14-1823

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

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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)

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

JOINT REPLY BRIEF OF INTERVENOR DEFENDANTS-APPELLANTS-CROSS APPELLEES STATES OF COLORADO, NEW MEXICO, ALASKA, ARIZONA (DEPT. OF WATER RESOURCES), IDAHO, NEBRASKA, NEVADA, NORTH DAKOTA, TEXAS, UTAH, WYOMING AND 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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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.

WESTERN WATER PROVIDERS
CORPORATE DISCLOSURE STATEMENT

Neither the Western Urban Water Coalition, the National Water Resources Association, the Idaho Water Users Association, nor the [California] State Water Contractors has a parent corporation or has issued stock. The other Western Water Providers are all governmental entities.[1]

[1]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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SUMMARY OF ARGUMENT

This Court should reverse the District Court and uphold EPA's Water Transfers Rule as the only permissible interpretation of the Clean Water Act ("Act") pursuant to the clear statement rule as applied by the Supreme Court in other cases interpreting the Act. There is nothing approaching a clear statement in section 402 that Congress intended to encroach upon the traditional federal-state balance in the area of water allocation and management. To the contrary, Congress' specific instructions in sections 101(b), 101(g), and 510(2) expressly preserve the states' traditional authority over water allocation and management, and EPA's Rule is consistent with these instructions. The Western States[2] and Western Water Providers[3] (collectively "Western Parties") respectfully urge this Court to interpret the Act in a manner that recognizes Congress' instructions and that water transfer activities are an essential and intrinsic element of state water allocation and management programs.

Appellees focus solely on the Act's water quality objectives while ignoring express statements preserving state authority over water allocation and management. Their reading of the Act destroys the balance that Congress intended to strike between these objectives and policies. Congress' attention to this balance

[2] States of Colorado, New Mexico, Alaska, Arizona (Department of Water Resources), Idaho, Nebraska, Nevada, North Dakota, Texas, Utah and Wyoming.
[3] See p. i.

is, however, evident throughout the Act. Indeed, Congress did not ignore water quality in the context of water management and allocation, which is why it included numerous provisions to encourage cooperative efforts between states to resolve water quality disputes. The Act also includes flexible water quality solutions, such as total maximum daily loads, that may be applied to water transfer activities. Finally, as also authorized in the Act, every state has enacted their own independent authority to regulate water quality, which can be tailored to address specific water transfers that pose environmental concerns.

ARGUMENT

I. THE CLEAR STATEMENT RULE AND THE AVOIDANCE DOCTRINE SHOULD GUIDE THIS COURT IN DETERMINING THE REACH OF THE CLEAN WATER ACT.

Just as in the Clean Water Act cases of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") and *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court's clear statement rule and the avoidance doctrine should guide this Court's determination of the reach of the Clean Water Act.

A. *SWANCC* and *Rapanos* Are Analogous Clean Water Act Cases.

The constitutional question presented here corresponds precisely to the questions examined in *SWANCC* and *Rapanos*, both of which struck down federal intrusion into areas of traditional state authority. *SWANCC*, 531 U.S. at 174;

Rapanos, 547 U.S. at 738–39. *SWANCC* and *Rapanos* dealt with whether the Army Corps of Engineers' broad interpretation of "navigable waters" violated the Commerce Clause or encroached upon a traditional state authority as reserved by the Tenth Amendment. In both cases, the Court found that the federal agencies stretched the outer limits of Congress' power in how they interpreted the Clean Water Act. *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738–39. The Western Parties urge this court to apply the Supreme Court's analytic approach to statutory construction in these other Clean Water Act cases to avoid interpreting the Act in a manner that would result in federal overreach into rights reserved to the states by the Tenth Amendment.

In *SWANCC* and *Rapanos*, EPA's regulations "raised significant constitutional questions" about federal intrusion on state authority because they sought to stretch the scope of "navigable waters" to the outer limits of Congress' power (as proscribed in the Commerce Clause). *See SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 738–39. Here, a reading of the Act that would result in subjecting water transfer activities to NPDES permitting requirements would similarly stretch the scope of the NPDES program to the outer limits of Congress' power, as limited by the powers reserved to the states by the Tenth Amendment. U.S. Const., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people."). Application of the clear statement rule in the present case results in upholding EPA's Water Transfers Rule because the Clean Water Act contains nothing approaching a clear statement that Congress intended to encroach upon the states' primary authority over water allocation and management.

B. Appellees Mischaracterize the Constitutional Issues.

State Appellees' assertion that applying NPDES requirements to water transfers does not raise constitutional issues misses the mark. Br. for the States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, & Washington, & The Province of Manitoba (hereinafter "State Appellees' Br.") at 55, Dec. 23, 2014, ECF No. 314. The issue here has nothing to do with whether NPDES regulation of water transfers falls within Congress' authority to regulate "navigable waters." Rather, the issue is whether subjecting water transfer activities to NPDES permitting requirements impinges upon the traditional state authority to allocate water, consistent with the Tenth Amendment.

The Tribe Appellees argue that the constitutional avoidance doctrine is inapplicable because the action was brought under the federal Administrative Procedures Act ("APA"), 5 U.S.C. §§ 501–706, and not as a constitutional challenge. Joint Br. for Intervenor Pls. – Appellees Miccosukee Tribe of Indians of Fla., Friends of the Everglades, Fla. Wildlife Fed'n, & Sierra Club (hereinafter

"Tribe Appellees' Br.") at 30—31, Dec. 23, 2014, ECF No. 312. The Tribe relies on *F.C.C. v. Fox Television Station, Inc*., 556 U.S. 502 (2009), to support its position, but in that opinion the Court acknowledged that the avoidance doctrine was properly applied in *SWANCC* – a Clean Water Act case over an agency regulation brought under the APA that is analogous to the present case. *Id*. at 516 n. 3; *see also SWANCC*, 531 U.S. at 174 (indicating that case brought was under the APA).

There is no rule that limits defensive theories to the specific causes of action or claims as framed by the plaintiff, and thus the intervening defendants in this case were not precluded from raising constitutional questions before the district court. The real issue here is whether the constitutional issue is properly before the appellate court. Here, the Western Parties raised the Tenth Amendment issue in their cross-motions for summary judgment, arguing that EPA's rule should be upheld as consistent with application of the clear statement rule and the avoidance doctrine. The Western Parties thus properly preserved the constitutional issues for appellate review. *See, e.g., Sage Prods., Inc. v. Devon Indus., Inc*., 126 F.3d 1420, 1426 (Fed. Cir. 1997) (issues raised at the district court level are properly preserved for appellate review). Although the district court below declined to address these constitutional issues, *see* Special App. at 6–121 (Opinion and Order

issued by the Southern District of New York on March 28, 2014), they remain proper defenses on appeal.

C. Section 510(2), Like the Clear Statement Rule, Requires an Express Statutory Directive in Order to Justify Any Form of Federal Intrusion into Traditional State Authority Over Water

Section 510(2) provides: "Except 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." 33 U.S.C. § 1370(2). Appellees reverse the meaning of section 510(2) to assert that the provisions of sections 301(a) and 402 trump the states' authority over their waters, despite the absence of any statement in those sections – express or otherwise – that Congress intended to subject the exercise of any state water allocations to NPDES permitting. Br. of Pls.-Appellees Catskill Mountains Chapter of Trout Unlimited, Inc. Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., Riverkeeper, Inc., Waterkeeper Alliance, Inc., Trout Unlimited, Inc., National Wildlife Federation, Environment America, Environment New Hampshire, Environment Rhode Island, and Environment Florida (hereinafter "Trout Appellees' Br"), at 34–35, Dec. 24, 2014, ECF No. 318.

In *Riverside Irrigation District v. Andrews*, the court invoked the exception in section 510(2) to uphold the scope of section 404 of the Act where it might

affect state water law. 568 F. Supp. 583, 589 (D. Colo. 1983), *aff'd on other grounds*, 758 F.2d 508 (10th Cir. 1985). The issue in *Riverside* was whether the Army Corps of Engineers appropriately denied a nationwide section 404 dredge and fill permit for construction of a dam and reservoir after finding that the activity would alter downstream river flows and thereby adversely impact endangered species. *Riverside Irrigation Dist.*, 568 F. Supp. at 589. The court upheld the Corps' denial of the permit because section 404 expressly provided for the regulation of activities that impair the flow or reach of waters. *Id*.; 33 U.S.C. § 1344(f)(2).

In contrast to section 404, section 402 and its related definitions authorizing federal regulation contain no express language that might affect any right or jurisdiction of the states with respect to the water of such states. When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29–30 (1997) (quotation marks omitted). The presence of express language in section 404 requiring a dredge and fill permit where flow is impaired or the reach of such waters is reduced – and the absence of similar language in section 402 – creates a presumption that Congress intentionally and purposefully

intended that NPDES permits under section 402 would not apply where they might affect state water law.[4]

Finally, it is telling that in the 42-year history of the Act, there are only a few isolated NPDES permits involving water transfers, despite the existence of tens of thousands of transfers in operation in 1972 and ever since. *See, e.g.*, Special App. at 125 (73 Fed. Reg. 33,697, 33,699 (June 13, 2008) (noting that there have been "few isolated instances where entities responsible for water transfers have been issued NPDES permits."). Apparently the plain language of the Act is not as plain as Appellees believe. Trout Appellees' Br. at 24; Tribe Appellees' Br. at 15.

II. SUBJECTING WATER TRANSFER ACTIVITIES TO NPDES REQUIREMENTS WOULD VIOLATE THE SPECIFIC INSTRUCTIONS IN SECTION 101 OF THE ACT.

Appellees continue to read the "states' rights" provisions out of the Act. As congressional "policy" statements on state authority, sections 101(b) and 101(g) have no less import than section 101(a), which contains Congress' "environmental goals." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 177–79 (D.C. Cir. 1982) (expressing doubts about how heavily to rely on the broad environmental "goals"

[4] Section 510(2) was enacted in 1972 as part of the original Clean Water Act. The 1977 Amendments did not change section 510(2), as Appellees point out. Trout Appellees' Br. at 31 (citing H.R. Rep. No. 95-830, at 52 (1977) (Conf. Rep.), reprinted in 3 Legislative History of the Clean Water Act of 1977, Comm. Print of the S. Comm. on Env't and Pub. Works, at 236).

in light of Congress' "specific indication" in section 101(g) that it "did not want to interfere any more than necessary with state water management"). Appellees in effect take the extreme position that any provision that can be seen as limiting the Act's "environmental goals" must not be given any meaning at all.

Appellees' approach ignores the balance that Congress intended to strike in section 101 by including the "states' rights" provisions of sections 101(b) and 101(g). 33 U.S.C. §§ 1251(b), (g), *see also California v. United States*, 438 U.S. 645, 653 (1978) (noting Congress' longstanding deference to state water laws); *SWANCC*, 531 U.S. at 173 (noting that "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). Moreover, the Supreme Court recognized that section 101(g) is "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." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004) (emphasis added). Section 101(g)'s "specific instruction" concerning states' rights is due at least as much weight as the statements in section 101(a). *See Gorsuch*, 693 F.2d at 177–79; 182 (finding that the district court erred in relying on the "environmental goals" in section 101(a) to invalidate EPA's otherwise reasonable construction of the NPDES permit program as excluding dam-caused pollution).

A. The Two Purposes of Section 101(g) are to Protect the Authority of Each State to Allocate Quantities of Water and to Ensure that the Established Quantities Can Reach the Intended Recipients.

Section 101(g), added by Congress in 1977 to expressly preserve state authority with respect to water allocation, provides in its entirety:

> 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 further the 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 cooperate 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) (emphasis and spacing added). Section 101(g) contains three independent sentences – not just one – although Appellees ignore the second and third.

The first sentence clearly preserves the rights of the states to "allocate quantities of water." *Id.* The second sentence preserves the integrity of the state water allocation process – the right for each individual to the quantity of water that the state has allocated to that individual. *Id.* Read together, these first two sentences are key to understanding Congress' intent: the Act may not be applied in a way that would result in superseding, abrogating, or otherwise impairing the rights of states to allocate water or the rights of individuals to receive their state

water allocations for their use. Applying the Act's inflexible NPDES requirements to water transfer activities would conversely have the effect of superseding, abrogating, or otherwise impairing those rights, as explained in the Western Water Providers' Opening Br. at 13, Sept. 10, 2014, ECF No. 207.

The third and final sentence of section 101(g) complements the first two with Congress' specific instruction that "[f]ederal agencies shall cooperate with State and local agencies to develop comprehensive solutions" to address water pollution related to state water resource allocation and management. 33 U.S.C § 1251(g). Congress' specific instruction directs government agencies to work together to "develop comprehensive solutions" to balance of water quality and water management objectives, consistent with the interpretation that the rigid water quality-focused NPDES program was not intended to apply to activities directly impacting state water management. *Id.*, *see also* 33 U.S.C. § 1370(2); *compare* 33 U.S.C. §§ 1344(f)(2) and § 1342; *see also* discussion of section 510(2) *supra* at I.C.

Catskills II focused solely on the first sentence of section 101(g) in rejecting New York City's state's rights arguments. *See Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 451 F. 3d 77, 84 (2d Cir. 2006) (quoting only the first sentence of section 101(g) to reach the broad conclusion that "[t]he power of the states to allocate *quantities* of water within their borders is not inconsistent

with federal regulation of water *quality*") (emphasis in original). The Western Parties respectfully urge this court to take a fresh look at the entirety of section 101(g) and give each sentence meaning.

B. The Legislative History of Section 101(g) Cannot be Interpreted in a Way That Strips All Meaning from Congress' Specific Instruction.

Appellees continue to read the legislative history of section 101(g) ("the Wallop Amendment") completely counter to the amendment's intent to clarify and reinforce the state deference language of section 510(2). Senator Wallop acknowledged on the floor that the Act's pollution control measures might have "incidental effects" on individual water rights. S. DEB.: Dec. 15, 1977, *reprinted in* Comm. on Envtl. & Pub. Works, 95th Cong., 2d Sess., 3 Legis. History of the Clean Water Act of 1977, at 531–32 (1978) (hereinafter "1977 Legislative History") (referring to such effects on "the method of water usage" as "incidental effects"). But extending that statement to assert section 402 encompasses water transfer activities would strip all meaning from the language in section 101(g), which: (1) preserves states' rights to allocate water; (2) preserves the recipients' right to receive their full state-allocated quantities of water; and (3) directs all levels of governmental agencies to cooperate in developing comprehensive solutions for water pollution control in the context of state water management programs. But "[t]he plain words and meaning of a statute cannot be overcome by

a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945).

Senator Wallop's statement simply acknowledged that the Act's pollution control requirements may be applied to discharges from industrial, commercial or municipal facilities – even where such facilities also hold state-established rights to beneficially use the water. This is clear from his complete floor statement which recognized that "[l]egitimate water quality measures authorized by this act may at times have some effect on the method of water usage." S. DEB.: Dec. 15, 1977, *reprinted in* 1977 Legislative History, at 531–32. Senator Wallop's focus on "water usage" in his explanation of the limitations of 101(g) is important; he did not in any way acquiesce to regulation of activities such as water transfers – prior to any use – that go to the heart of state water allocation authority.

Irrigation return flows provide a prime example of a category of discharges that occur after water is beneficially used. Irrigation return flows contain pollutants that are added in the course of agricultural use (e.g., fertilizers, pesticides). Thus, when litigated in 1975, the United States District Court for the District of Columbia held, and the United States Court of Appeals affirmed, that irrigation return flows were point sources subject to the Act's NPDES requirements. *NRDC v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *aff'd*,

NRDC v. Costle 568 F.2d 1369, 1382 (D.C. Cir. 1977) (vacating EPA's 1973 regulation exempting certain discharges of irrigation return flow from NPDES permitting).

In 1977, in the same act that added the Wallop amendment, Congress enacted an exemption for "return flows from irrigated agriculture" in direct response to *NRDC v. Train* litigation. *See* 33 U.S.C. 1342(l)(1) and 1362(14); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, No. CIV S-11-2980-KJM-CKD, 2012 U.S. Dist. LEXIS 124720, at *16–17 (E.D. Cal. Aug. 31, 2012). That Congress did not also specifically exempt water transfer activities at the same time simply reflects the fact that there was no question of NPDES applicability for Congress to address. Indeed, a specific exemption in the Act for water transfers was (and still is) unnecessary because the activity of transferring raw water before it is put to use directly invokes the prohibitions in sections 101(g) and 510(2).

C. The Supreme Court's Oft-Cited Statement in *PUD No. 1* Must be Reconciled with the Entirety of Section 101(g) as Applied to Water Transfer Activities.

PUD No. 1, a case involving the scope of state authority under section 401 of the Act, concerned a proposed hydroelectric project to withdraw and use water to generate electricity, which would have reduced water flow in a specific reach of a river. *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 708–709 (1994). The project proponent's suit challenged the state's section 401

certification requirement for the facility to maintain a minimum instream flow to protect designated uses (i.e., a fishery). *Id.*

In rejecting the general argument that sections 101(g) and 510(2) exclude water quantity issues from the Act's coverage, the Court stated: "[These sections] preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *Id.* at 720. The Court's statement should be read in the context of that case and the entirety of section 101(g). The state-imposed "pollution controls" – the minimum instream flow requirements – on the hydroelectric facility in *PUD No. 1* were directly related to the facility's use of the water for an industrial purpose, i.e., withdrawing and using the water to generate electricity.

The express language in section 101(g), however, concentrates on a point in time before the water's actual use. As explained above, the first sentence of section 101(g) deals with ensuring the integrity of the state water allocation process, while the second sentence is meant to protect the right of individuals to receive their state-allocated quantities of water before it is put to beneficial use. If *PUD No. 1* is extended beyond the context of that particular case to support applying NPDES requirements to water transfer activities, the effect would be to

"supersede or abrogate the rights to quantities of water" to which a user is entitled. This result would be in direct conflict with the second sentence of section 101(g).

III. VARIOUS MECHANISMS EXIST TO ADDRESS THE RARE INSTANCE OF AN INTERSTATE DISPUTE INVOLVING WATER TRANSFER ACTIVITIES.

State Appellees speculate that "Congress could not have intended" for inter-basin transfers to be outside the NPDES program "when two States cannot resolve an interstate water-pollution dispute." State Appellees' Br. at 37. Their speculation, however, fails in light of the Act's specific interstate provisions, as well as traditional common law remedies.

A. Congress Provided for Alternative Mechanisms in the Act to Address Interstate Issues.

Appellees' myopic focus on NPDES as the only mechanism to address their interstate concerns overlooks specific provisions Congress enacted to address interstate issues. *See* Western States' Br. at 42–44, Sept. 9, 2014, ECF No. 190 (discussing 33 U.S.C. §§ 1253(a), 1288(a)(4), 1252(b), 1252(c), 1329(g)). Nor have Appellees identified any instances where downstream states have availed themselves of these interstate provisions of the Act,[5] let alone found them

[5] Appellee States' response identified a single instance of interstate and international concern – supported solely by a New York employee who did not even claim personal knowledge, although involving co-appellees Minnesota and Manitoba. *See* State Appellees' Br. at 6–7. In fact, state law, an interstate compact, and an international treaty work to address this situation, as Congress intended. *See* Western States' Br. at 42–43, 46–47.

insufficient, so as to justify NPDES permitting in such circumstances. Moreover, these provisions would be rendered largely superfluous under the Appellees' reading of the Act. The court must, of course, "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).

History contains many more instances of interstate disputes over the quantity of water received by downstream states than over the quality of such water.[6] In most instances, the states ultimately addressed their concerns through negotiations,

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[6] There are a multitude of United States Supreme Court cases addressing interstate disputes over quantities of water, *see, e.g.*, *Kansas v. Colorado*, 206 U.S. 46 (1907) (action for equitable apportionment of interstate waters); *Arizona v. California*, 373 U.S. 546 (1963) (discussing apportionment of interstate waters of the Colorado River); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (discussing apportionment of the interstate waters of the North Platte River); *Texas v. New Mexico*, 462 U.S. 554 (1983) (action for alleged breach of Pecos River Compact); *Montana v. Wyoming*, 131 S.Ct. 1765 (2011) (action for alleged breach of Yellowstone River Compact); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991) (concerning dispute over interpretation of provisions of the Canadian River Compact); *Colorado v. New Mexico*, 467 U.S. 310 (1984) (action for equitable apportionment of interstate waters); *Wyoming v. Colorado*, 298 U.S. 573 (1936) (interstate dispute over quantity of water that Wyoming could divert from the Laramie River); *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (action for equitable apportionment of interstate river water); and *Colorado v. Kansas*, 320 U.S. 382 (1943) (dispute over rights to use the waters of the Colorado River), whereas there are significantly fewer addressing interstate disputes over water quality. *See, e.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (concerning Oklahoma challenge of NPDES permit issued to city of Fayetteville, Arkansas); and *Missouri v. Illinois*, 200 U.S. 496 (1906) (disputes over introduction of pollutants by upstream state).

leading to interstate compacts.[7] *See, e.g.*, Colorado River Compact [between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming], ch. 72, 42 Stat. 171 (1921). Congress recognized this historically successful approach to interstate dispute resolution, and directed EPA to "encourage cooperative activities by the States for the prevention, reduction and elimination of pollution . . . and encourage compacts between States for the prevention and control of pollution," and gave its consent for such compacts. 33 U.S.C. § 1253(a); H.R. Rep. No. 92-911, *reprinted in* Comm. on Envtl. & Pub. Works, 92d Cong., 2d Sess., 1 Legis. History of the Clean Water Act of 1972, at 767 (1973) (hereinafter "1972 Legislative History") (noting that section 103 "establishes a policy for active Federal promotion of cooperative efforts among the States to promote pollution control" (emphasis added)). There are, in fact, more than a dozen compacts on interstate pollution control among more than twenty-five states. *See* Western States' Br. at 43.

Just as Congress did not want to encourage states to compete for growth by establishing lower water quality protections than other states, *NRDC v. Costle*, 568 F.2d at 1378, Congress wanted to ensure "that State allocation systems are not subverted . . . and to protect historic rights from mischievous abrogation by those

[7] Litigation often leads to negotiated compacts, as well. *See, e.g.*, *Kansas v. Colorado*, 206 U.S. 46 (1907) (action for equitable apportionment of interstate waters); Arkansas River Compact, 63 Stat 145 (1949).

who would use an act, designed solely to protect water quality and wetlands, for other purposes." S. DEB.: Dec. 15, 1977, *reprinted in* 1977 Legislative History, at 531. Notably all of the states downstream of Colorado, the ultimate headwaters state, are either co-appellants or supporting *amici* in this or related litigation; none sees any need for the NPDES program to supplement the explicit interstate provisions of the Act. Western States – who depend on interstate water transfers to meet their needs – understand that EPA appropriately balanced the interests of upstream and downstream states, unlike the State Appellees' more limited interests.

B. Remedies At State Common Law are a Viable Backstop Where Cooperative Efforts Are Not Effective.

State Appellees and the District Court express concern that without the NPDES program's statutory remedies, states receiving polluted water from another State would be relegated to filing a common-law nuisance or trespass lawsuit under the law of the polluting State. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490–91 (1987); State Appellees' Br. at 12–14; Special App. at 96 (Opinion and Order issued by the Southern District of New York). State Appellees bemoan the absence of NPDES permits to protect interstate water quality. State Appellees' Br. at 6–8 (discussing the Red River). Yet their concerns seem largely hypothetical because they have failed to explain how or why the interstate provisions of the Act are inadequate to address the water quality issues they allege.

If the cooperative remedies authorized and encouraged in the Act are not sufficient to address a downstream state's concerns, remedies at common-law are a viable option. A common-law nuisance or trespass lawsuit ultimately may be a more effective remedy for the downstream state than the administrative remedies under the NPDES program.[8] Indeed, under the Act's NPDES provisions, EPA has the discretionary power to make a final determination about a discharge permit in instances where a downstream state raises objections to that permit. 33 U.S.C. § 1342(d)(2). If appealed, EPA's determination would be subject to the APA's deferential "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Thus, as summarized by the Supreme Court in *International Paper v. Oullette*, downstream states "occupy a subordinate position to source states in the federal [NPDES] program" because they only have an "advisory role" in regulating pollutants that originate in upstream states. 479 U.S. at 491.

On the other hand, where a claim is brought under state common law, the plaintiff is master of its own claims. *See, e.g., Pan Am. Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 662 (1961) (complaints determine the nature of the suits before the court and "party who brings a suit is master to decide what

[8] Although the Supreme Court has ruled that the Clean Water Act preempts federal common law and the law of the affected state, the common law of the state where the point source is located remains a viable option to address an interstate discharge. *See Int'l Paper Co.*, 479 U.S. at 493, 487; *see also Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992).

law he will rely on"). The states' common laws regard water pollution as a trespass or nuisance 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. For example, in Colorado, a state "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 City and Cnty. 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"). These state common law theories clearly provide for more robust remedies than available under the Act's NPDES provisions.

IV. THE NPDES PERMITTING SCHEME IS TOO INFLEXIBLE TO ENSURE DEFERENCE TO STATE ALLOCATION SYSTEMS AND INDIVIDUAL WATER RIGHTS.

Water transfers are very different from the municipal and industrial discharges that were Congress' focus for NPDES permitting. The enormous volume of water involved and the logistics and locations of water transfers contribute to the cost of compliance. AR 1415.20 at 5–12, 33. Indeed, the Supreme Court in *Miccosukee* noted the direct correlation between costs under the NPDES framework and section 101(g) of the Act by recognizing: "[i]t 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.[9] *Miccosukee*, 541 U.S. at 108 (quoting 33 U.S.C. § 1251(g)). In fact, transferors' costs to comply with NPDES requirements would be cost prohibitive and technically impractical to avoid violating water quality standards for transfers whose quality is overwhelmingly determined by natural processes. *See* Western Providers' Br. at 19–23; *see also* California Amicus Br. at 16 (same), Sept. 18, 2014, ECF No. 225.

General permits, consideration of the cost of compliance, and variances are of little value to water transferors, despite wishful thinking of Appellees and courts. State Appellees' Br. at 75–77; Tribe Appellees' Br. at 29–30. All NPDES

[9] Appellees incorrectly assert that Congress "intended an accommodation" to be reached through the NPDES permit process where a "state's interest in allocating water and the federal interest in protecting" water quality are both implicated, citing *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985). State Appellees' Br. at 75–77. *Riverside Irrigation*, however, did not address NPDES permitting. Rather, *Riverside Irrigation* dealt with section 404, which contains express language subjecting the discharge of dredged or fill material to permitting where the flow of navigable waters may be impaired or the reach of such waters reduced. 33 U.S.C. § 1344(f)(2). As discussed *supra* at I.C, the express language in section 404 satisfies the proviso of section 510(2) that "nothing in this chapter 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." 33 U.S.C. § 1370(2). No similar language appears in section 402. 33 U.S.C. § 1342.

permits – including general permits – must include limitations designed to control the potential to cause or contribute to an exceedance of every one of the dozens of water quality standards of the receiving waters. 33 U.S.C. § 1342; 40 C.F.R. § 122.44(d)(1)(i). All permits must also include technology-based effluent limits, as well as any more stringent limits necessary to meet applicable state water quality standards. *See* 33 U.S.C. § 1342(a). And for certain waterbodies, the rigid antidegradation review process applies to all permits (including certifications issued under general permits). 40 C.F.R. § 122.44.

Permit requirements that recognize compliance costs are difficult to justify and extremely rare. Variances are even more uncommon, contrary to *Amicus* claims. *See* Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 Minn. L. Rev. 547, 550 n.8 (1997) (noting that variances under the Act were the subject of two Supreme Court opinions and discussed in a third, "but proved nearly so uncommon in reality as to qualify for listing as an endangered species of regulatory instrument") (citing William Pederson, *Turning the Tide on Water Quality*, 15 Ecology L.Q. 69, 86 & n.81 (1988)). Given these universal NPDES requirements, general permits would not lower the costs of compliance necessary to meet applicable water quality standards and do little, if anything, to ameliorate the negative impacts on transferors' water rights, or to alleviate the corresponding negative impacts to the states' water

allocation systems. *See, e.g.*, California Amicus Br. at 18 (explaining that the State could not have operated the State Water Project during the recent drought to meet the needs of 25 million residents if an NPDES were in place); *see also* Western Water Providers Br. at 16–23. Thus, a general permit requirement for water transfer activities does not resolve conflicts with sections 101(g) and 510(2).

The *Miccosukee* Court also postulated that the use of general permits might provide some relief with respect to "regulatory costs." *Id*. While some relief could be expected in the form of streamlining of permits, the administrative burden of maintaining a general NPDES permitting system would not be minimal, contrary to Appellees' assertions. *See* Trout Appellees' Br. at 48; Tribe Appellees' Br. at 29–30. States and the EPA would have to expend considerable time and effort to develop general permits, which would be complicated because of the geographically diverse locations of transfers, differing watershed characteristics, the complex and varied water transfer infrastructure, including natural streams, rivers and lakes, and highly variable water transfer rates and quantities. Moreover, States and EPA would have to monitor and enforce the compliance with dozens of water quality standards associated with tens of thousands of water transfers, a responsibility an order of magnitude greater than current NPDES permits. This is a challenge that could divert limited state and EPA resources from more essential

programs that address widespread and real water quality problems of impaired water bodies across the nation.

In sum, neither individual nor general NPDES permits embody sufficient flexibility to overcome the conflict with sections 101(g) and 510(2) –Congress' specific instructions to preserve of the integrity of state water allocation systems. EPA's Water Transfers Rule is consistent with the Act and the balance that Congress intended between its environmental and states' rights goals.

V. SECTION 303(d) OF THE ACT AND INDEPENDENT STATE AUTHORITY PROVIDE EFFECTIVE MECHANISMS TO ADDRESS PROBLEMATIC WATER TRANSFERS.

Section 303(d) can be used to effectively address underlying water quality issues at their sources. 33 U.S.C. § 1313(d). Independent state authority is expressly authorized in section 510(1) of the Act – authority which can be invoked to address any water transfer activity that a state views as problematic. 33 U.S.C. § 1370(2). Use of these more flexible mechanisms would serve to protect the quality of receiving waters, while at the same time maintaining the integrity of the state's water allocation system.

A. States Can Use Total Maximum Daily Loads To Address Water Transfer Activities.

Although much of this litigation involves an unrelenting semantic debate over the word "addition," the more important substantive issue is the effect of water transfers on water quality. Despite Appellees' parade of horribles, most of

the pollution present in water transfers is the result of nonpoint natural processes, i.e., erosion from precipitation events and snowmelt, passage through geological formations, and flow from brackish springs. *See, e.g.*, Western Water Providers Br. at 19–20; Western Water Providers Mem. of L. in Supp. of Mot. Summ. J. at 9–10, ECF No. 188, Case No. 08-cv-5606 (S.D.N.Y. June 9, 2013). Accordingly, water quality benefits more overall by preventing pollution from entering water before a transfer than by removing pollution after it enters the water. Taking the Appellees' concerns with water quality to heart, it is puzzling that they focus on NPDES permitting, which would not address water quality until the tail end of a water transfer, rather than preventing pollution from entering the water before any transfer. State Appellees' Br. at 59–60.

Appellees' principal objection to nonpoint source controls in the context of Total Maximum Daily Loads ("TMDLs") apparently stems from their concern that nonpoint sources are not traceable to a discrete source. State Appellees' Br. at 59–60.[10] As of January 2010, there were, however, over 40,000 TMDLs completed across the country, 95% of which included an identification and quantification of nonpoint or a combination of point and nonpoint sources of pollution. *See* EPA

[10] Appellees also assert – without authority – that implementation of a TMDL would "almost by definition" limit the volume of water transferred. Tribe Appellees' Br. at 37. If that were true, then many existing TMDLs would be limiting water transfers, but there is no evidence of such an impact in the record, nor even any anecdotal reports.

Office of Water, *TMDL Program Results Analysis Fact Sheet # EPA841-F-10-001* (Jan. 2010), *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/tmdl_progress_fact_sheet.pdf. Indeed, the Act and EPA regulations require identification and quantification of nonpoint source loading in the TMDL process. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. §§ 130.2(e)–(i), 130.7; *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1132 (9th Cir. 2002), *cert. denied* No. 02-1186, 2003 U.S. LEXIS 4608 (June 16, 2003) (upholding EPA regulations subjecting nonpoint sources to TMDLs). In fact, Appellees admit that states are required by section 303(d) to ensure, through point and nonpoint source programs, that section 303(d)-designated water bodies meet water quality standards through the implementation of TMDLs. Trout Appellees' Br. at 44.

TMDLs are also important to integrating point and nonpoint source regulations into watershed-scale water quality management. *See, e.g.*, Clean Water Act, at 60 (Am. Bar Assoc., 2d ed. 2012); *see also Am. Farm Bureau Fed'n v. EPA*, 984 F. Supp. 2d 289, 330, 331–32 (M.D. Pa. 2013). For example, a TMDL is a more comprehensive and effective approach for waters involving more than one state. Such TMDLs must ensure that the most stringent water quality standards applicable to the impaired waterbody are met. *See, e.g.*, *Dioxin/Organochloride Ctr. v. Rasmussen*, No. C93-33D, 1993 U.S. Dist. LEXIS

15595, at *17–18 (W.D. Wash. Aug. 16, 1992) (explaining that in the context of a TMDL for dioxin in the Columbia River basin, the EPA recognized that it "was required to implement a TMDL to comply with the most stringent water quality standard from among the States through which the Columbia flows."). As a practical matter, the TMDL process gives a downstream or neighboring state impacted by pollution from an upstream state a greater ability to protect its water quality standards.

With a multistate TMDL in place, the downstream state can rely on the multistate TMDL to protect its water quality. *See Am. Farm Bureau Fed'n*, 984 F. Supp. 2d at 330, 331 (discussing utilizing a watershed-wide approach and noting that "EPA has authority to set TMDL allocations for upstream states in order to achieve downstream water quality standards"). The Columbia River Dioxin TMDL is an example that addresses the waters of Washington, Oregon and Idaho. *See* Columbia River Dioxin TMDL, EPA (Feb. 25, 1991), *available at* http://yosemite.epa.gov/R10/water.nsf/ac5dc0447a281f4e882569ed0073521f/062e4bb7e44b8e90882569a700767e8d/$FILE/columbia%20dioxin%20tmdl.PDF; *see also Dioxin/Organochloride Ctr. v. Clarke*, 57 F.3d 1517, 1528 (9th Cir. 1995) (upholding the Columbia River Dioxin TMDL).

B. States Have Independent Legal Authority To Regulate the Quality of Water Transfers.

As discussed in the Western States' Opening Brief, states are free to exercise their own legal authority – independent authority that extends beyond the federal Act – to address potential water quality issues associated with water transfers. Western States' Br. at 18–20; 33 U.S.C. § 1370(1).

Every state has authority under its own laws to protect water quality, as well as to provide for the vital transfer of water for subsequent beneficial use. These statutes demonstrate that the states have flexible mechanisms in place to address specific water quality issues not addressed by the Act, but important to each state, exactly as Congress authorized in section 510. 33 U.S.C. § 1370.

CONCLUSION

For the reasons stated in the Western Parties' opening briefs and above, the Western Parties urge the court to reverse the decision below.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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