

WESTERN COALITION OF ARID STATES
POSITION STATEMENT ON
PROTECTING INTERSTATE WATER SUPPLY TRANSFER PROJECTS
March 13, 2018

I. PROTECTING INTERSTATE WATER SUPPLY TRANSFER PROJECTS

II. BRIEF SUMMARY OF THE ISSUE

Interstate water supply transfer projects are essential to support growing communities in arid west States. EPA adopted the Water Transfer Rule in 2008 to recognize that projects moving water from one water of the U.S. to another (water transfers) do not require National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act because they do not result in the addition of a pollutant. It would be infeasible to ensure contaminant levels in the water conveyed from the donor watershed are identical those found in the receiving water. Removing any aquatic invasive species found in these water supply projects is equally impractical and unwarranted. Enacted in 1900, the Lacey Act helps protect the environment by prohibiting the transport of a listed invasive species by travelers crossing State borders. Recent application of the Lacey Act for listed aquatic invasive species in waters of the U.S. has impacted established interstate water supply arrangements. These conflicts will become more acute with future discoveries of aquatic invasive species leading to new Lacey Act listings. Ongoing efforts to overturn the Water Transfer Rule and stretching the application of the Lacey Act to interstate water transfers threaten the viability of these important water supply projects.

III. DESCRIPTION OF IMPACTS ON ARID WEST

Applications of NPDES programs have inhibited water transfers and resulted in long and costly legal challenges including *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* and *South Florida Water Management District v. Miccosukee Tribe of Indians*. Similar challenges could impact numerous projects in arid west States if ongoing efforts to overturn the Water Transfer Rule are successful. Examples of water transfer project impacts due to actions by the U.S. Fish and Wildlife and projects with identified risks related to the application of the Lacey Act for aquatic Zebra mussels include:

- North Texas Municipal Water District (NTMWD) and Lake Texoma in 2009; Congress addressed issue with the passage of PL 112-237 and PL 113-117 but with cost of over \$300 million to the NTMWD.

- San Juan Water Commission and interstate transfers at risk from Colorado into New Mexico;
- Sabine River Authority of Texas and Louisiana. The Sabine River Authority of Texas is currently in the process of constructing a new pump station in the Sabine River. Because the river is relatively narrow, the intake of the pump will by necessity be located just a few yards from the Louisiana State line.

IV. **PRINCIPLES AND GUIDELINES**

- Congress did not intend to subject water transfers to the NPDES program.
- Water transfers do not require NPDES permits because they do not constitute the addition of a pollutant to waters of the U.S.
- States currently have the ability to address downstream effects from water transfers through existing water quality standards programs.
- Congress did not intend to subject water transfers to the requirements of the Lacey Act.
- The US Court of Appeals for the District of Columbia issued a decision in 2017 holding that Title 18 of the Lacey Act does not prohibit transportation of listed injurious species between states of the continental United States. *United States Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131 (D.C. Cir. 2017).
- Water transfers should be exempted from the requirements of the Lacey Act.
- States currently have the ability to prevent the addition of invasive aquatic species to waters of the U.S. and require controls to limit their occurrence when present.

V. **PRIORITIES AND ACTION PLAN**

WESTCAS continues to advocate for actions that prevent inappropriate applications of NPDES permitting programs and Lacey Act provisions that impact water transfer projects that are essential for water supplies in arid west States. WESTCAS supports efforts to define a proper solution that will provide compatibility between interstate water supply transfers in the arid West and provisions of the Lacey Act currently preventing or restricting those transfers.

To attain these priorities, WESTCAS plans to:

1. Continue tracking ongoing efforts to appeal rulings that support EPA's Water Transfer Rule and provide WESTCAS input when needed.
2. Actively engage with state Congressional delegations to obtain legislation expressly exempting water transfers from the requirements of the Lacey Act. If there is future legislation prohibiting transportation of listed injurious species between states of the continental United States in response to the *Reptile Keepers* case, work to include a provision exempting water transfers.

3. In the interim, support HR 1807 to provide immediate relief from Lacey Act provisions for water transfer projects in some arid west States
4. Seek opportunities to expand any successful outcome from HR 1807, or similar legislation, to help protect water transfer projects in other arid west States, while clarifying that WESTCAS does not agree:
 - a. the Lacey Act applies to interstate water transfers; or
 - b. the exemption requirements found in HR 1807 should be applied to any future exemptions for water transfers.
5. Continue to support efforts by State agencies to prevent the addition of pollutants or aquatic invasive species to waters of the U.S. in amounts that could impact beneficial uses of these receiving waters.