

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 98-6056-CIV – LENARD/KLEIN

<hr/> MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,)	
)	
)	
Plaintiff,)	
v.)	
)	
SOUTH FLORIDA WATER MANAGEMENT)	
DISTRICT and CAROL WHELE, as Executive)	
Director,)	
)	
Defendants.)	
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**BRIEF *AMICI CURIAE* OF THE NATIONAL WATER RESOURCES ASSOCIATION,
THE WESTERN URBAN WATER COALITION, THE WESTERN COALITION OF
ARID STATES, THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, THE
CENTRAL ARIZONA WATER CONSERVATION DISTRICT, THE METROPOLITAN
WATER DISTRICT OF SOUTHERN CALIFORNIA, THE CITY AND COUNTY OF
DENVER [COLORADO] ACTING BY AND THROUGH ITS BOARD OF WATER
COMMISSIONERS, THE ALBUQUERQUE BERNALILLO COUNTY [NEW MEXICO]
WATER AUTHORITY, THE METROPOLITAN WATER DISTRICT OF SALT LAKE
CITY & SANDY [UTAH], THE FREMONT MADISON [IDAHO] IRRIGATION
DISTRICT, THE NORTHERN COLORADO WATER CONSERVANCY DISTRICT,
THE CITY OF AURORA [COLORADO], AND THE [CALIFORNIA] STATE WATER
CONTRACTORS IN SUPPORT OF THE DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

QUESTION PRESENTED

Western states and water users depend upon thousands of water transfers to move trillions of gallons of water annually to meet domestic, municipal, agricultural and other needs. The question *amici* will address is: Whether extending the National Pollutant Discharge Elimination System to water transfers would violate Congress' specific instruction in the Clean Water Act, 33 U.S.C. §§ 1251-1387, not to supersede, abrogate, or impair either the authority of each State to allocate water or individual water allocations under.

INTEREST OF *AMICI CURIAE*

The United States Environmental Protection Agency ("EPA") has accurately explained that "numerous States, localities, and residents are dependent upon water transfers, and these transfers are an integral component of U.S. infrastructure." *NPDES Water Transfers Proposed Rule*, 71 Fed. Reg. 32887, at 32289 ("*EPA's Proposed Rule*") (June 7, 2006); *Agency Interpretation on the Applicability of Section 402 of the Clean Water Act to Water Transfers*, Docket No. EPA-HQ-OW-2006-0141, at 4 ("*EPA's Interpretation or Interpretation*") (Aug. 5, 2005). This dependence on water transfers is a simple fact of life of nearly universal and paramount importance throughout the arid west.¹ As explained in their Motion for Leave to Appear as *Amici Curiae*, *Amici* include or represent public western water providers as well as private water users that depend on these essential water transfers.²

The States allocate the waters within their boundaries for "beneficial" or "reasonable" use under one of two prevailing legal theories.³ Eastern States, like Florida, use variations of the riparian doctrine, whereas the arid western States generally follow the prior appropriation doctrine. Under the prior appropriation doctrine, water users acquire the right to use public water resources by placing the water to beneficial use. *Amici* are largely the owners and/or beneficiaries of such water rights, which give them the legal authority to transfer water to where it is needed – places that are often distant from where such water naturally arises.

¹ The arid west is generally described as encompassing all lands west of the 100th Meridian, which runs north-south through Texas, Oklahoma, Kansas, Nebraska and the Dakotas.

² For the purpose of this brief, a water transfer is a diversion of water, without alteration, from one waterbody to another it would not naturally reach absent such transfer.

³ Hawaii follows a unique form of the Public Trust Doctrine.

The Plaintiffs' reading of the Clean Water Act to require a National Pollutant Discharge Elimination System ("NPDES") permit under the federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1387, threatens the ability of *Amici* and similarly situated water providers and individuals across the West to transfer water in its unaltered condition from one waterbody to a different waterbody to meet essential municipal, agricultural, and industrial needs.

SUMMARY OF ARGUMENT

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Supreme Court recognized that the imposition of NPDES permit requirements on transfers of water from one waterbody to another is a complex issue, particularly in the western States.

If we read the Clean Water Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western states, whose water supply networks often rely on engineered transfers among various natural water bodies. See Brief for Colorado et al. as *Amici Curiae* 2-4. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and 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. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs. See 40 CFR §§ 122.28, 123.25 (2003).

541 U.S. 95, 108-109 (2004). The Court pointed out that extending the NPDES Program to water transfers implicates two mandates of the Clean Water Act. First, Congress specifically instructed that the Act should not supersede, abrogate, or impair either the authority of each State to allocate water or individual water allocations. Second, Congress required the protection of water quality. Although the Court expressed the hope that general permits could resolve any conflict, general permits would not solve the essential problem that it is impractical – and unnecessary to protect water quality – for water transfers to meet NPDES Program requirements.

Congress anticipated this potential conflict between State water allocations and water quality when it enacted the Clean Water Act. Rather than including water transfers in the

NPDES Program, Congress structured the Act to give States primacy in matters likely to affect State water allocations, while simultaneously providing other legal tools to protect water quality. In short, Congress left decisions as to the appropriate regulation of water transfers to the States. In so doing, Congress wisely recognized that integrating water quantity and water quality must occur at the State level.

Under the “addition” test of the Plaintiffs, at each point where a ditch, canal, tunnel, or pipeline introduces water to a stream or reservoir for subsequent use, an NPDES permit would be required, subjecting the transfer to the water quality standards and antidegradation requirements of the CWA. This extension of the NPDES Program would impair the States’ ability to meet the unique and varied needs of their residents and to meet their legal obligations to other states under interstate water compacts and apportionments. In addition, water rights owners – including *amici* – may be faced with an impossible choice: constructing prohibitively expensive facilities to meet unnecessary permitting requirements, or forfeiting part or all of their water rights. Either way, existing beneficial uses would be deprived of essential water. The use of general permits and best management practices would not ameliorate this draconian result, as each water transfer would be subject to the same requirements as wastewater dischargers. That is why, as *EPA’s Proposed Rule and Interpretation* explain, Congress chose to authorize other means to control water quality impacts associated with water transfers.

ARGUMENT

I. Requiring NPDES Permits for Engineered Transfers is Contrary to the Plain Language of the Clean Water Act and Congress’ Mandate to Defer to the States’ Allocation of Water.

Congress plainly expressed its intent to honor State water allocation law and specific State water allocations in the plain language of the Clean Water Act, as confirmed by the Act’s legislative history. Requiring an NPDES permit for water transfers contradicts Congress’ directives not to interfere in State water law or allocations. Such interference with the historical federal-state balance concerning the allocation of water is plainly contrary to the intent of Congress.

**A. In the Clean Water Act, Congress Expressly Preserved the
Traditional Federal-State Balance in Water Allocation.**

Land and water uses are traditionally and primarily State prerogatives. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("SWANCC"). As the Supreme Court stated, Congress must convey its purpose clearly where a statutory interpretation

alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) ("Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

Id. at 173. See also, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *U.S. v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). The Clean Water Act plainly expresses Congress' intent to preserve, rather than alter, the federal-state framework in water allocation decisions by deferring to State law. 33 U.S.C. 1251(b) and (g) (2005). Imposing NPDES permitting requirements on water transfers would be "plainly contrary to the intent of Congress."

Although federal-state relations are a particularly complicated area of the law, the Supreme Court and Congress have spoken with clear and consistent voices regarding the allocation of water. For example, subsequent to Congress' adoption of the Clean Water Act in 1972 and section 1251(g) in 1977, the Court observed in its landmark decision in *California v. United States*, 438 U.S. 645, 653 (1978):

The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

Not surprisingly, Congress incorporated its long-standing deference to state water law in section 1251(g) of the Clean Water Act. The Plaintiffs, in contrast, urge this court to adopt a construction that would fundamentally alter the established federal-state framework of deference to state water law.

B. Section 1251(g) of the Clean Water Act Expresses Congress' Clear Intent to Preserve State Water Allocations and Individual Water Rights.

Congress adopted section 1251(g) in its 1977 amendments to the Clean Water Act:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g)(2004). In short, Congress mandated not only deference to the States, but also respect for individual water rights determined pursuant to the States' water laws. And, to the extent water quality concerns arise in the context of water allocations, the Act requires the federal government to cooperate with the States to develop comprehensive solutions.

C. The Legislative History of Section 1251(g) Confirms Congress' Clear Intent to Refrain from Interfering with State Water Allocations.

Section 1251(g) arose as a response to suggestions that reducing water transfers under State water law might be necessary to solve water quality problems.⁴ As the Conference Committee explained:

[I]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction should not be superseded, abrogated or otherwise impaired by this Act . . . [and] that nothing in this Act should be construed to supersede or abrogate rights to quantities of water that have been established by any State.

H.R. CONF. REP. NO. 95-830, at 52 (1977), *reprinted in* 3 Legislative History of the Clean Water Act of 1977 (committee print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 236 (1978). *See also*, S. DEB.: August 4, 1977, *Id.* 1030 (Remarks of Sen. Wallop during Senate debate on the amendment); S. DEB.: Dec. 15, 1977, *Id.* 531 (Remarks of Sen. Wallop explaining conference report). In adopting section 1251(g),

⁴The amendment was prompted in part by concerns over proposals in a Water Resource Council ("WRC") policy study released three weeks earlier. 42 Fed. Reg. at 36788 (July 15, 1977). Among other assaults on the integrity of

Congress reacted swiftly and decisively to the suggestion that diminishing water transfers under State water rights might be necessary to solve water quality problems.

Notably, the 1977 amendment strengthened language adopted just five years earlier that already recognized federal deference to the States.

It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of this authority under the Act.

33 U.S.C. § 1251(b). Similarly, section 1370 – also adopted in 1972 – declared “[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States.” *Id.* § 1370. Thus, over time Congress added language to the Act that progressively reinforced and strengthened federal deference to State water law and water allocations.

The legislative history of section 1251(g) plainly demonstrates the intent of Congress to defer to State water law, while recognizing a more general federal role in protecting water quality. Congress instructed that decisions about integration of water quality and quantity should be made at the State level.

D. EPA’s NPDES Water Transfers Proposed Rule and Agency Interpretation Conclusion that Congress intended to leave the Oversight of Water Transfers to Authorities Other Than the NPDES Program is entitled to Deference.

EPA’s NPDES Water Transfers Proposed Rule and Interpretation conclude that “Congress did not generally intend to subject water transfers to the NPDES Program. Rather, Congress intended to leave the oversight of water transfers to water resource management agencies and the States.” 71 Fed. Reg. 32891; Docket, at 8. *EPA’s Proposed Rule and Interpretation* codify the agency’s long-standing reading of the CWA. *See, National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982) (“EPA’s construction was made contemporaneously with the passage of the [Clean Water] Act, and has been consistently adhered to since.”). That EPA did not find it necessary to promulgate a formal rule on water transfers earlier – the question simply was not a national issue before *Miccosukee* because there was

the states’ water allocation laws, the WRC study concluded that reducing water transfers under state water rights might be necessary to solve water quality problems. *Id.* at 36793.

nearly universal understanding that water transfers were not subject to the NPDES Program – should not undermine the level of deference to which EPA is entitled. Moreover, *EPA's Proposed Rule*⁵ is entitled to even more judicial deference than its long-standing reading and *Interpretation*.⁶ See, e.g., *Vanscoter v. Sullivan*, 920 F.2d 1441, 1449 (9th Cir. 1990) (Although the . . . transmittal and subsequent Notice of Proposed Rulemaking may not themselves have the force of law, they constitute the Secretary's authoritative administrative interpretation of the governing statute . . . [w]e find the Secretary's interpretation of the statute reasonable and defer to it.”).

EPA's Interpretation is entitled to deference on its own merits. See, e.g., *Young v. Community Nutrition Institute*, 476 U.S. 974, 981 (1986) (“We find the FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA.”); *Western Nuclear v. Huffman*, 825 F.2d 1430, 1438 (10th Cir. 1987) (“The critical point in the analysis was that the “FDA [had] advanced an interpretation of an ambiguous statutory provision.” Once that point was reached, the Court was required to defer to the reasonable interpretation of the agency.” [citation omitted]).

EPA's Proposed Rule and *Interpretation* of the CWA are entitled to at least the degree of deference afforded under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). “[A]n agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.’” *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore*, 323 U.S. at 139). Thus, the measure of deference the Court should give to an administrative interpretation in a given case depends upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give

⁵ *Amici* endorse EPA’s Rationale and Scope of its *Proposed Rule*, 71 Fed. Reg. 32889 – 32892, while continuing to analyze the proposed amendments to 40 C.F.R. 122 for clarity and consistency with the agency’s stated intent. *Amici* expect to file formal comments on *EPA's Proposed Rule* in accordance with the procedures set forth in the Federal Register Notice.

⁶ Although the Second Circuit Court of Appeals did not find EPA’s *Interpretation* persuasive, the court was apparently not aware of and did not consider EPA’s promulgation of its *Proposed Rule*, which was announced shortly before the court’s decision. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, Nos. 03-7203(L) and 03-7203(XAP) (“Catskill II”) (2nd Cir. 2006).

it power to persuade, if lacking power to control,” *Skidmore*, 323 U.S. at 140, as well as its formality and relative expertness. *Mead*, 533 U.S. at 228.

Under these standards, *EPA’s Proposed Rule and Interpretation* are entitled to substantial deference. The agency’s *Proposed Rule and Interpretation* are thorough and their reasoning is valid. They address a legal issue that is “interstitial” in nature in a manner that employs the agency’s substantial expertise and is consistent with the agency’s long-standing practice. Contrary to Plaintiff’s assertion that *EPA’s Proposed Rule and Interpretation* are merely a litigation position, Miccosukee Tribe Motion for Summary Judgment, at FN 4, the *Proposed Rule and Interpretation* are consistent with EPA’s long-standing interpretations of the CWA made contemporaneously with its passage. *Gorsuch*. Therefore, the court should afford *EPA’s Proposed Rule and Interpretation* substantial deference.

II. Extending NPDES Permits to Water Transfers Would Unnecessarily Interfere with the States’ Water Allocation Laws and with the Exercise of Individual Water Rights.

Extending the NPDES program to water transfers would eviscerate the fundamental doctrine of State water allocation law because it would either limit or stop the transfer of water. Permit conditions that prevent or render prohibitively costly the transfer of some or all of the water legally available to individual water rights allocated under State law would directly abrogate State water law, injuring *amici*, other western water users, and western States. Such federal interference also has important implications for comity among the States under interstate water compacts and equitable apportionments.

A. Water Transfers Do Not Cause Significant Water Quality Problems.

In Colorado for example, more than 1,700 diversions transfer water into a water body that it would not naturally reach. However, the water quality of Colorado’s streams and lakes is generally excellent without the imposition of NPDES program requirements on these transfers. Of its 107,403 miles of streams, just 7,705 (7.2%) were designated as “impaired” in 2004, 5 Colo. Code Regs. § 1002-93 (2004), that is, not meeting one or more water quality standards or designated uses under the Clean Water Act, 33 U.S.C. § 1313. The majority of these designations were attributable to natural causes, e.g., selenium leached from shale. In fact, in

developing and updating this list, Colorado has never encountered a waterbody whose quality is impaired as a result of contaminants transferred from another waterbody.

B. Requiring NPDES Permits for Water Transfers Would Interfere with Interstate Compacts and Water Apportionments.

A significant number of water transfers occur on interstate stream systems, the waters of which are allocated among the States by interstate compact or Supreme Court decree.⁷ Extending the NPDES program to water transfers would pose significant problems for such interstate allocations.

States may not be able to fully utilize their legal entitlement to use scarce water if – due to technically or economically impossible NPDES program requirements – they are prevented from transferring legally available water from one basin to another to meet demands. For example, Colorado uses much of its Colorado River Compact entitlement to meet needs in the South Platte and Arkansas River basins, which lack adequate native water. Similarly, New Mexico uses much of its Colorado River Compact entitlement in the Rio Grande basin; Arizona uses most of its entitlement in the Gila and Salt River basins; and California transfers much of its entitlement outside the basin to serve coastal communities. Trans-basin transfers also often mitigate the impact of native water diversions in the receiving basin, allowing a State to meet its water delivery obligations to downstream States in the receiving river basin. For example, New Mexico indirectly relies on water transfers from the Colorado River Basin to satisfy native Rio Grande water rights, freeing native water to meet the State’s water delivery obligations to Texas under the Rio Grande Compact. 53 Stat. 785 (1939).

C. Requiring NPDES Permits for Water Transfers Would Abrogate Water Allocations Because Permit Conditions Would Effectively Prohibit the Full Exercise of Many State Water Rights.

In *Miccosukee*, *supra*, the Supreme Court postulated that general permits might ameliorate the impact of extending the NPDES program to water transfers. General permits might alleviate the administrative burden upon State permit-issuing agencies. However, they

⁷ See, e.g., Colorado River Compact, 42 Stat. 171 (1921) (Ariz., Cal., Colo., Nev., N.M., Utah, Wyo.); *Arizona v. California*, 373 U.S. 546 (1963) (allocating the lower Colo. River among Ariz., Cal., and Nev.).

would not address the impact on water rights owners, such as *amici*. If required to operate under NPDES permits, many water rights owners would have no alternative but to curtail their transfers to meet water quality standards and antidegradation requirements of the Clean Water Act, as it would be impractical and cost prohibitive to construct treatment facilities. These substantive provisions would apply regardless of how simplified the administrative process might be.

(i) *Water quality standards*

If a discharge merely has the “potential to cause . . . an excursion above any State water quality standard,” its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i). *See also, Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (“The [CWA] does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit.”) Thus, an NPDES permit necessarily contains conditions that limit the amount of pollutants delivered to the receiving waters regardless of whether standards are, in fact, exceeded or whether the transfer is a significant potential cause of an exceedance. For example, Colorado has adopted water quality standards for thirty-six different naturally-occurring parameters, including suspended solids and temperature, 5 Colo. Code Regs. § 1002-31.16, which are influenced by snowmelt, rain runoff, and reservoir storage. Water quality standards also apply to aluminum, cadmium, copper, gold, iron, lead, silver, and zinc, *id.*, metals commonly present downstream from Colorado’s mineralized mountains.

Further, water quality almost inevitably varies between basins. Movement of water from one basin to another could therefore be subject to a permit even though the transferor has no ability to control naturally occurring or ubiquitous parameters. The only sure way an operator of a water transfer could control the introduction of pollutants into receiving waters would be to transfer no water at all.

Eighty percent of the precipitation in the western states falls as snow. Runoff from snowmelt and storm events, such as thunderstorms, naturally contains elevated levels of pollutants: total suspended solids, i.e. particles of soil and sediment, and turbidity, i.e. muddy water, from erosion caused by rapid runoff and accompanying high stream flows. The dramatic topography of the west – which extends from 280 feet below sea level to over 14,494 feet above

sea level – is, of course, the result of such natural erosive processes. Although suspended solids carried into a stream or open ditch may eventually settle out downstream, their temporary presence at the point of introduction could cause an excursion above water quality standards and trigger regulatory consequences. And, the source water, such as the headwaters of the Colorado River, may be naturally high in total dissolved solids, e.g., salts, as a result of its passage through saline geological formations and inflows from brackish hot springs. Finally, water conveyances typically are open canals and ditches, which receive pollutants directly from natural erosion.

(ii) *The impact on water transfers*

To avoid the potential to cause an excursion above the water quality standards of the receiving waterbody during spring runoff or following a thunderstorm, a single diverter might have to expend hundreds of millions of dollars to construct one or more treatment facilities or implement best management practices⁸ to reduce the presence of even natural pollutants with the “potential to cause . . . an excursion above any State water quality standard.” 40 C.F.R. § 122.44(d)(1)(i). Each facility would be required to treat peak flows – which might occur just one or two days a year during spring snowmelt – in order to match the water quality of receiving waters. Further, expensive treatment plants would operate for only a few weeks or months because water is usually available only during snowmelt (50 percent of mountain stream flow occurs in just three months: May, June and July). Meeting temperature and nutrient standards of receiving waters would pose particular challenges for reservoir releases because of naturally occurring differences in water quality.

The Colorado-Big Thompson (“C-BT”) Project transfers water from the Colorado River and delivers it through a tunnel under the Continental Divide for municipal, agricultural, and other uses in northeastern Colorado. The Project diverts water from four source lakes, reservoirs, and streams, and conveys that water by means of gravity and three pump stations through two tunnels and nine canals into and then out of at least thirteen different natural streams and rivers that are integral parts of the water transfer. Transfers average 203 million gallons per day (“MGD”), although transfers peak at 358 MGD. For comparison, the Metropolitan Water District of Southern California delivers 1,696 MGD. The potential capital cost to treat C-BT

⁸ Best management practices are methods and practices, including structural and nonstructural controls and operation and maintenance procedures, applied before, during, or after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters. *See, e.g.*, 40 C.F.R. § 130.2(m).

water only once could exceed \$315 million, double the initial cost of the entire C-BT Project.⁹ Without the ability to treat peaking flows, the Project would face an uncertain future. Furthermore, the Project might have to treat essentially the same water 17 times in 17 different treatment plants, that is, at every point water is discharged to a lake, reservoir, or stream for later delivery downstream. Such treatment would be prohibitively expensive, if even possible.

Treatment plants generally cannot handle large fluctuations in volume; they require gradual changes. Therefore, most treatment plants use a forebay, i.e., a surge reservoir, to buffer variable flows. In addition, the removal of any constituents by the treatment plant produces a “sludge,” which requires disposal. Treatment facilities also require access for people and equipment. Possible site requirements to treat C-BT Project water, as described above, could exceed 240 acres per plant. Such large areas may not be physically available in steep headwaters terrain where they would be needed.

Many water transfers, such as the C-BT Project, traverse federal land, including national parks and national forests adjacent to wilderness areas. (See Motion to Appear as *Amici Curiae*, at 10.) Given the location of many transfers within or near pristine areas and the need for large sites for treatment facilities, the NPDES approach may not be economically or technically feasible, politically acceptable, or environmentally desirable. To permit a treatment facility, sludge disposal, or a forebay would invoke the dredge-and-fill provisions of the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. Obtaining necessary approvals would be costly, time-consuming, and likely impossible.

Under these circumstances, diverters like *amici* may have no alternative but to curtail transfers at least part of the year. In so doing, they would effectively forfeit part of their State-allocated water right, contrary to Congress’ directives throughout the Clean Water Act.

(iii) *Antidegradation*

Where the quality of waters “exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water,” antidegradation provisions apply so as to maintain and protect existing quality. 40 C.F.R. § 131.12(a)(2). Although transferred water is often suitable for beneficial use without treatment, water transfers would nonetheless be subject

⁹ The Engineering Department of Denver Water, which transfers an average of 106 MGD – 39 billion gallons per year – to meet the needs of the Denver Metro area, estimates that the capital costs of treating water transfers for total

to this “no degradation” requirement if an NPDES permit were necessary.¹⁰ Antidegradation requirements may apply where only one water quality constituent is better than the corresponding stream standard. The only practical way for many diverters to meet antidegradation requirements for high quality waters might be to curtail transfers and forgo the use of a portion of their State-allocated right to use a specific quantity of water.

(iv) *General permits*

All NPDES permits – general as well as individual permits – must include limitations to comply with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A). “No permit may be issued . . . [w]hen the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA.” 40 C.F.R. § 122.4. Thus, the general permit process would not change NPDES program requirements that would force many transferors like *amici* to forgo the full exercise of their State water rights, as explained above.

(v) *Best Management Practices*

NPDES permits may include numeric effluent limitations on the concentration of pollutants as necessary to comply with water quality standards, 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. § 122.4(d), and may require best management practices (“BMPs”), 33 U.S.C. § 1314(e). However, adherence to BMPs – generally simpler and less costly than the usual technological controls – does not automatically assure compliance with requirements of the Clean Water Act concerning water quality standards, *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 589 (9th Cir. 1985), or antidegradation. Furthermore, it is difficult to envision how many water providers could utilize BMPs in an economical manner to control source water quality without significantly curtailing their water transfers.

suspended solids, metals, and phosphorus could be as much as \$0.90 per gallon per day of capacity, depending on plant location and complexity of necessary treatment.

¹⁰ A state may allow degradation only if it finds, following an analysis of alternatives, that “allowing lower water quality is necessary to accommodate important economic or social development in the areas where the waters are located.” 40 C.F.R. § 131.12(2).

III. The Clean Water Act Authorizes the States to Control Pollutants from Water Transfers When Necessary to Meet Water Quality Standards.

Congress created a number of tools in the Clean Water Act to address water quality in water transfers. States, in addition, have independent authority over water transfers. Using these tools, states can protect both water quality and water rights allocated under state law.

A. The Clean Water Act Authorizes States to Condition Federal Licenses and Permits on Compliance with Water Quality Standards.

Water transfers necessarily require physical structures to divert from and discharge to waters of the United States. Such structures are regulated under section 404 of the Act because they typically involve the “discharge of dredged or fill material into the navigable waters.”¹¹ 33 U.S.C. § 1344. Any applicant for a 404 Permit must obtain a State certification that the requested activity will comply with State water quality standards under section 401 of the Clean Water Act. 33 U.S.C. § 1341 (a)(1); 33 C.F.R. §§ 325.2(b), 330.4(c).

Section 401(d) allows States to impose “other limitations” to assure compliance with State water quality standards and with “any other appropriate requirement of State law.” *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 713-14 (1994).¹² *See also, S.D. Warren v. Maine Bd. of Environmental Protection*, 547 U.S. ___, Slip Op. at 15 (2006). Sections 404 and 401 thus work in concert to provide States with the authority to regulate the discharge of pollutants from water transfers so as to prevent and address adverse water quality impacts that could otherwise result from these activities. For example, States may limit the construction and operation of any water transfer based on State water quality standards, including conditions to protect designated uses, to meet water quality criteria, and to avoid water quality degradation. *Id.* at 715-16, 719.

¹¹ It is virtually impossible to construct a water transfer structure without the discharge of dredged or fill material into navigable waters, which would invoke section 404 of the Act.

¹² It is critical to understand that the Supreme Court in *PUD No. 1* recognized the States’ authority to impose limitations under section 401, but in no way suggested, let alone mandated, the imposition of the NPDES Program on water transfers, a distinction overlooked by the Plaintiffs. *Friends Mot.* at 9. In short, the Supreme Court did absolutely nothing to interfere with the States’ authority preserved by sections 1251(g) and 1370(2).

B. The Clean Water Act Authorizes States to Adopt More Stringent Requirements Respecting Discharges of Pollutants.

Many states have enacted water quality laws to supplement the Clean Water Act, as recognized by 33 U.S.C. § 1370. For example, California's State Water Project and Central Valley Project are the largest water transfers in the country. These transfers are regulated under state water rights laws that may impose requirements to protect water quality, e.g., Cal. Water Code §§ 1257 and 1258 (2004), and under state water quality law, *id.* § 13000 *et seq.*

Colorado has similar state statutory authority to regulate any "activity" that causes "the quality of any state waters to be in violation of any applicable water quality standard." Colo. Rev. Stat. § 25-8-205(1)(c) (2003). The Colorado statute also contains specific regulatory authority empowering the state to protect water quality through the adoption of control regulations¹³ for discharges from the "diversion, carriage, and exchange of water from or into streams, lakes, reservoirs, or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures." *Id.* § 25-8-503(5). The state may also adopt control regulations when necessary to assure compliance with water quality standards and classifications. *Id.* § 25-8-202(7)(b)(II)(A).¹⁴ State statutory authority such as the above allows states to control the discharge of pollutants in situations analogous to *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 ("Catskill I") (2nd Cir. 2001) (drinking water diverted from a reservoir through a tunnel and released into a creek), while simultaneously ensuring that water rights are not impaired. *See, e.g.*, Colo. Rev. Stat. § 25-8-104. Thus, state laws can and do appropriately address water quality problems potentially associated with water transfers, while respecting state water allocations.

A number of states can also apply a "public interest test" to protect water quality when granting a water right. For example, in Idaho, "if an applicant's appropriation of water will conflict with the local public interest . . . then the Director may reject such application and refuse a permit therefore . . . or may grant a permit upon conditions." *Shokal v. Dunn*, 109 Idaho 330,

¹³ Control regulations may, for example, "describe precautionary measures, both mandatory and prohibitory, that must be taken by any person . . . [who] could reasonably be expected to cause pollution of any state waters . . . or . . . be in violation of any applicable water quality standard." Colo. Rev. Stat. § 25-8-205(1)(c) (2003).

¹⁴ While conveyances are not subject to NPDES permitting, Colorado statute prohibits the discharge of any pollutant into a ditch or man-made conveyance for the purposes of evading NPDES permitting requirements. Colo. Rev. Stat. § 25-8-501(1) (2003). Thus, a discharger could not evade permitting by discharging pollutants to an engineered water conveyance rather than a stream.

336, 707 P.2d 441, 448 (Id. 1985) (internal quotations omitted). Similarly, Alaska “may not issue a permit unless doing so is in the public interest,” considering the “impacts of water appropriation on fish and game resources, and public health.” *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 950 (Alaska 1995). And California’s State Water Resources Control Board “has been granted broad authority to control and condition water use, insuring utilization consistent with the public interest The [board’s] powers extend to regulation of water quality.” *Environmental Def. Fund, Inc. v. E. Bay Mun. Dist.*, 26 Cal.3d 183, 198, 605 P.2d 1, 9 (Cal. 1980).

In each of these examples, the states have authority under state law to protect water quality as well as the vital transfer of water for beneficial use. If a state determines that discharge permits for water transfers are needed, then that state is free to adopt such a program. However, the Clean Water Act does not require the state to do so.

C. The Clean Water Act Further Encourages States or Local Governments to Prepare Areawide Waste Treatment Management Plans to Control Pollution.

Section 1288 of the Clean Water Act encourages states to identify geographic areas with substantial water quality control problems and to designate planning agencies to prepare areawide wastewater treatment management plans. 33 U.S.C. § 1288(a)(2). These areawide plans identify priority water quality problems and recommend control measures. In the context of water transfers, they can address not only pollution problems in the receiving waters from such transfers, but also water quality problems in source waters before the transfer. Areawide plans thus provide another flexible tool for states to use to control any water quality problems created by water transfers.

D. The States’ Common Laws Protect Water Quality

The states’ common laws regard water pollution as a trespass against the complainant’s right to use water. The fundamental doctrine is that water quality cannot be impaired to an extent that would injure subsequent uses.

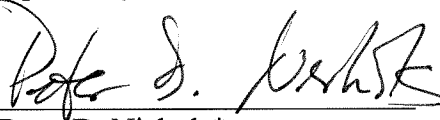
In Colorado, “a common law theory . . . prohibits the discharge of contaminants into streams where doing so makes the water unsuitable for an[other] appropriator’s normal use of water.” *In re Concerning Application for Plan for Augmentation of the City and County of Denver*, 44 P.3d 1019, 1028 (Colo. 2002). Other states reach similar results. *See, e.g., Phillips*

v. Davis Timber Co., Inc., 468 So.2d 72, 79 (Miss. 1985) (plaintiff “entitled to an injunction enjoining and prohibiting further PCP pollution into his lake”); *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291, 538 N.Y.S.2d 844, 846 (1989) (commercial fishermen have standing to sue for nuisance and obtain an injunction to prevent water pollution); *Dingwell v. Town of Litchfield*, 4 Conn. App. 621, 496 A.2d 213 (1985) (upholding injunction against town’s pollution of well); *Penn. R.R. v. Sagamore Coal Co.*, 281 Pa. 233, 238, 126 A. 386, 387 (1924) (pollution of stream creates an enjoined nuisance).

SUMMARY

For the forgoing reasons, *amici curiae* respectfully urge the Court to grant the South Florida Water Management District’s Motion for Summary Judgment.

Respectfully submitted,



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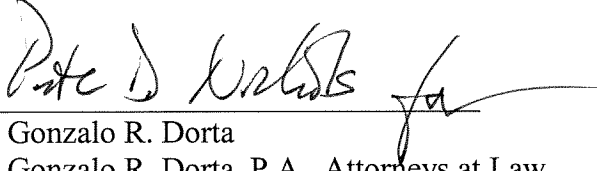
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