

# 14-1823

**Consolidated Cases: 14-1909, 14-1991, 14-1997, 14-2003**

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., *et al.*,

Plaintiffs - Appellees,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants - Appellants - Cross Appellees,

*(For Complete Caption See Reverse Side of Cover)*

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

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**BRIEF OF INTERVENOR DEFENDANTS-APPELLANTS-CROSS APPELLEES CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL UTAH WATER CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER, BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION, CITY OF BOULDER [COLORADO], CITY OF AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT, IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, KANE COUNTY [UTAH] WATER CONSERVANCY DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION, SALT LAKE & SANDY [UTAH] METROPOLITAN WATER DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER AUTHORITY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS, ACTING BY AND THROUGH ITS ENTERPRISE COLORADO SPRINGS UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS**

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CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELEWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., WATERKEEPER ALLIANCE, INC., TROUT UNLIMITED, INC., NATIONAL WILDLIFE FEDERATION, ENVIRONMENT AMERICA, ENVIRONMENT NEW HAMPSHIRE, ENVIRONMENT RHODE ISLAND, ENVIRONMENT FLORIDA, STATE OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON,

Plaintiffs - Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

Consolidated Plaintiff - Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, SIERRA CLUB,

Intervenor Plaintiffs - Appellees,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants - Appellants - Cross Appellees,

STATES OF COLORADO, STATE OF NEW MEXICO, STATE OF ALASKA, ARIZONA DEPARTMENT OF WATER RESOURCES, STATE OF IDAHO, STATE OF NEBRASKA, STATE OF NORTH DAKOTA, STATE OF NEVADA, STATE OF TEXAS, STATE OF UTAH, STATE OF WYOMING, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL UTAH WATER CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER, BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION, CITY OF BOULDER [COLORADO], CITY OF AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT, IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, KANE COUNTY [UTAH] WATER CONSERVANCY DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION, SALT LAKE & SANDY [UTAH] METROPOLITAN WATER DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER AUTHORITY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS, ACTING BY AND THROUGH ITS ENTERPRISE COLORADO SPRINGS UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS, CITY OF NEW YORK,

Intervenor Defendants - Appellants - Cross Appellees,

NORTHERN COLORADO WATER CONSERVANCY DISTRICT,

Intervenor Defendants,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Intervenor Defendant - Appellant - Cross Appellant.

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## **CORPORATE DISCLOSURE STATEMENT**

Neither the Western Urban Water Coalition nor the National Water Resources Association has a parent corporation or has issued stock. The other Western Water Providers are all governmental entities.<sup>1</sup>

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<sup>1</sup>Central Arizona Water Conservation District, Central Utah Water Conservancy District, City And County Of Denver, By And Through Its Board Of Water Commissioners, City And County Of San Francisco Public Utilities Commission, City Of Boulder [Colorado], City Of Aurora [Colorado], El Dorado Irrigation District, Idaho Water Users Association, Imperial Irrigation District, Kane County [Utah] Water Conservancy District, Las Vegas Valley Water District, Lower Arkansas Valley Water Conservancy District, Metropolitan Water District Of Southern California, National Water Resources Association, Salt Lake & Sandy [Utah] Metropolitan Water District, Salt River Project, San Diego County Water Authority, Southeastern Colorado Water Conservancy District, The City Of Colorado Springs, Acting By And Through Its Enterprise Colorado Springs Utilities, Washington County [Utah] Water District, Western Urban Water Coalition, [California] State Water Contractors.

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## PRELIMINARY STATEMENT

Supplying water to the 70 million people living in the arid West is a daunting challenge that depends on thousands of water transfers every day. Water transfers rarely impair water quality, as identified pursuant to § 303(d) of the Clean Water Act in the Administrative Record.<sup>2</sup> 33 U.S.C. § 1313(d). And transferors are generally not responsible for the presence of naturally-occurring constituents and the physical properties of the waters they transport.<sup>3</sup> But meeting the dozens of water quality standards coincident with § 402 National Pollutant Discharge Elimination System permitting to address these natural processes would be cost prohibitive and technically impractical.<sup>4</sup> 33 U.S.C. § 1342. Western Water Providers<sup>5</sup> would thus face Hobson's choice: continue transfers and risk regulatory

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<sup>2</sup> See e.g., J.A. at 320.

<sup>3</sup> J.A. at 121 (National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,702 (June 13, 2008)); Administrative Record (hereinafter "AR") [Doc. 119], 0875.1, at 1 (DOI); AR 0953, at 2; AR 1361.1, at 4; AR 1371.1, at 2; J.A. at 1172; J.A. at 347.

<sup>4</sup> J.A. at 1173; AR 1433, at 18; AR 1308.1, at 2; J.A. at 345; AR 1286.1, at 1; AR 1292.1, at 2; AR 1362.1 at 3; AR 1375.1, at 2; AR 0036, at 1; AR 1275.1, at 5; J.A. at 1315; AR 1415.21, at 3–4; AR 1348.1, at 2; AR 1265, at 1; AR 0679.1, at 2; J.A. at 1232–33; AR 0874.1, at 5; AR 1448, at 19.

<sup>5</sup> Western Water Providers are the Western Urban Water Coalition, National Water Resources Association, the City and County of Denver, acting by and through its Board of Water Commissioners, the City of Boulder [Colorado], the City of Aurora [Colorado], the Metropolitan Water District of Southern California, the San Diego County Water Authority, the City and County of San Francisco Public Utilities Commission, the Salt Lake & Sandy [Utah] Metropolitan Water District, the Las Vegas Valley Water District, the Lower Arkansas Valley [Colorado] Water

agency enforcement action and citizen suits, or curtail water transfers and deprive tens of millions of people of essential water supplies. Congress did not intend that result after spending billions to help the West develop its water resources. Rather, Congress enacted in §101(g) its respect for individual water allocations – real property “water rights” in the West, determined pursuant to state law. 33 U.S.C. § 1251(g). The Environmental Protection Agency understood all of this when it adopted the Water Transfers Rule, which excludes water transfers from § 402. 40 C.F.R. § 122.3(i). EPA made a reasonable interpretation of the Act. This Court should reverse the lower court.

Since most western precipitation falls as snow, Western Water Providers (“Western Providers”) must capture water when and where the snow melts, far from the West’s urban and agricultural centers. Western Providers and countless other entities (“Providers”) divert water from other watersheds to meet water needs across the West. Providers divert and deliver water through natural rivers and lakes, as wells as through conveyance facilities such as reservoirs, aqueducts, ditches, canals and pipelines for municipal, agricultural, industrial, commercial and

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Conservancy District, the Central Utah Water Conservancy District, the Washington County [Utah] Water District, the Idaho Water Users Association, the [California] State Water Contractors, Eldorado Irrigation District, the City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities, the Southeastern Colorado Water Conservancy District, the Kane County [Utah] Water Conservancy District, the Imperial Irrigation District [California], the Central Arizona Water Conservation District, [California] State Water Contractors, and the [Arizona] Salt River Project.

other beneficial uses. Without this extensive infrastructure for water transfers, many of the nation's great cities could not exist, including Albuquerque, Colorado Springs, Denver, Las Vegas, Los Angeles, Phoenix, Reno, Salt Lake City, San Diego, San Francisco, Santa Fe, and Seattle. Similarly, many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, the Snake River Valley of Idaho, and the Yakima Valley of Washington. *See* J.A. at 1141.

### **JURISDICTIONAL STATEMENT**

The Western Providers adopt the Western States' Jurisdictional Statement.

### **STANDARD OF REVIEW**

The Western Providers adopt the Western States' Standard of Review.

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the lower court erred in interpreting the Clean Water Act contrary to Congress' specific instructions in 33 U.S.C. §§ 1251 and 1370, and the Supreme Court's warning that nothing in the Act shall be construed to supersede, abrogate or otherwise impair the authority of each state to allocate quantities of water, *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004)?

2. Whether the lower court erred in failing to apply *Chevron* deference to EPA's reasonable interpretation of the Clean Water Act in the Waters Transfers

Rule, 40 C.F.R. § 122.3(i), where Congress has delegated to EPA, as the administrative agency with the appropriate expertise, the authority to interpret and administer that statute?

## **STATEMENT OF THE CASE**

The Western Providers' appeal questions whether Congress intended water transfers to be subject to § 402 because NPDES requirements would impair the exercise of individual water rights established by the states.

### **Nature of the Case, Procedural History and Summary of the Decision Below**

The Western Providers adopt the Western States' Nature of the Case, Procedural History and Summary of the Decision Below.

### **Western Providers' Statement of Relevant Facts**

1. Water transfers are routine in many different contexts across the United States. Transfers can be relatively simple, moving a little water a short distance within a small watershed, or very complex, moving large quantities of water long distances, across state lines and into distant river basins. Typically, water transfers route water through constructed conveyances, such as aqueducts, canals, channels, ditches, tunnels, and reservoirs, as well as natural streams, rivers and lakes. Transfers employ gravity or pumps to deliver water for use, such as municipal water supply, irrigation, power generation, flood control, and environmental services. There are thousands of water transfers currently in place

in the United States. Many federal, state, local and private entities operate water transfers. Numerous states, communities and individuals depend on water transfers for their water supply, and these transfers are an integral component of U.S. infrastructure.<sup>6</sup>

2. The federal government authorized many water transfers by specific Congressional action or by the U.S. Corps of Engineers pursuant to the Rivers and Harbors Act.<sup>7</sup> The U.S. Bureau of Reclamation's 170 projects "bring water to more than 31 million people, and provide one out of five Western farmers (140,000) with irrigation water for 10 million acres of farmland that produce 60% of the nation's vegetables and 25% of its fruits and nuts" in eleven western states.<sup>8</sup>

3. Western interbasin water transfers total at least 14.2 million acre-feet per year,<sup>9</sup> and serve nearly 60 million residents of the arid west.<sup>10</sup>

4. Eighty percent of the precipitation in the western states falls as snow. Runoff from snowmelt and storm events naturally contains elevated levels of total suspended solids (particles of soil and sediment) and turbidity (muddy water) from

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<sup>6</sup> AR 0001, at 2; J.A. at 117 (NPDES Water Transfers Rule, 73 Fed. Reg. at 33,698); AR 0030, at 1–2; AR 0873.1, at 1; AR 0874.1, at 2–3; AR 1262.1, at 2; AR 1275.1, at 5; AR 1302.1, at 1; AR 1305, at 2; AR 1421; AR 1405, at 2; AR 1408, at 1; AR 1410, at 1; J.A. at 1179–1226; J.A. at 1227–28; J.A. at 1232–33.

<sup>7</sup> AR 1348.1, at 2; *see also* J.A. at 1190–94; AR 1248.1, at 2; AR 1265, at 4; AR 1362.1, at 1; J.A. at 1227; AR 1391.1, at 12; AR 1306, at 3; J.A. at 1232–33.

<sup>8</sup> *Bureau of Reclamation – About Us*, U.S. Dep't of the Interior Bureau of Reclamation (last updated Sept. 4, 2014), <http://www.usbr.gov/main/about/>.

<sup>9</sup> J.A. at 1216.

<sup>10</sup> J.A. at 1152.

erosion caused by rapid runoff and accompanying high stream flows. Water conveyances typically are open canals and ditches and therefore receive regulated constituents directly from natural precipitation runoff and erosion. And the source water may also be naturally high in total dissolved solids, such as salts, as a result of passage through saline geological formations and inflows from brackish hot springs.<sup>11</sup>

5. Providers are generally not responsible for the presence of naturally-occurring pollutants in the waters they transport.<sup>12</sup>

6. The capital costs to treat water transfers for total suspended solids, metals, and phosphorus could be as much as \$0.90 per gallon, per day of capacity.<sup>13</sup> Providers would have to expend millions of dollars reconfiguring and redesigning their water delivery infrastructure to meet NPDES requirements for naturally-occurring constituents.<sup>14</sup> A single Provider might have to expend hundreds of millions of dollars to construct one or more water treatment facilities to reduce the levels of natural pollution that have the potential to exceed water quality standards in receiving waters. Each treatment facility would be required to treat peak flows, which might occur just one or two days a year, in order to meet

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<sup>11</sup> AR 1433, at 16.

<sup>12</sup> J.A. at 121 (NPDES Water Transfers Rule, 73 Fed. Reg. at 33,702); AR 0875.1, at 1 (DOI); AR 0953, at 2; AR 1361.1, at 4; AR 1365.1, at 2; AR 1371, at 2; J.A. at 1172; J.A. at 347.

<sup>13</sup> J.A. at 1172; AR 1433, at 17.

<sup>14</sup> J.A. at 309.



the water quality standards of receiving waters. Treatment plants would operate for only a few weeks or months each year because water is usually available for transfer only during snowmelt, from May to July.<sup>15</sup>

7. Meeting temperature and nutrient water quality standards of receiving waters would pose particular challenges for reservoir releases because of natural differences in water quality between watersheds.<sup>16</sup>

8. The construction of water treatment plants to meet NPDES program requirements may be cost prohibitive, technically impractical, politically unacceptable, or environmentally undesirable.<sup>17</sup> Many water transfers traverse federal land, including national parks and national forests adjacent to wilderness areas.<sup>18</sup> Construction of a treatment facility, disposal of naturally-occurring constituents, or a fore bay/surge reservoir in such locations would invoke the dredge-and-fill provisions of the Clean Water Act, the Endangered Species Act, the Federal Land Policy and Management Act, and the National Environmental Policy

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<sup>15</sup> J.A. at 1172; J.A. at 347.

<sup>16</sup> J.A. at 1172; J.A. at 374.

<sup>17</sup> J.A. at 1173; AR 1433, at 18; AR 1308.1, at 2; J.A. at 345; AR 1286.1, at 1; AR 1292.1, at 2; AR 1362.1 at 3; AR 1375.1, at 2; AR 0036, at 1; AR 1275.1, at 5; J.A. at 1315; AR 1415.21, at 3–4; AR 1348.1, at 2; AR 1265, at 1; AR 0679.1, at 2; J.A. at 1232–33; AR 0874.1, at 5; AR 1448, at 19.

<sup>18</sup> J.A. at 1173; AR 1433, at 17; AR 1415.21, at 5.

Act. Obtaining necessary approvals would be costly, time-consuming, and, likely impossible.<sup>19</sup>

9. If subject to NPDES permitting, Providers may have no alternative but to curtail transfers to meet NPDES requirements, forgoing their use of water rights established by the states.<sup>20</sup>

### SUMMARY OF ARGUMENT

An interpretation of the NPDES program that covers water transfers would run contrary to Congress' specific instruction and the Supreme Court's warning that nothing in the Act shall be construed to supersede, abrogate or impair "the authority of each State to allocate quantities of water within its jurisdiction" or "to supersede or abrogate rights to quantities of water which have been established by any state," i.e., individual water rights owned by Providers and others. 33 U.S.C. § 1251(g); *Miccosukee*, 541 U.S. at 108. This is because the NPDES program could require treatment of naturally-occurring water quality constituents (sediment, turbidity) in the water transferred. This treatment would be both cost prohibitive and technically impractical for water transferors, ultimately forcing

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<sup>19</sup> See J.A. at 1173; AR 1433, at 1.

<sup>20</sup> J.A. at 1173; AR 1433, at 18; AR 1308.1, at 2; J.A. at 345; AR 1286.1, at 1; AR 1292.1, at 2; AR 1362.1 at 3; AR 1375.1, at 2; AR 0036, at 1; AR 1275.1, at 5; J.A. at 1315; AR 1415.21, at 3–4; AR 1348.1, at 2; AR 1265, at 1; AR 0679.1, at 2; J.A. at 1232–33; AR 0874.1, at 5; AR 1448, at 19.

Providers to curtail water transfers and to forgo exercise of their state-established water rights.

All NPDES permits must include discharge limitations designed to meet the water quality standards of the receiving waters, and must include antidegradation requirements. The naturally-occurring constituents and physical properties of water involved in water transfer essential to western water supplies may violate those requirements. But water transfers rarely impair water quality, as identified pursuant to § 303(d) of the Clean Water Act in the Administrative Record.<sup>21</sup> 33 U.S.C. § 1313(d). Nevertheless, Providers would need to invest in the capacity to treat water transfers for various naturally-occurring constituents and physical properties to avoid the “potential to cause or contribute” to a violation of the water quality standards of the receiving waters, even though the transfer itself has not affected the naturally-occurring constituents or physical properties of the waters they transport.<sup>22</sup> Treatment of water transfers could cost \$4.2 billion per year in just the western states. Costs of that magnitude are neither feasible nor justified to

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<sup>21</sup> See e.g., AR 1197, at 1.

<sup>22</sup> J.A. at 121 (National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,702 (June 13, 2008) (later codified at 40 C.F.R. pt. 122)); Administrative Record (hereinafter “AR”) [Doc. 119], 0875.1, at 1 (DOI); AR 0953, at 2; AR 1361.1, at 4; AR 1371.1, at 2; J.A. at 1172; J.A. at 347.

treat natural water quality. Nor could Congress have intended to impose this crippling burden on water transfers when establishing the NPDES program.

Failing to meet the water quality standards of the receiving waters would expose Providers to regulatory agency enforcement action and citizen suits, including injunctions against transfers that could deprive western residents of essential water supplies, as well as the risk of multi-million dollar penalties. Providers would therefore be compelled to curtail transfers to avoid violating NPDES requirements, and forgo the diversion, transfer and use of significant portions of their water rights to meet essential water supply needs.

Although water transfers had a 100-year history, Congress apparently did not contemplate the potential for them to fall within the NPDES program when it adopted the Act. Congress accordingly did not expressly exempt water transfers from the NPDES program in § 402. Nor did Congress subject water transfers to NPDES permitting as required by § 510.

Congress may not have seen an express exemption as necessary because of that requirement in § 510, as well as the language of § 101 (g). Like the exemption Congress enacted for irrigation return flows in response to action by the Administration, Congress enacted § 101(g) to reaffirm its commitment to states' rights in response to a report by the Administration that suggested using federal water quality legislation to effect federal purposes in areas of traditional state

authority. Water transfers, which rely on state-established water rights to operate, fall squarely within this area of traditional state authority. Furthermore, Congress could not have intended to frustrate the purposes of nearly 200 federal reclamation water supply projects that are the “life blood” of the West.

EPA recognized the need to maintain the federal-state balance in adopting the Water Transfers Rule. And while EPA’s legal analysis did not satisfy the lower court, a court should not substitute its judgment for the agency’s, even if it prefers a different result. EPA’s Water Transfers Rule is consistent with Congress’ intent and the practical realities of water transfers. The Rule is a reasonable interpretation of the Act. This Court should reverse.

## **ARGUMENT**

### **I. EXTENDING THE NPDES PROGRAM TO WATER TRANSFERS WOULD BE CONTRARY TO CONGRESS’ SPECIFIC INSTRUCTIONS IN § 101(g).**

It would be cost prohibitive and technically impractical for water transferors to meet NPDES program requirements to address water quality constituents arising from natural processes, resulting in forced reductions of water transfers. This result would violate Congress’ specific instruction and the Supreme Court’s warning that nothing in the Act shall be construed “to supersede or abrogate rights to quantities of water which have been established by any state,” such as the individual water rights owned by Providers and others. EPA’s Water Transfers

Rule recognized this and is a reasonable interpretation of the Clean Water Act that preserves the federal-state balance Congress intended to achieve.

**A. Congress specifically instructed that the act shall not supersede or abrogate rights to quantities of water allocated by the states.**

In *Miccossukee*, the Supreme Court recognized the potentially far-reaching effects of the Plaintiffs’ reading of the Clean Water Act:

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.

541 U.S. at 108 (quoting 33 U.S.C. § 1251(g)).

The Providers hold rights to quantities of water (“water rights”) established by authority of their respective states to allocate water within their jurisdictions, authority recognized by the Supreme Court in *Miccossukee* and by Congress in § 101(g) of the Act. 33 U.S.C. § 1251(g). These water rights are real property rights under the prior appropriation doctrine in seventeen western states, including Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah,

Washington, and Wyoming. *See* Joseph L. Sax, et al., *Legal Control of Water Resources: Cases And Materials* 111 (3d ed. 2000). Some Providers also have legally protectable interests to transfer water pursuant to Supreme Court decrees, Congressional acts, federal, state and local contracts, and interstate compacts.

As explained below, construing the NPDES program to encompass water transfers would raise the costs of water distribution prohibitively, and thus violate Congress' specific instruction and the Supreme Court's warning that nothing in the Act shall be construed "to supersede or abrogate rights to quantities of water which have been established by any state," such as the water rights held by Providers. *Miccosukee*, 541 U.S. at 108; 33 U.S.C. § 1251(g). NPDES requirements "could potentially cripple water management activities throughout the country, particularly in the West." *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309-CIV, 2006 U.S. Dist. LEXIS 89450, at \*141 (S.D. Fla. Dec. 11, 2006), *rev'd in part, appeal dismissed in part sub nom. Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

## **B. NPDES requirements**

All NPDES permits must include discharge limitations designed to ensure that the water quality standards of the receiving waters are consistently met. Further, all NPDES permits are also subject to requirements concerning antidegradation review under the Act.

## 1. Water Quality Standards.

States are primarily responsible for adopting and periodically revising standards to protect water quality and water uses. 33 U.S.C. § 1313(a), (c)(2)(A). Those standards must “be established taking into consideration the use and value of water bodies for public water supplies, propagation of fish and wildlife, recreational purposes, and . . . also taking into consideration their use and value for navigation.” *Id.* at § 1313(c)(2)(A). A discharger must not only ensure the attainment of the numeric and narrative water quality standards, but must protect all underlying beneficial uses as designated by the State.

Under the NPDES program, if a discharge merely has the “*potential* to cause or contribute to . . . an excursion above any State water quality standard,” its NPDES permit must contain conditions to control all such potential contributions. 40 C.F.R. § 122.44(d)(1)(i); *see also Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). In other words, an NPDES permit must contain conditions that limit the amount of pollutants delivered to the receiving waters, regardless of whether the transfer would cause an exceedance of the water quality standards or be a significant potential cause of an exceedance.



## 2. Antidegradation.

Antidegradation is a component of the Act's water quality standards program. 40 C.F.R. § 131.12(a)(2). Where the quality of waters "exceed 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. *Id.* Antidegradation requirements may apply to prevent any change to the quality of the receiving water for every one of a multitude of parameters, even if the overall quality is poor. The antidegradation analysis would apply even in the absence of any threat to the ultimate beneficial use.<sup>23</sup>

Transferred water is typically suitable for subsequent agricultural use without treatment, while water destined for domestic and municipal purposes is treated, as necessary, to meet Safe Drinking Water Act requirements. Treatment of naturally-occurring constituents to meet the antidegradation provisions prior to completing water transfers would pose additional unnecessary or redundant costs for Providers.

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<sup>23</sup> 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 area in which the waters are located." 40 C.F.R. § 131.12(a)(2). Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected. *Id.* at § 131.12(a)(3).

**C. NPDES requirements would be prohibitively expensive and technically impractical, and would compel curtailment of water rights.**

The decision below grants sparse recognition of material in the administrative record regarding the practical effects of subjecting water transfers to NPDES requirements, effects that would impair the authority of each state to manage its water resources, and abrogate or impair individual water rights granted by the states contrary to §§ 101(g) and 510(2). Further, the lower court criticized EPA for failing to provide a reasoned explanation as to why requiring NPDES permits for water transfers would unnecessarily and unduly interfere with state authority and individual water rights. Special App. at 98. The administrative record, however, contained substantial material – discussed below – that supported EPA’s policy choice. J.A. at 1162–65; J.A. at 309–11; AR 1433 at 13–14.<sup>24</sup>

**1. Water transfers provide essential water supplies.**

It is important to understand water transfers to see how extension of the NPDES program to water transfers would ultimately curtail Providers’ use of their water rights. The lower court did not do this.

Many of the West’s great cities could not exist without water transfers, including Albuquerque, Colorado Springs, Denver, Las Vegas, Los Angeles, Phoenix, Reno, Salt Lake City, San Diego, San Francisco, Santa Fe, and Seattle.

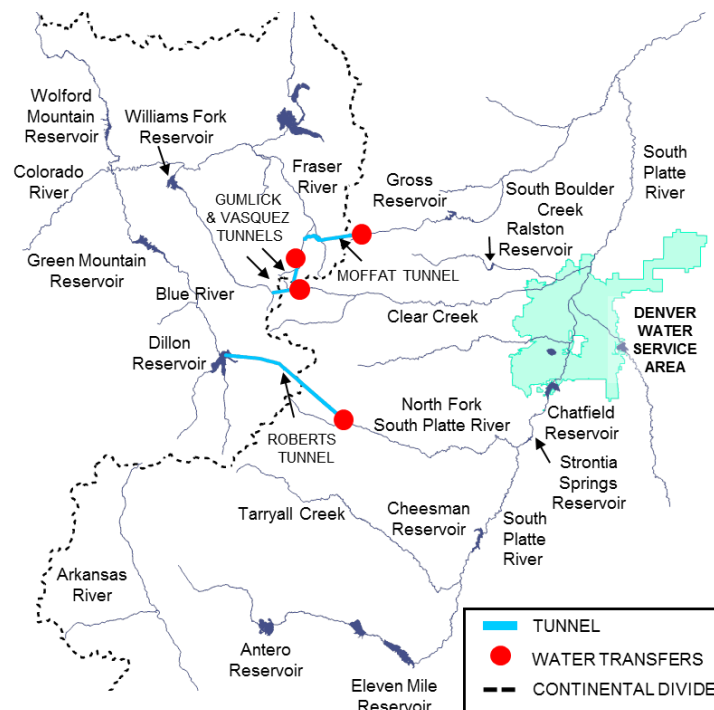
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<sup>24</sup> The lower court recognized these potential effects, however, in remanding rather than vacating the rule. Special App. at 120.

And many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, the Snake River Valley of Idaho, and the Yakima Valley of Washington. *See* J.A. at 1141. The following examples are illustrative of major western water transfers.

*a. Denver Water*

Denver Water has three major collection systems: the South Platte, the Roberts Tunnel, and the Moffat Tunnel. The map below shows Denver Water's four major water transfers through the Continental Divide, although the City relies



on approximately fifty transfers to supply its customers. Denver Water provides up to 200,000 acre-feet (64 billion gallons) of water to approximately 1.3 million people in the metropolitan area. J.A. at 1146.

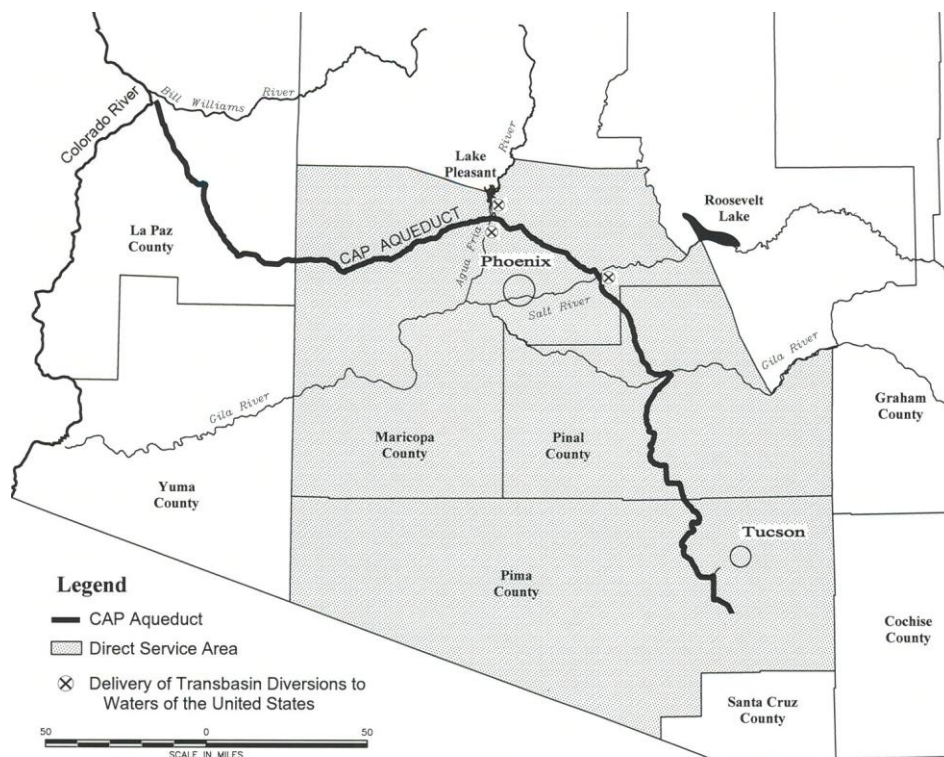
*b. Metropolitan Water District of Southern California*

The Metropolitan Water District of Southern California transfers water from the Colorado River and Northern California to serve nearly nineteen million customers of its twenty-six member public agencies, as shown below. The Colorado River Aqueduct has a capacity of 1.25 million acre-feet per year (407 billion gallons). Up to 2.0 million acre-feet per year (652 billion gallons) is available via the California Aqueduct. J.A. at 1144.



*c. Central Arizona Project*

The Central Arizona Project (“CAP”) is a federal reclamation project, 43 U.S.C. §§ 1521 *et seq.*, operated by the Central Arizona Water Conservation District. CAP includes three water transfers to move 1.5 million acre-feet (489 billion gallons) of Colorado River water to serve eighty percent of Arizona’s water users, as depicted below. J.A. at 1145.



**2. Natural water quality may violate NPES requirements.**

Water quality varies between watersheds, and between the source waters and the receiving waters in water transfers as a consequence of natural processes. Snow in the western states accounts for eighty percent of the surface water runoff.

AR 1433, at 15. Thunderstorms account for much of the rest. *Id.* Runoff from snowmelt and storm events naturally exhibit elevated levels of total suspended solids (TSS, suspended particles of soil and sediment), total dissolved solids (TDS, dissolved particles of soil and sediment) and turbidity (muddy water) from erosion, as well as nutrients. *Id.* The dramatic topography of the west, which extends from over 14,494 feet above sea level to 280 feet below sea level, is, of course, largely the result of such natural erosive processes. *Id.* Water transfers typically employ unlined open canals, ditches, and tunnels that receive these constituents directly from natural erosion. *Id.* at 16. Furthermore, the source water itself may be naturally high in total dissolved solids (TDS) and other constituents due to passing through saline geological formations and receiving inflows from brackish hot springs. *Id.*

Water quality standards are in place across the United States for more than three dozen naturally-occurring constituents and physical properties of water. Standards include temperature, total dissolved solids (TDS), nutrients and sediment. *See* 40 C.F.R. pt. 131, subparts A, B, & C (State Establishment of Water Quality Standards); *see, e.g.*, 5 Colo. Code Regs. § 1002-31 (2014); *see also* 40 C.F.R. pt. 131, subpart D (Federally Promulgated Water Quality Standards). Each of the water quality standards of the receiving waters would apply to a water transfer, as well as the antidegradation requirements discussed above.

**3. Water treatment to meet NPDES requirements would be cost prohibitive and technically impractical.**

It could cost an estimated \$4.2 billion per year to treat just the most significant western interbasin transfers to avoid the potential to cause or contribute to a violation of the water quality standards of the receiving waters triggered by the natural processes described above.<sup>25</sup> J.A. at 1211; J.A. at 1172. Costs of such magnitude are neither feasible nor justified to treat the naturally-occurring constituents present in source waters.

If the NPDES program covered water transfers, a Provider might be compelled to expend hundreds of millions of dollars to construct one or more water treatment facilities, surge reservoirs, and pollutant disposal facilities, or reconfigure its water delivery infrastructure to exercise its water rights by eliminating its water transfers to waters of the United States. J.A. at 1172; J.A. at 346–47; J.A. at 309.

A treatment facility would have to be capable of treating peak flows of source water (which might occur just one or two days a year during spring snowmelt) to avoid the risk of violating the water quality standards of receiving waters. J.A. at 1172. Further, because fifty percent of mountain stream flow occurs in May-June-July, expensive treatment plants might operate only a few

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<sup>25</sup> 14.2 million acre-feet per year, J.A. at 1211, at \$0.90/1000 gallons. J.A. at 1172 n.11.

weeks or months a year during snowmelt run-off when it's legal to divert water pursuant to the prior appropriation doctrine of the western states. J.A. at 1172.

What is more, many water systems include multiple sequential transfers, i.e., into and out of waters of the United States multiple times before ultimate use. J.A. at 1144–51.

While municipal and industrial wastewater dischargers employ conventional treatment techniques to affordably meet NPDES program requirements, it would be technically impractical for Providers to treat water transfers because of the variable quality of the source water, enormous volumes of water, and high transfer flow rates. J.A. at 1172.<sup>26</sup> Moreover, pollutants removed by a treatment plant requires expensive disposal in accord with applicable federal and state law. J.A. at 1173.

Many water transfers, such as the U.S. Bureau of Reclamation's Colorado-Big Thompson and interstate (Colo.-N.M.) San Juan-Chama Projects, traverse or abut federal land, including national forests, national parks, national recreation areas and wilderness areas. J.A. at 1147-50. To construct a treatment facility, surge reservoir, or pollutant disposal site would likely invoke the dredge-and-fill permit provisions of § 404 the Act, the National Environmental Policy Act, the

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<sup>26</sup> As an alternative to sizing a treatment plant for maximum flow rates, a transferor could attempt to construct one or more large surge reservoirs in order to feed water into the plant at a constant rate. J.A. at 1173.



Federal Land Policy and Management Act, and potentially the Endangered Species Act. J.A. at 1173. Obtaining necessary approvals would be costly, time-consuming, and potentially impossible given site requirements within or near federal lands and environmentally sensitive locations.<sup>27</sup> J.A. at 1173.

In short, infrastructure investments necessary to comply with NPDES requirements for naturally-occurring constituents would be cost prohibitive and technically impractical. Yet such controls would be necessary to avoid regulatory agency enforcement action and citizen suits if NPDES requirements applied to water transfers.

**D. Enforcement actions and citizen suits would pose significant risks to western water supplies.**

If water transfers become subject to the NPDES program, any water quality exceedances – even those resulting from natural processes – would expose Providers to enforcement action and citizen suits. 33 U.S.C. §§ 1319, 1365. Of particular concern is the possibility of an injunction limiting the operation of a water transfer without an NPDES permit, which would deprive westerners of essential water supplies. 33 U.S.C. § 1319(b); *see also Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1370 (11th Cir. 2002), *vacated*, 541 U.S. 95 (2004) (discussing district court injunction prohibiting the

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<sup>27</sup> Possible site requirements could exceed 240 acres per treatment plant. AR 1433, at 18.

operation of a water transfer without an NPDES permit in the context of a citizen suit under 33 U.S.C. § 1365).

Furthermore, some of the Appellees have repeatedly sued New York City over its water transfers. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 79–80 (2d Cir. 2006); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923, at \*2 (N.Y. Sup. Ct. Aug. 5, 2008). The Northern District of New York imposed civil penalties of \$5,749,000 on New York City for a water transfer without an NPDES permit, and calculated the maximum civil penalties at \$63,249,000. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 54 (N.D.N.Y. 2003), *aff'd in part and remanded*, 451 F.3d 77 (2d Cir. 2006). That is an enormous risk for any Provider, and one that could materially interfere with their ability to bond future capital projects to supply water to the West's growing population.

Providers would find themselves between the proverbial rock and a hard place: facing enormous risks from transferring water without any alternative sources of water supply. But “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). EPA recognized this potential to impair water rights when it adopted the Water Transfers Rule.

## II. EPA’S WATER TRANSFERS RULE IS A REASONABLE INTERPRETATION OF THE CLEAN WATER ACT.

The lower court’s review embraced *Chevron*, but – ignoring context – at step one dove into the narrow confines of § 301(a), which states that the discharge of any pollutant by any person shall be unlawful. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984); 33 U.S.C. § 1311(a); Special App. at 37. The court accordingly framed the issue as “whether a water transfer, as defined by the rule, is a “discharge of a pollutant,” as defined in § 502(12). Special App. at 37–38. What one sees of course depends on where one looks.

### A. The Court should uphold the Rule pursuant to the Supreme Court’s reasoning in *SWANCC* and *Rapanos*.

The lower court’s immediate foray into the weeds of § 301(a) and § 502(12) was error. The court should have started by looking at the statute as a whole, especially the vital federal-state landscape of the Act, which “establishes a distinctive variety of cooperative federalism.” *Dep’t of Energy v. Ohio*, 503 U.S. 607, 633 (1992), *superseded by statute on other grounds as stated in United States v. Certain Real Prop.*, 579 F.3d 1315 (11th Cir. 2009). The court, however, cursorily dismissed in a footnote two key tools of statutory construction that are especially relevant to the federal-state framework of the Act, and the issue here concerning water transfers. Special App. at 60 n.18.

Providers agree with the Western States that constitutional doctrines employed by the Supreme Court to interpret the Act are of great importance. First, the “clear statement rule” requires a “clear and manifest” statement from Congress to authorize an unprecedented intrusion into traditional state authority over water allocation matters. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001) (“SWANCC”); *Rapanos v. United States*, 547 U.S. 715, 738 (2004). There are no such clear and manifest statements in the Act, although many to the contrary. 33 U.S.C. §§ 1251(a), 1251(g), and 1370(2). Second, the “avoidance canon” counsels for a statutory interpretation that avoids constitutional problems, such as a federal intrusion into traditional state authority. *SWANCC*, 531 U.S. at 173–74. The Supreme Court has applied both of these doctrines to decide federal jurisdictional questions involving traditional state authority under the Act. *Id.*; *Rapanos*, 547 U.S. at 738–39.

Rather than follow the lower court into the weeds, this Court should apply the Supreme Court’s reasoning in *SWANCC* and *Rapanos* to uphold EPA’s Rule because it is consistent with these constitutional tools of statutory construction that avoid federal intrusion into traditional state authority over water resources.<sup>28</sup>

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<sup>28</sup> Curiously, the lower court found the Supreme Court’s decision in *Rapanos* binding, Special App. at 119, but failed to consider how the *Rapanos* Court analyzed jurisdiction under the Act.

**B. Alternately, the Court should uphold the Rule under *Chevron*.**

The lower court unfortunately started in the weeds, thrashed through its own interpretations of many different provisions, and consequently found the Act ambiguous under *Chevron*. Special App. at 59–60. The *Chevron* doctrine of course concerns judicial deference to an agency’s interpretation of an ambiguous statute when the agency administers the statute at issue. *Chevron*, 467 U.S. at 842–44. The reviewing court must initially determine whether Congress has directly spoken to the precise question at issue (“step one”). *Id.* at 842–43. If Congress’ intent is clear, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* If, however, “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute” (“step two”). *Id.* at 843.

The Western Providers disagree with the lower court’s analysis and remand to EPA, as explained below.

*i. Express § 402 exemptions and § 1370(2)*

The lower court posited “one could ... infer from Congress’s failure to include an express statutory exemption for water transfers that Congress did not intend to exempt them” from § 402. Special App. at 59, 79–81. One can easily conclude, however, that Congress did not intend to subject transfers to § 402

because Congress did not include an express statutory provision to that end as required by § 1370(2). *See* 33 U.S.C. § 1370(2) (“Except as expressly provided, . . . nothing in the Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.”). The lower court rendered § 1370(2) superfluous, saying “this provision has little bearing on an interpretation of those other provisions i.e., §§ 301(a) and 502(12),” and “[b]ecause this language does not address what other provisions of the Act “expressly provide[.]” Special App. at 52. The Supreme Court instructs courts, however, to “construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.” *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

*ii. Section 101(g)*

Another possible inference from the lack of a statutory exemption for water transfers is that Congress did not see any need for an express exemption given the language of § 1370(2) and §§ 1251(a) and (g). For example, in the same act that added § 101(g), Congress amended the definition of “point source” to exclude “return flows from irrigated agriculture,” which are waters that have been diverted, often transferred, used for irrigation and then reintroduced into waters of the United States. Act of Dec. 27, 1977, Pub. L. No. 95-217, 91 Stat. 1566, sec. 33 (Dec. 27, 1977). There, Congress acted only after EPA construed irrigation return

flows to be subject to § 402 NPDES permitting requirements. S. RPT.: July 29, 1977, *reprinted in* Comm. on Envtl. & Pub. Works, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977 & A Continuation of the Legislative History of the Federal Water Pollution Control Act (1978) (hereinafter “1977 Legislative History”), at 668.

Congress analogously enacted § 101(g) in response to Administration suggestions that reducing water diversions could solve water quality problems. *See* AR 1414.9, at 2–3; S. DEB.: Dec. 15, 1977, remarks of Sen. Wallop, *reprinted in* 1977 Legislative History at 531; Water Resource Policy Study, 42 Fed. Reg. 36,788, 36,793 (July 15, 1977). The legislative history indicates that the amendment to § 101(g) “came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study,” which contained several options that “called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. . . . [including], but [] not limited to Federal land use planning, plant siting and production planning purposes.” AR 1414.9, at 2–3; S. DEB.: Dec. 15, 1977, remarks of Sen. Wallop, *reprinted in* 1977 Legislative History at 531. In response, the Senate proposed an amendment to § 510(2), which Congress later substituted by enacting § 101(g). “[T]he States historic rights to allocate quantity, and establish priority of usage

remains inviolate because of this amendment.” S. DEB.: Dec. 15, 1977, remarks of Sen. Wallop, *reprinted in* 1977 Legislative History at 531–32.

*iii. Legislative record*

Alternately, it never occurred to Congress that the mere movement of water to serve beneficial uses without the addition of pollutants might be considered a “discharge of pollutants” subject to the NPDES program because Congress was focused on public outcry over notorious end-of-pipe municipal and industrial discharges – like the Cuyahoga River fire – and unaware of any water quality problems caused by water transfers. 33 U.S.C. § 1362(12). Nor does Congress’ failure to address water transfers in § 304(f) undermine EPA’s analysis, despite the lower court’s aspersions. Special App. at 84. In fact, Congress apparently did not even discuss water transfers, which are noticeably absent from *over 3,000 pages* of legislative history. *See generally* Comm. on Env’tl. & Pub. Works, 92nd Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of (1973) (hereinafter “1972 Legislative History”); 1977 Legislative History. It is inconceivable that Congress could have intended to subject water transfers to NPDES permitting given the long history and prevalence of water transfers in 1977, especially in the West, and the thirty-five years of opportunity since then to make that intent explicit in the statute.



*iv. EPA's legal analysis*

In a footnote, the lower court seems willing to entertain the possibility that EPA's choice of a "legal" analysis for its decision was appropriate, although admonishing EPA for failing to apply the analysis in a reasonable fashion. Special App. at 62–63 n.19. The court then deconstructs EPA's interpretation and develops myriad alternative interpretations of the Act for a dozen pages before finding EPA's analysis arbitrary and capricious, apparently because EPA focused on statutory provisions supporting the Act's states' rights goals. Special App. at 66–78. EPA appropriately interpreted the federal-state landscape of the Act, as discussed above. Indeed, while EPA has discretion to interpret the Act, it would have been an abuse of discretion for the agency not to preserve the Act's core principles concerning states' rights. 5 U.S.C. § 706(2)(A). An agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). And, of course, the court may not substitute its judgment for the agency's, even if it prefers another result. *Judulang v. Holder*, 132 S. Ct. 476, 483 (2012) (noting that the Court's scope of review under the Administrative Procedure Act's "arbitrary and capricious" standard is narrow, and that "a court is not to substitute its judgment for that of the agency" and that agencies "have

expertise and experience in administering their statutes that no court can properly ignore”); *Arkansas v. Oklahoma*, 503 U.S. 91, 112–13 (1992) (noting that the Tenth Circuit Court of Appeals erred in failing to give due regard to the EPA’s interpretation of its own regulations under the Clean Water Act under *Chevron* where it “voiced its own interpretation of the governing law”).

After rendering § 1370(2) meaningless, as discussed above, the lower court then found EPA’s citations to § 101(a) and § 101(g) insufficient to support its decision not to require NPDES permits for water transfers “because such a permit requirement might be entirely consistent with the goals expressed in those provisions.” Special App. at 93. In so finding, the court substituted its judgment for that of the agency. *Judulang*, 132 S. Ct. at 483–84. Further, as explained above, the administrative record contains numerous comments that explain how NPDES permit requirements would not be consistent with § 101(g)’s protections of the authority of each state to allocate quantities of water within its jurisdiction and individual water rights granted by the states. J.A. at 1162–65; J.A. at 309–11; AR 1433, at 13–14.

The lower court also found that EPA failed to explain how the Rule was consistent with the statutory goals it identified to avoid unnecessary and undue interference with state authority. Special App. at 97–98. But EPA was fully aware

of the magnitude of water transfers, and cited that as a basis for its Rule. J.A. at 121 (NPDES Water Transfers Rule, 73 Fed. Reg. at 33,702).

*v. Environmental impacts of water transfers*

The lower court found EPA’s consideration of the environmental impacts of water transfers unsupported and therefore its methodology arbitrary and capricious. Special App. at 87–91. The lower court, however, overlooked substantial evidence in the record that “most of the thousands of water transfers in the United States do not result in any substantial environmental impairment.” J.A. at 1268; Special App. at 90 n.26.

Not surprisingly in view of the naturally high water quality of the western states, there are few reported water quality problems from water transfers. Colorado, for example, has more than 1,700 diversions that transfer water, including fifty major trans-mountain transfers that move 500,000 acre-feet of water per year to serve more than three million residents of the State’s major cities, from Pueblo and Colorado Springs north to Denver, Boulder and Fort Collins. J.A. at 320. Nonetheless, Colorado has never identified a water body impaired by water transfers pursuant to § 303(d) of the Act. J.A. at 321. There are surprisingly few reports of such impairment in the Administrative Record. *See, e.g.*, J.A. at 292; J.A. at 298; J.A. at 325–26; J.A. at 355; J.A. at 360–61. Moreover, the number of examples in the record is tiny compared to the thousands of water transfers in the

United States. J.A. at 117 (NPDES Water Transfers Rule, 73 Fed. Reg. at 33,698) (noting that “[t]here are thousands of water transfers currently in place in the United States, including sixteen major diversion projects in the western States alone”). One would expect to see more water bodies identified as impaired pursuant to § 303(d) if water transfers caused widespread problems.

There is only one reported Clean Water Act case involving a water transfer in the western states. *See ONRC Action v. U.S. Bureau of Reclamation*, Civ. No. 97-3090-CL, 2012 U.S. Dist. LEXIS 118153 (D. Or. Jan. 17, 2012), *report and recommendation adopted sub nom. ONRC Action v. Bureau of Reclamation*, No. 1:97-CV-03090-CL, 2012 U.S. Dist. LEXIS 114295 (D. Or. Aug. 14, 2012), *appeal docketed*, No. 12-35831 (9th Cir. Oct. 12, 2012).<sup>29</sup> One might expect more reported cases if water transfers caused significant water quality problems.

As explained above, if a transfer caused or had the potential to cause an exceedance of any of the dozens of water quality standards of receiving waters, the transfer must meet each of those standards and the antidegradation provisions if subject to the NPDES program. Infrastructure investments necessary to comply with those requirements for naturally-occurring constituents would be cost

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<sup>29</sup> Another case involved the disposal of contaminated groundwater – which is not “waters of the United States” – discharged to waters of the United States, although the Ninth Circuit Court of Appeals did not understand that disposal of groundwater was per se a jurisdictional discharge rather than a water transfer. *N. Great Plains Res. Council v. Fid. Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003).

prohibitive and technically impractical. Yet such controls would be necessary to avoid regulatory agency enforcement action and citizen suits.

EPA reasonably concluded that the states have the necessary tools and authority to deal with these limited instances of water quality problems. J.A. at 118, 121 (NPDES Water Transfers Rule, 73 Fed. Reg. at 33,699, 33,702).

*vi. State authority over water resources*

The record is replete with explanations as to how NPDES permit requirements would interfere with state authority to allocate water. J.A. at 1173; AR 1433, at 18.<sup>30</sup> And, as explained above at I.C., it would be cost prohibitive, impractical, and/or unworkable for Providers to transfer water without the potential to cause an excursion above the water quality standards of the receiving water body due to natural processes. Without any economically feasible, technically practical or workable options to avoid the potential to cause an excursion, the only alternative for many Providers would be to curtail transfers and forgo the use of their individual water rights. J.A. at 1173; AR 1433, at 18.<sup>31</sup> Both results are contrary to the express language of § 1370(2) and §§ 1251(a) and (g).

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<sup>30</sup> See also AR 1308.1, at 2; J.A. at 345; AR 1286.1, at 1; AR 1292.1, at 2; AR 1362.1 at 3; AR 1375.1, at 2; AR 0036, at 1; AR 1275.1, at 5; J.A. at 1315; AR 1415.21, at 3-4; AR 1348.1, at 2; AR 1265, at 1; AR 0679.1, at 2; J.A. at 1232–33; AR 0874.1, at 5; AR 1448, at 19.

<sup>31</sup> See also AR 1308.1, at 2; J.A. at 345, 347; AR 1286.1, at 1; AR 1292.1, at 2; AR 1362.1 at 3; AR 1375.1, at 2; AR 0036, at 1; AR 1275.1, at 5; J.A. at 1315; AR

In short, the lower court's deconstruction of EPA's rationale, fabrication of alternatives, and the equally plausible opposite interpretations of Congress' intent merely reinforce that court's finding that the Act is ambiguous with regard to whether water transfers are subject to the NPDES program. But the court should not have substituted its judgment for the agency's and remanded the Rule to EPA. This court should defer to EPA's reasonable interpretation, as required by *Chevron*.

**C. Congress did not intend the NPDES program to frustrate western water supplies provided by federal water projects.**

In the seventy years preceding adoption of the Act in 1972, Congress authorized over 170 federal water projects. *Bureau of Reclamation – Projects*, U.S. Dep't of the Interior Bureau of Reclamation (last updated Sept. 4, 2014), [http://www.usbr.gov/projects/projects.jsp#Initial\\_P](http://www.usbr.gov/projects/projects.jsp#Initial_P) (comprehensive list of Bureau of Reclamation Projects); *see also, e.g.*, Pub. L. No. 392, 50 Stat. 844 (Aug. 26, 1937) (reauthorizing the Central Valley Cal. project); Pub. L. No. 273, 64 Stat. 677 (Aug. 29, 1949) (authorizing construction of the Weber Basin, Ut. project); Pub. L. No. 87-590, 76 Stat. 389 (Aug. 16, 1962) (authorizing construction of the Fryingpan-Arkansas, Colo. project); Pub. L. No. 90-537, 82 Stat. 885 (Sept. 30, 1968) (authorizing construction of the Colorado River Basin project, the Central

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1415.21, at 3-4; AR 1348.1, at 2; AR 1265, at 1; AR 0679.1, at 2; J.A. at 1232–33; AR 0874.1, at 5; AR 1448, at 19.

Arizona Project, etc.); Pub. L. No. 87-483, 76 Stat. 96, sec. 8 (June 13, 1962) (authorizing construction of the initial stage of the San Juan-Chama, Colo.-N.M. project).

And, in the fifty plus years following adoption of the Act in 1972, Congress continued to authorize federal water projects. *See, e.g.*, Pub. L. No. 92-514, 86 Stat. 964, sec. 201 (Oct. 20, 1972) (authorizing construction of the Brantley Project, N.M.); Pub. L. No. 94-423, 90 Stat. 1324, sec. 701 (Sept. 28, 1976) (authorizing construction of the McGee Creek Project, Okla.); and Pub. L. No. 93-493, 88 Stat. 1486, sec. 1001 (Oct. 27, 1974) (authorizing construction of the Nueces River Project, Tex.).

These federal projects “bring water to more than 31 million people, and provide one out of five Western farmers (140,000) with irrigation water for 10 million acres of farmland that produce 60% of the nation's vegetables and 25% of its fruits and nuts.” *Bureau of Reclamation – About Us*, U.S. Dep’t of the Interior Bureau of Reclamation (last updated Sept. 4, 2014), <http://www.usbr.gov/main/about/>. It is inconceivable that Congress would apply NPDES requirements that could frustrate the “life blood of the west” provided by these projects it authorized and funded without explicitly saying so, as required by §§ 101(g) and 510.

## CONCLUSION

It would be cost prohibitive and technically impractical for water transferors to meet NPDES requirements to address naturally-occurring constituents and physical water properties, leading to forced curtailments of water transfers. Forced curtailment of water transfers would significantly impair water rights throughout the western states. Interpreting the NPDES program to cover water transfers would thus run contrary to Congress' specific instruction and the Supreme Court's warning that nothing in the Act shall be construed "to supersede or abrogate rights to quantities of water which have been established by any state," including individual water rights owned by Providers and others.

EPA reasonably interpreted the Act when it adopted the Water Transfers Rule. The Western Water Providers respectfully request that the Court defer to EPA's interpretation, and reverse the lower court's opinion and order.

Respectfully Submitted,

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s/ *Peter D. Nichols*

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