of certiorari, the district court’s incorporation of *State Farm* into its *Chevron* analysis would have provided a route to reversal that could have weakened agency deference and protected American waters in the process. Instead, the Second Circuit’s decision stands, the Water Transfers Rule survives, and an anemic standard lives on, requiring nothing more than a hint of ambiguity in order to receive judicial affirmation.

2. *Catskill*’s Consequences

For all of its administrative implications, an important part of *Catskill* is the potential effect it could have on the environment. As discussed in the introduction to this Note,¹⁴³ nutrient pollution is a major concern and results mainly from the actions of mankind.¹⁴⁴ With *Catskill*’s affirmation of the Water Transfers Rule, “loathsome concoction[s]” similar to the mixture described in *Friends of the Everglades*¹⁴⁵ are now free to flow into bodies of water such as “pristine mountain stream[s]”¹⁴⁶ without being monitored or permitted by the NPDES permit program. This flow of excess nutrients directly contributes to “degradation not only in . . . water quality but in plant materials, soils, animal habitat and

¹³⁹ *Id.* at 2371 (Reliance on nothing more than “legal” statutory interpretation translates to the agency taking a gamble on *Chevron* coming to the rescue. In the absence of a factual standard, all an agency must do is find an ambiguity, interpret that ambiguity in a way that meets their policy goals, then hope it has met the requirement of a “reasonable interpretation” needed for deference to be accorded.).

¹⁴⁰ *Id.* at 2369–73.

¹⁴¹ Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).

¹⁴² *Id.*

¹⁴³ See discussion *supra* Introduction.

¹⁴⁴ EPA, *supra* note 3.

¹⁴⁵ *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009).

¹⁴⁶ Hande, *supra* note 6, at 404.

biological life.”¹⁴⁷ The environmental concern that surrounds the Water Transfers Rule speaks to another route to reversal that the Court could have taken in *Catskill* without effecting a doctrinal change in agency deference: holding that the rule implements policy that runs manifestly contrary to the intent of the CWA.

NPDES permitting is “the most important component of the [CWA]”¹⁴⁸ and provides an essential method of policing water quality. By hamstringing the ability of the NPDES program to require permits for water transfers, the Water Transfers Rule facilitates the dumping of polluted water into pure water, and eliminates a common means of fighting water quality degradation: lawsuits by concerned citizens.¹⁴⁹ In the absence of NPDES permits and potential citizen lawsuits, states are left on their own to monitor water quality, a function that some have either relied partially on the CWA to enforce or left entirely to the NPDES permit program.¹⁵⁰ Following the Water Transfers Rule’s validation, “states may no longer rely upon the NPDES program in lieu of state permits to regulate pure water transfers . . . severely limit[ing] an important tool available to concerned citizens and states.”¹⁵¹

In addition to its usefulness as a regulatory tool at the state level, the NPDES program plays a crucial role in regulating nonpoint source pollution¹⁵² on a national scale. Although the CWA does not require an NPDES permit for nonpoint source pollution (despite the EPA’s recognition that nonpoint sources are “the most significant source of water pollution overall in the country”)¹⁵³ the Water Transfers Rule still has a significant effect on water quality via its expansion of NPDES program exemptions.¹⁵⁴ The rule specifically exempts pure water transfers from

¹⁴⁷ *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, No. 98-6056-CIV, 1999 WL 33494862, at *1 (S.D. Fla. Sept. 30, 1999).

¹⁴⁸ *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1294 (1st Cir. 1996).

¹⁴⁹ *Reagen*, *supra* note 36, at 323–24.

¹⁵⁰ *Id.* at 324.

¹⁵¹ *Id.*

¹⁵² *Introduction to the Clean Water Act, Section 319: Nonpoint Source Program*, EPA, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2788 [<https://perma.cc/X7SW-6FWV>] (last visited Dec. 3, 2019) (stating that “anything not considered a ‘point source’” is a nonpoint source; examples include “stormwater associated with industrial activity, construction-related runoff, and discharges from municipal separate stormwater systems (MS4s)”).

¹⁵³ *Id.* (stating that “[n]onpoint source pollution (NPS) represents the most significant source of pollution overall in the country,” with “more than 40 percent of all impaired waters [] affected solely by nonpoint sources,” compared to “less than 10 percent of water quality criteria exceedances [being] caused by point source discharges alone”).

¹⁵⁴ *Reagen*, *supra* note 36, at 328.

the NPDES permitting requirement, opening a loophole in the CWA and preventing the utilization of NPDES permitting to assist in limiting the spread of nonpoint source pollution.¹⁵⁵ “Requiring NPDES permits for pure water transfers can limit the spread of pollutants already introduced by nonpoint sources,” but allowing the transfers to occur without NPDES permit requirements “eliminates a federal check on nonpoint source pollution.”¹⁵⁶ A modicum of factual analysis prior to promulgating the rule (or even a reanalysis following the district court’s invalidation) could have prevented implementation of an overbroad exemption. This would have allowed the NPDES program to continue to indirectly prevent the spread of nonpoint source pollution via water transfers and enabled the CWA to function in the fashion that Congress intended.¹⁵⁷

Had the Court decided to take the opportunity for reexamination that *Catskill* offered, an invalidation of the Water Transfers Rule as manifestly contrary to the goals of the CWA would not have been out of the question. The CWA’s stated purpose is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁵⁸ With nonpoint sources representing America’s largest source of pollution¹⁵⁹ and affecting “more than 40 percent of all impaired waters,”¹⁶⁰ an EPA rule that prevents regulation of the worst water pollution source in the nation certainly runs contrary to the CWA’s purpose of protecting American waters. The Water Transfers Rule is an impermissible interpretation of the CWA that facilitates “the spread of nonpoint source pollution through water transfers.”¹⁶¹ The Court had an opportunity to invalidate this environmentally harmful rule due to its clearly negative impact on the effectiveness of the CWA; it inexplicably refused to do so,¹⁶² and the effects of that decision will certainly be exhibited in every body of water no longer subject to the protections of the NPDES permitting program.

CONCLUSION

In *Miccousukee Tribe*, the Supreme Court chose to ignore the issue of environmental justice, a concept that implies fair environmental treatment

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 33 U.S.C. § 1251(a) (2006).

¹⁵⁹ EPA, *supra* note 152.

¹⁶⁰ *Id.*

¹⁶¹ Reagen, *supra* note 36, at 328.

¹⁶² *Docket Files*, *supra* note 72.

of all people, and fair enforcement of environmental law.¹⁶³ The situation in *Miccosukee Tribe* arguably violated this principle, forcing a single tribe to shoulder the burden of an environmental injustice.¹⁶⁴ The Court's refusal to reconsider *Catskill* comparatively violates the concept on a much larger scale, subjecting the entirety of a nation to uninhibited water transfers pollution and the inevitable consequences that are inherent in the practice. NPDES program regulation of water transfers "presents an opportunity for innovative, cooperative, and practical permitting solutions,"¹⁶⁵ while simultaneously preventing exacerbation of current water quality issues and protecting from the dangers of nonpoint source pollution.

The Water Transfers Rule prevents challenges to practices that have obvious environmental harms. The destruction of the Everglades environment in *Miccosukee Tribe*,¹⁶⁶ the pumping of polluted groundwater into rivers,¹⁶⁷ and the nationwide nutrient pollution problem¹⁶⁸ all stem at least partially from water transfers, and with the Court's silent approval of the Water Transfers Rule, the practices and their resulting problems will continue. With a clear path to certiorari and multiple routes to reversal, the Court could have made a potentially groundbreaking environmental decision, one that would have greatly assisted in the uphill battle for water quality. Instead, the Court declined review, emboldening the EPA in its piecemeal destruction of necessary environmental protections and breathing new life into a near-dead rule. Looking forward, there always exists the possibility of new challenges to the Water Transfers Rule or perhaps a fresh line of cases taking aim at the EPA's revised definition of "waters of the United States."¹⁶⁹ In other words, there are still potential avenues to beneficial alterations in the nation's water policy, but their odds of success are questionable in the aftermath of *Catskill*. Until alternate routes to change are tested, the Water Transfers Rule will live on, eroding the CWA while two words echo in the minds of those who believed *Catskill* could be their salvation: certiorari denied.

¹⁶³ *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/69WR-VPFW>] (last updated Nov. 20, 2019).

¹⁶⁴ Kristin Carden, Note, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 28 HARV. ENVTL. L. REV. 549, 556, 560 (2004).

¹⁶⁵ Hande, *supra* note 6, at 446.

¹⁶⁶ *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 99–100 (2004).

¹⁶⁷ Reagen, *supra* note 36, at 327–28.

¹⁶⁸ EPA, *supra* note 3.

¹⁶⁹ *See, e.g.*, Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328).