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

Defendants - Appellants - Cross Appellees,

(For the Complete Caption See Reverse Side of Cover)

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

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

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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,

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PRELIMINARY STATEMENT

The Western States' appeal is fundamentally about deference, specifically, historical federal deference to traditional state authority over management of their water resources, as properly recognized by the Environmental Protection Agency's ("EPA") interpretation of the Clean Water Act in its Water Transfers Rule.

"The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress" and the courts. *California v. United States*, 438 U.S. 645, 653 (1978). The Clean Water Act (or "Act") did not alter this historical federal deference to the states in matters involving the management of their water resources. EPA's Water Transfers Rule respects this deference, as well as the environmental goals of the Act. *See* 40 C.F.R. § 122.3(i)(2014).

The "Western States" – Colorado, New Mexico, Alaska, Arizona, Idaho, North Dakota, Nebraska, Nevada, Texas, Utah, and Wyoming – have vital interests in maintaining historical federal deference to traditional state authority to manage their water resources because of the importance of water transfers to their economies and the environment.

Most precipitation in the West falls as snow. The arid West must consequently capture water when and where the snow melts, in areas often remote

from places of need. Countless entities thus divert water from natural watercourses; many then transfer water into other streams, lakes, and reservoirs to meet essential domestic, commercial, agricultural and other needs.

Water transfers may be as simple as the diversion of water from one stream into an adjacent (but hydrologically separate) stream for irrigation of a nearby field, or as complex as the U.S. Bureau of Reclamation's interstate San Juan-Chama Project that transfers water through the Continental Divide and across the Colorado-New Mexico state line to serve New Mexico residents. Western States in fact depend upon thousands of daily water transfers to deliver billions of gallons of water to meet their residents' water supply needs. All of these transfers include the capture and transfer of water pursuant to state law.

Subjecting water transfers to federal NPDES program requirements would trump federal deference to the states' traditional authority over their water resources.[1] The states' management of their water resources would be superseded, abrogated or impaired because many individual water diversions would have to be curtailed because it would be cost prohibitive, impractical, or unworkable to

[1] Even for States such as Alaska where arid conditions generally are not an issue, the economic cost of regulating water transfers under the NPDES permit system would pose an impractical and unrealistic burden for the administering agency and an applicant, while at the same time usurping existing and adequate state authorities already governing water transfers.

construct the water treatment facilities necessary to comply with NPDES requirements.

This Court should reverse the District Court because Congress neither intended nor authorized altering historical federal deference to the states' traditional authority over their water resources.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, as a civil action raising questions of federal law, and pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The order and judgment are appealable as of right pursuant to 28 U.S.C. § 1291 as the final judgment of the District Court. On May 27, 2014, the "Western States" timely filed their notice of appeal from the District Court's final Judgment, dated March 31, 2014, and Opinion and Order, dated March 28, 2014.

STANDARD OF REVIEW

Federal appellate courts review the grant of summary judgment *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Guertin v. United States*, 743 F.3d 382, 385 (2d Cir. 2014). In the context of an agency rulemaking under the Administrative Procedure Act, the appellate court must "review the administrative record directly." *Gas Appliance Mfrs. v. Dep't of Energy*, 998 F.2d 1041, 1045 (D.C. Cir. 1993). Courts review an administrative agency's action under the

"arbitrary, capricious or abuse of discretion" standard. 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002).

STATEMENT OF ISSUES

1. Whether the District Court erred by not applying the "clear statement rule" where the Clean Water Act lacks a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority over their water resources.

2. Whether the District Court erred by not applying the "avoidance canon" to interpret the Clean Water Act in a manner that avoids constitutional problems, i.e., alteration of the established framework of federal deference to traditional state authority over their water resources.

3. Whether the District Court erred in failing to give meaning to §§ 101(b), 101(g) and 510(2) of the Clean Water Act, which expressly preserve traditional state authority over their water resources.

4. Whether the District Court erred in interpreting the Clean Water Act in a manner that will impermissibly interfere with the states' capacity to meet their interstate obligations under interstate compacts, Supreme Court interstate water apportionments, and congressional acts.

STATEMENT OF CASE

This appeal questions whether the District Court erred by failing to respect historical federal deference to the states' traditional authority over their water resources.

Nature of the Case

This is an appeal of an Opinion and Order vacating EPA's Water Transfers Rule to the extent it is inconsistent with the statute and remanding the Rule to EPA. Special App. at 121. Judge Kenneth M. Karas, District Court Judge for the Southern District of New York, issued his Opinion and Order on March 28, 2014. Special App. at 6–21.

Procedural History

In 2008, EPA promulgated its Water Transfers Rule, 40 C.F.R. § 122.3(i), which clarifies that a water transfer – "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" – is not subject to regulation under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program as "a discharge of a pollutant." 33 U.S.C. § 1311(a). Several groups of plaintiffs challenged this regulation, in both federal district and appellate courts, as impermissible under the Clean Water Act. Several groups of stakeholders sought to intervene as defendants in these challenges.

The two district court proceedings, in the Southern District of New York and the Southern District of Florida, were stayed pending resolution of the challenges filed in several federal courts of appeal. On October 26, 2012, the Eleventh Circuit held that it lacked jurisdiction to review the consolidated challenges and accordingly dismissed the petitions and the Supreme Court subsequently denied EPA's petition for *certiorari* on October 15, 2013. The stays lifted on December 17, 2012, and the plaintiffs in the Southern District of Florida voluntarily dismissed those proceedings.

The multiple challenges consequently became one, in the Southern District of New York. On January 30, 2013, Judge Karas granted, on the parties' consent, intervention to the Florida plaintiffs (Miccosukee Tribe of Indians, Friends of the Everglades, the Florida Wildlife Federation, and the Sierra Club) who joined a group of nine (mostly eastern) states and the Province of Manitoba, Canada as challengers, as well as eleven Western States, numerous Western Water Providers, and the South Florida Water Management District, who joined New York City as intervenor-defendants (and EPA) to defend EPA's Rule.

The parties briefed cross motions for summary judgment at the direction of the Court, which held oral argument on December 19, 2013. The District Court issued its Opinion and Order on March 28, 2014.

Summary of Decision Below

The District Court adopted the two-step *Chevron* framework for its analysis. Special App. at 35 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The Court noted that the first step was "whether Congress clearly answered the precise question whether a transfer of water and any pollutants contained therein is an 'addition' of those pollutants 'to navigable waters.'" Special App. at 38. In this regard, the Court found that the "text alone" of the Clean Water Act was ambiguous and susceptible to the two constructions that treat navigable waters either collectively as a whole or as individual water bodies. Special App. at 41–47.

The District Court purported to undertake a "holistic" analysis of the statute's structure, purpose, and history, and determined that none of those construction devices resolved the aforementioned ambiguity. Special App. at 54–60. The Court found that EPA's Rule satisfied step one of *Chevron* review, holding that the statutory language was ambiguous as to whether Congress intended a water transfer to be considered an "addition" of pollutants to "navigable waters." Special App. at 59–60.

The Court next proceeded to step two of *Chevron* to determine whether EPA's Rule represents a permissible interpretation of the Act. Special App. at 60. After lengthy discussion, the District Court concluded that EPA did not satisfy step

two because the agency failed to provide a reasoned explanation for its interpretation of the statute. Special App. at 89.

The Court provided a separate discussion of EPA's "status-based" interpretation of the term "navigable waters." Special App. at 110. The Court found that EPA failed to provide a reasoned explanation for its interpretation, and further found EPA's interpretation inconsistent with the Act. Special App. at 111, 113.

In the Opinion and Order, the Court vacated the Water Transfers Rule to the extent it is inconsistent with the statute – and in particular the phrase "navigable waters" as interpreted in *Rapanos v. United States*, 547 U.S. 715 (2006) and in the Court's Opinion dated March 28, 2014. The District Court also remanded the Water Transfers Rule "to the extent EPA did not provide a reasoned explanation for its interpretation." Special App. at 121.

Relevant Facts

Federal deference to the states' authority to allocate their water resources is especially important in arid Western States that rely on water transfers to meet the water needs of their residents. Administrative Record [Doc. 119] (hereinafter "AR"), 1272.1, at 3. Subjecting water transfers to the NPDES permitting scheme could unnecessarily interfere with state management of their water resources. J.A. at 276 (EPA Interpretation); AR 0679.1, at 1.

States have sovereign authority to regulate water quality within their jurisdiction, 33 U.S.C. § 1370 (Act § 510), and have enacted statutory authority both to implement the Act and to supplement its provisions to address water quality, including effects from water transfers. J.A. at 1542. Further, this authority is redundant in all fifty states, that is, each state has multiple, overlapping authorities to regulate negative water quality impacts from water transfers.

State water quality authority, found in different combinations in the various states, includes:

a. Broad authority for the state's water quality agency to prevent the pollution of the state's waters;

b. Specific authority for the state's water quality agency to address particular pollution or threats of pollution;

c. General authority to protect human health and wildlife, including aquatic life;

d. Nuisance statutes to enjoin and abate pollution; and

e. Common law nuisance to enjoin and abate pollution.

Id. This authority allows the states to implement the environmental goals of the Act while exercising their traditional authority to manage their water resources. *Id.*

SUMMARY OF ARGUMENT

The Supreme Court employs a consistent analytic approach to statutory interpretations of the Act that may alter the traditional federal-state framework. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs ("SWANCC"),*

531 U.S. 159, 174 (2001); *Rapanos*, 547 U.S. at 738. The District Court followed a different analytic approach, one which overlooked the traditional federal-state framework of deference to the states' authority over their water resources.

Federal deference to state water law has its origins in the "equal footing doctrine," as explained in *Kansas v. Colorado*, 206 U.S. 46, 94 (1907). Congress has repeatedly reaffirmed deference to state water law by including express language in numerous pieces of federal legislation over the years, including the Clean Water Act. Likewise, the Supreme Court has been consistent in recognizing the states' traditional authority over use of their water resources. *See, e.g.*, *California v. United States*, 438 U.S. at 653.

The Clean Water Act lacks a "'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority" over water uses. *See, e.g.*, *Rapanos*, 547 U.S. at 738. Moreover, the "canon of constitutional avoidance" militates against extending NPDES program jurisdiction over water transfers, thus avoiding a constitutional problem posed by impinging on the states' traditional and primary power over land and water use. *Id.*; *Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005). EPA's Rule is consistent with these Supreme Court doctrines.

Rather than expressing a desire to alter the federal-state balance, Congress chose to "recognize, preserve and protect the primary responsibilities and rights of

States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Consistent with this notion, Congress expressed its intent "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, and that nothing in the Act "shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." *Id.* at § 1251(g). Congress further mandated that 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." *Id.* at § 1370(2). The District Court erred in failing to give effect to these "state deference" provisions.

Furthermore, NPDES requirements may impermissibly abrogate interstate compacts, Supreme Court interstate water apportionments, and congressional acts if states are not able to use their full legal entitlement to scarce water due to technically or economically infeasible program requirements that prevent the transfer of legally available water from one basin to another.

NPDES permitting authority is not necessary to deal with rare instances of water quality problems associated with water transfers. Congress gave the states specific tools in the Act, such as § 208, to address nonpoint source pollution from water management activities such as water transfers. States also have the ability to address water transfer-related issues where they deem it necessary and appropriate

under state law. Moreover, states may enter into compacts to address interstate pollution, while international treaties speak to cross-boundary pollution. If necessary, remedies in common law are also available to downstream states adversely impacted by water transfers.

In short, Congress did not intend the NPDES program to intrude on historical federal deference to the states' traditional authority to manage their water resources. This Court should give effect to Congress' intent and reverse the District Court.

ARGUMENT

I. The Court Should Uphold EPA's Water Transfers Rule Pursuant to the Supreme Court's Clear Statement Rule and the Constitutional Avoidance Doctrine.

In a footnote halfway through its opinion, the District Court summarily dismissed historical federal deference to the states' traditional authority to manage their water resources. *See* Special App. at 60 n.18. The District Court thus erred by failing to consider the federal-state constitutional issues inherent in water transfers. Specifically, the decision below is inconsistent with the Supreme Court's "clear statement rule" and with the related "avoidance doctrine," which command statutory interpretations that avoid constitutional problems such as infringing on states' authority to manage their water resources. The District Court failed to give meaning to the provisions in the Act that convey congressional intent

to maintain the states' traditional authority over their water resources.

A. Congress and the Supreme Court Historically Defer to Traditional State Authority to Manage Their Water Resources.

The origins of federal deference to state water allocation law lie in the "equal footing" doctrine. Under that doctrine, Congress granted the Western States, upon their admission into the Union, sovereignty over the unappropriated waters in their streams. *See Kansas v. Colorado*, 206 U.S. at 94; *Fox River Paper Co. v. R.R. Comm'n of Wisc.*, 274 U.S. 651, 655 (1927).

Congress affirmed its deference to states' water allocation laws when it passed the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877). *See Cal. Ore. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (explaining that the Desert Land Act effected a severance of all waters upon the public domain and reserved such water for use under the laws of the states); *see also* Mining Act of 1866, ch. 262, 14 Stat. 253 (codified at 43 U.S.C. § 661); Mining Act of 1870, ch. 235, 16 Stat. 218 (codified at 30 U.S.C. §§ 51, 52). Moreover, Congress repeatedly reaffirmed federal deference to state water law when it ratified Western States' constitutions in their acts of admission.[2]

[2] For example, Wyoming's Constitution, art. VIII, § 1 states "[t]he water of all natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state." *See* The Act to provide for the Admission of the State of Wyoming into the Union, ch. 664, 26 Stat. 222 (1890). New Mexico's Constitution, art. XVI, § 2, provides "[t]he unappropriated water of every

In 1978, the Court cemented federal deference to state water law in the case of *California v. United States*. In that litigation, the United States challenged California's authority to impose conditions on the operation of New Melones Dam and Reservoir, a federal facility. The Court rejected the United States' arguments and concluded that Section 8 of the Reclamation Act required the federal government "to comply with state [water] law in the 'control, appropriation, use, or distribution of water.'" *California*, 438 U.S. at 675.

In another opinion issued the same day, the Supreme Court similarly highlighted the Federal Government's consistent deference to the states on water allocation matters. Indeed, "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 702 & n.5 (1978) (noting the existence of 37 statutes in which Congress has expressly recognized the importance of deferring to state water law). Congress'

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natural stream . . . is hereby declared to belong to the public and to be subject to appropriation for beneficial use." *See* Joint Resolution to Admit the Territories of New Mexico and Arizona as states into the Union, Pub. Res. 8, 37 Stat. 39 (1911). North Dakota's Constitution, art. XI, § 3, states "[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes." An Act to Provide for the Division of Dakota into Two States and to Enable the People of North Dakota, South Dakota, Montana, and Washington to Form Constitutions and State Governments and to be Admitted Into the Union, ch. 180, 25 Stat. 676 (1889).

deference to state authority over water allocation is underscored by the so-called "McCarran Amendment," 43 U.S.C. § 666. The statute grants the United States' consent to state jurisdiction in water adjudication proceedings, i.e., the allocation of water under state law also recognized by §§ 101(g) and 510(2) of the Act.

It is important to note that the Supreme Court is also clear that federal deference is not unique to the West, but applies across the country.

> While arid lands are to be found mainly, if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.

California, 438 U.S. at 655 (quoting *Kansas*, 206 U.S. at 92).

And, in the context of the Clean Water Act, the Supreme Court has reiterated that land and water uses are traditionally and primarily state prerogatives, as long understood and applied by federal and state governments. *See, e.g.*, *SWANCC*, 531 U.S. 159, 174.

B. The Clean Water Act Lacks a Clear Statement Authorizing Federal Encroachment Upon the States' Traditional Authority Over Their Water Resources.

The Supreme Court's "clear statement rule" upholds the principles underlying the Tenth Amendment: "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." U.S. Const., amend. X. Accordingly, this rule of

statutory construction is based on the principle that Congress must make its intention "clear and manifest" if it intends to override the historic powers of the states. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). It is therefore the duty of the courts in construing statutes to be certain of Congress' intent before finding that federal law disrupts the usual constitutional balance of federal and state powers. *Id.* at 460.

The Supreme Court has twice applied the "clear statement rule" in the context of the Clean Water Act – both times concluding that the statute lacks any statement by Congress to authorize federal encroachment upon traditional state authority over land and water resources. In *SWANCC*, the Court considered a challenge to EPA and the Corps' definition of "waters of the United States" concerning isolated waters and § 404 permitting. The Court struck down the rule, warning against statutory interpretations that "alter[] the federal–state framework by permitting federal encroachment upon a traditional state power," and reiterating applicability of the clear statement rule: "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *SWANCC*, 531 U.S. at 173 (citations omitted).

Most recently in *Rapanos*, a plurality of the Court found that EPA had exceeded its authority through regulation of isolated wetlands under § 404 of the Act on the basis that the Act lacks a "'clear and manifest' statement from Congress

"to authorize an unprecedented intrusion into traditional state authority" over land and water resources. *See Rapanos*, 547 U.S. at 738. The plurality further observed, "rather than 'preserv[ing] the primary rights and responsibilities of the States,'" extending federal jurisdiction would bring "virtually all plan[ning of] the development and use . . . of land and water resources' by the States under federal control.'" *Id.* at 737. The plurality declared that outcome to be "an unlikely reading" of the Act. *Id.*

The Supreme Court's application of the "clear statement rule" in *SWANCC* and *Rapanos* to the Clean Water Act should guide the Court's decision here.

C. Application of the Avoidance Canon Results in Upholding EPA's Rule.

The Supreme Court has applied the separate "avoidance canon" – which calls for statutory interpretations that avoid constitutional problems – to the Clean Water Act in concert with the clear statement rule. *See, e.g.*, *SWANCC*, 531 U.S. at 173. As the Supreme Court noted in *SWANCC*, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.*

When deciding which of two plausible statutory constructions to adopt, the "canon of constitutional avoidance" requires the Court to "consider the necessary consequences of its choice," and rests on "the reasonable presumption that

Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 380–81. "If one of them would raise a multitude of constitutional problems, the other should prevail . . . ." *Id*. Because there are arguably two plausible interpretations of the Act at issue here, as the Eleventh Circuit found in *Friends of the Everglades*, 570 F.3d 1210, 1227 (11th Cir. 2009), EPA's interpretation should prevail because it avoids a constitutional problem, that is, alteration of the established framework of federal deference to traditional state authority over land and water resources. *SWANCC*, 531 U.S. at 174 ("[S]ignificant constitutional questions [are] raised by . . . impingement of the States' traditional and primary power over land and water use.").

II. The Court Should Uphold EPA's Water Transfers Rule Because it is Consistent with the "State Deference" Provisions in the Act.

Congress did not include a clear statement of intent in the Act to disrupt traditional deference to the states to manage their water resources. In fact, Congress expressly and repeatedly articulated its intention to preserve the established federal-state framework. *See* 33 U.S.C. §§ 1251(b) and (g), and § 1370(2). EPA recognized this in promulgating the Water Transfers Rule, stating that "[t]aken as a whole, the statutory language and scheme [of the Act] support the conclusion that [NPDES] permits are not required for water transfers." J.A. at 172 (National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,700 (June 13, 2008) (later codified at 40 C.F.R. pt. 122)).

A. Congress Expressly Preserved Deference to State Water Resource Management in §§ 101(b), 101(g) and 510(2) of the Act.

In its initial adoption of the Act in 1972, Congress intended that primary authority over water would continue to rest with the states. Congress incorporated in § 510 of the Act its historical deference to traditional state authority over their water resources, mandating that "[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2). At the same time, Congress also expressed in § 101(b) an overarching policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." *Id.* at § 1251(b).

Just five years later, in the 1977 amendments to the Act, Congress felt compelled to reiterate and clarify its intent with respect to state authority over matters of water allocation:

> 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 Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies

> shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g) (emphasis added).

Section 101(g) includes a requirement that federal agencies cooperate with state and local governments to develop "comprehensive solutions" for "pollution," "in concert with" "managing water resources." *Id.* Congress thus explicitly acknowledged that state and local management of water resources involves "pollution" from nonpoint sources, which are not subject to the Act's NPDES program, rather than "pollutants" from point sources, which are subject to the Act's NPDES framework. *Id.*; 33 U.S.C. § 1342(a)(1).

B. The Legislative History of § 101(g) Confirms Congress' Intent to Refrain from Interfering with State Water Resource Management.

The legislative history of § 101(g) confirms Congress' dedication to long-standing federal deference to the states' water allocation systems. Congress reacted swiftly to concerns over federal policy options contained in the federal "Issue and Option Papers for the Water Resource Policy Study." Water Resource Policy Study, 42 Fed. Reg. 36,788, 36,788 (July 15, 1977) ("WRC Paper"). The WRC Paper exacerbated fears of federal interference in traditional state authority to manage their water resources. Several options in the WRC Paper challenged federal deference to the states in matters of water allocation, including the

suggestion that water diversions be reduced to solve water quality problems. *Id*. at 36,793.

In order to allay those concerns the Conference Committee for the 1977 reauthorization of the Act added a new subsection to § 101. During the floor debate, Conferee Senator Wallop explained that §101(g):

> is an attempt to recognize historic allocation rights contained in State constitutions. . . .[and] the States [sic] historic rights to allocate quantity, and establish priority of usage remains inviolate because of this amendment.

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 532 (1978) (hereinafter "1977 Legislative History"). Senator Wallop further explained: "[§ 101(g)] . . . will reassure the State[s] that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems." S. DEB.: Dec. 15, 1977, *reprinted in* 1977 Legislative History, at 531.

Senator Wallop clarified that the purpose of his amendment was "to insure that State allocation systems are not subverted . . . ." *Id.* Contrary to the stated intent and the plain language of § 101(g), state management of their water resources would be subverted by extending NPDES requirements to water transfer activities. Most of the Western States, for example, allocate significant quantities of water for complex systems of transbasin transfers through multiple individual

water rights. *See, e.g., City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992 (Colo. 1954) (concerning the water rights of the cities of Colorado Springs and Denver to transfer water under the Continental Divide). Where a significant transbasin transfer becomes cost-prohibitive, impractical, or unworkable because of NPDES program requirements, the resulting curtailment would create widespread impacts to the State's water allocation system as a whole, such as the forty trans-mountain diversions for 500,000 acre feet allocated by Colorado to serve more than half of the State's residents. J.A. at 320; *see also* Western States' Mem. of L. in Supp. or Cross-Mot. Summ. J. [Doc. 171], at 9; Western States' Mem. of L. in Reply to Pls.' Opp'n to Cross-Mot. Summ. J. [Doc. 204], at 11.

C. The District Court Erred in its Failure to Give Proper Meaning to the "State Deference" Provisions in the Act.

The District Court erred when it elevated the "environmental goals" and discounted the "state deference" goals of the Act.

1. State Deference

The District Court undervalued the Act's numerous "state deference" provisions, stating that "[m]any of these general expressions of congressional recognition of the states' role in water-allocation management are limited, however, by specific language qualifying that intent, and by specific provisions within the NPDES program indicating the precise balance that Congress intended

to strike." Special App. at 51 (emphasis added). To the contrary, § 402 is silent with regard to the states' role in water allocation management: § 402 only discusses the states' role in NPDES permitting. 33 U.S.C. § 1342. The District Court finessed this silence by importing § 301(a)'s general prohibitions on discharges and §§ 502(12) and 502(7)'s definitions regarding "addition" of pollutants to "navigable waters." Even if the District Court's conflation of these provisions was not error, §§ 301(a), 502(12) and 502(7) do not amount to "specific language," as underscored by the Court's own finding that they are ambiguous. Special App. at 59. On the other hand, the language in §§ 101(b), 101(g) and 510(2) is specific in its intent to preserve the states' primary responsibilities over water resource management, to which water transfers are fundamental.

Surprisingly, the Court read the Act's state deference provisions as conferring authority on the federal government over the states' management of their water resources. For example, the Court surmised that Congress' use of "primary responsibilities" to describe the states' rights in § 101(b) means that both §§ 101(b) and (g) "implicitly contemplate that the federal government might have a secondary role in both regulating and supporting states' resource-management rights." Special App. at 92 (emphasis in original); *see also* Special App. at 52–55. The Court then concluded that EPA's "implicit" "secondary role" in state water management created federal authority to regulate water transfer activities. Special

App. at 92. The "secondary role" for EPA that Congress intended, however, was oversight of the states' implementation of the NPDES program. 33 U.S.C. §§ 1342(b) and (d). But § 510 of the Act requires "express" language to construe the Act in a way that would "impair[] or in any manner affect[]" the states' jurisdiction over their waters. *See* 33 U.S.C. § 1370(2). The District Court thus erred in reading §§ 101(b) and 101(g) as containing an "implicit" role for EPA in state water resource management because this would supersede, abrogate, or impair the states' traditional authority to manage their water resources. 33 U.S.C. §§ 1251(b) and (g).

2. Legislative History

The District Court referenced a 1972 House Report – notably prior to Congress' 1977 addition of § 101(g) – to support its notion that the Act authorizes the Federal Government to exercise a heightened role in state water resource management. Special App. at 51–53. The 1972 House Report actually expresses the logical notion that "[t]o avoid duplication, . . . a State which has an approved program . . . under [§] 402, and which has a program for water resource allocation, should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system." H.R. Rep. No. 92-911, at 96 (1972). But the District Court concluded that the 1972 Report "implies that states should have control over water-resource allocation only where they have an EPA

approved § 402 program and a water-resource-allocation program." Special App. at 53 (emphasis added). In other words, the Court asserted that responsibility over water allocation systems lies with the federal government unless and until a state has an approved NPDES program – the antithesis of federal deference.

3. "Environmental Goals"

The District Court focused on the Act's "environmental goals," while downgrading Congress' "state deference" goals. Special App. at 88–89, 101. (discussing §§ 101(a), 101(b), 101(g) and 510). It is ironic that after admonishing EPA for a perceived failure to balance the Act's environmental goals the Court itself committed that very error by failing to balance the Act's states' rights goals. The Supreme Court has warned courts about this potential pitfall in construing statutes, explaining that

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (emphasis omitted). The District Court's devaluation of the Act's objectives related to state authority over water allocation and management fails to effectuate the balance that Congress intended.

4. NPDES Exemptions

The District Court also found it significant that "water transfers" are not enumerated in the Act's exemption provisions at § 402(l) ("[l]imitation on [NPDES] permit requirement"). Special App. at 58. That conclusion, however, fails to give significance to the provisions in the Act that have the closest relationship to water transfer activities. The "secondary role" for EPA that Congress intended under the Act was oversight of the states' implementation of the NPDES program. 33 U.S.C. §§ 1342(b) and (d). The Court's approach, in contrast, violates a fundamental principle of statutory construction: "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. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

Furthermore, the court must "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). The District Court's focus renders superfluous sections of the Act that are as important to its goals as § 402 and more relevant to the issue – namely §§ 101(b), 101(g), and 510(2), which require that the Act be construed in a manner that preserves state authority over their water resources. A specific "water transfers" exemption is not necessary given the clear language Congress included in the Act concerning the states' traditional authority

to manage their water resources. In short, Congress' policies and directives in §§ 101(b), 101(g), and 510(2) must be given effect.

D. The District Court Erred in Extending *PUD No. 1* to Justify Federal Regulation of Water Transfers.

The District Court incorrectly extended *PUD No. 1 of Jefferson County v. Washington Department of Ecology* – a case involving state certification under § 401 of a federal action – to assert that "the Supreme Court has conclusively rejected the argument that §§ 101(g) and 510(2) exclude the regulation of water quantity from the coverage of the Act." Special App. at 51–52 (citing 511 U.S. 700, 720 (1994)). The Court's statement highlights the importance of reading the Supreme Court's holding in *PUD No. 1* in the proper context.

In *PUD No. 1*, the issue before the Supreme Court was whether the State of Washington could exercise the state's § 401 certification authority to impose minimum stream flow requirements on a federally-licensed hydroelectric facility to protect water quality standards. *PUD No. 1*, 511 U.S. at 709. The Court explained that "[s]ections 101(g) and 510(2) 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 [by a state under § 401] on users who have obtained, pursuant to state law, a water allocation." *Id.* at 720. The District Court erroneously extended this holding to § 402 (NPDES permitting). The Western States agree that § 401 of the Act gives the states broad authority to impose

conditions on the exercise of state-allocated water rights in order to protect water quality standards, but *PUD No. 1* does not authorize the federal government to intrude on traditional state authority over their water resources in § 401.

Similarly, in *S.D. Warren Co. v. Maine Board of Environmental Protection*, the State of Maine issued certifications that required an industry to maintain a minimum stream flow in the bypassed portions of a river in order to allow passage for migratory fish and eels. 547 U.S. 370, 375 (2006). As in *PUD No. 1*, the Supreme Court recognized that "State certifications under § 401 are essential in the scheme to preserve State authority to address the broad range of pollution." *Id.* at 386. The *S.D. Warren* Court also acknowledged that state imposition of water pollution controls on state water allocations under § 401 is entirely consistent with Congress' policy in § 101(b) of the Act. *Id.* (citations omitted) (referring to the state deference provisions of the Act to recognize that "[c]hanges in the [flow of a river] . . . fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns"). *PUD No. 1* and *S.D. Warren* thus support the longstanding authority of states to manage their water resources as recognized in §§ 101(b), 101(g) and 510(2) of the Act. The District Court erred in extending the holding of *PUD No. 1* concerning state discretionary authority under § 401 to the mandatory requirements of § 402.

Even if appropriately applied in the § 402 context, the holding from *PUD No. 1* – that "[s]ections 101(g) and 510(2) . . . . 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" – cannot be extended to support NPDES permitting of water transfer activities. Many industrial and municipal wastewater facilities (those that the NPDES program was intended to cover) utilize state-authorized water rights in their operations. Discharges of wastewater from such facilities remain subject to the § 402 NPDES permitting scheme despite their being associated with a water right.

To illustrate, an industrial discharger may have the right to divert water for industrial uses pursuant to a state water allocation, but after use, the discharges from such industrial facilities are subject to NPDES requirements. Similarly, a municipal (domestic) wastewater discharger might have the obligation under a state water allocation to discharge a certain amount of water from its facility for downstream users. But this does not mean that the municipal discharger is exempt from NPDES requirements. Requiring industrial and municipal dischargers to obtain § 402 NPDES permit coverage does not violate §§ 101(g) and 510(2) because imposing permit requirements on such facilities does not affect state water allocation systems, *per se*. EPA recognized this in its Rule, which does not apply when there is an intervening industrial, municipal, or commercial use.

In contrast with industrial and municipal wastewater discharges, regulating the transfer of raw water through NPDES would have the direct effect of superseding, abrogating or impairing the states' management of their water resources. *See* 33 U.S.C. §§ 1251(g) and 1370(2). This is because water transfers are often essential to the waters' use; water transfers are necessary to the states' management of their water resources. *See generally*, *City & Cnty. of Denver*, 276 P.2d at 992. If water transfers are curtailed because of NPDES requirements, then the states' management of their water resources is inevitably superseded, abrogated or impaired, contrary to §§ 101(g) and 510(2). For this reason the *PUD No. 1* holding concerning these provisions of the Act cannot be used to extend § 402 to water transfer activities.

III. Extension of the NPDES Program to Water Transfers Would Supersede State Water Law and Interfere with Interstate Compacts, Supreme Court Water Apportionments, and Congressional Acts.

Extending the NPDES program to water transfers would supersede the Western States' prior appropriation systems because it would effectively alter individual water rights established by the states. NPDES requirements might also have the effect of impermissibly limiting interstate transfers, thus interfering with interstate compacts, water apportionments determined by the Supreme Court, and Congressional Acts concerning interstate water obligations.

A. Extension of the NPDES Program to Water Transfers Would Supersede, Abrogate or Impair the Authority of Each State to Allocate Quantities of Water Within its Jurisdiction.

The Western States follow the prior appropriation doctrine – "first in time, first in right" – to allocate quantities of water within their jurisdictions. Joseph L. Sax, et al., *Legal Control of Water Resources: Cases and Materials*, 111 (3d ed. 2000). In these states, water is a public resource, subject to appropriation and use by individuals under state law. Dean David H. Getches, *Water Law in a Nutshell*, 77–78, 86 (4th ed. 2008). All prior appropriation states have constitutionally or statutorily asserted their sovereign prerogative to regulate the appropriation and use of water for the benefit of their citizens. *Id.* at 86.

The date of appropriation determines the user's right to use water, with earlier appropriators having priority over later appropriators. *Id*. at 78. When the water supply is insufficient to meet all appropriators' rights, those earliest in time of appropriation will typically obtain all of their quantity of water established by the state for their beneficial use, and those who appropriated later may receive only some or none of the water to which they have rights established by the state, depending on the amount of water available. *Id.*

In contravention of § 101(g), "the authority of a State to allocate quantities of water within its jurisdiction" would be "superseded, abrogated or otherwise impaired" whenever a senior individual water right established by the state curtails

diversions because it cannot comply with NPDES program requirements. The consequence of an individual water right's curtailment to comply with NPDES requirements would be to reduce that appropriator's diversions, thereby making every junior appropriator's rights senior, and thereby turning the prior appropriation doctrine on its head: "later in time, first in right." That result is contrary to § 101(g), as well as §§ 101(b) and 510(2).

Finally, the District Court erred by not recognizing that extension of NPDES program requirements to water transfers would unnecessarily and unduly interfere with state authority because individual water rights holders would have no alternative but to curtail their water transfers, as it would be cost prohibitive, impractical or unworkable to construct the water treatment facilities necessary to comply with NPDES requirements. Special App. at 98.[3] Colorado, for example, has over 40 major transbasin water transfers that transfer over 500,000 acre-feet of water per year between major river basins, and thereby form a critical component of Colorado's water supplies. J.A. at 320. Many of these transbasin transfers would be in jeopardy, threatening Colorado's allocation of water supplies to meet the needs of the State's largest cities and to irrigate nationally important agricultural lands. J.A. at 1141, 1146–48.

[3] The Court, however, recognized these potential effects in deciding to remand rather than vacate the Rule. Special App. at 120.

B. Extension of the NPDES Program to Water Transfers Would Interfere With Interstate Compacts, Supreme Court Water Apportionments, and Congressional Acts.

A significant number of water transfers occur on interstate stream systems, the waters of which are allocated among the states by interstate compact, Supreme Court decree, or congressional act, often affirmed by state statutes.[4] States may not be able to fully use their legal entitlement to scarce water under these authorities if—due to technically or economically infeasible NPDES requirements—they cannot transfer legally available water from one basin to another to meet demands. Vacating the Water Transfers Rule could make such interstate allocations ineffective without a clear statement that Congress intended to do so. Indeed, the Tenth Circuit has recognized that if a state could not obtain a permit under the Act, or if the permit imposed infeasible conditions or restrictions, such an eventuality might have the impermissible effect of abrogating an interstate compact and denying the state its water use rights thereunder. *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985).

For example, Congress authorized construction of the San Juan-Chama Project, which transfers water from the Colorado River Basin to the Rio Grande

[4] *See, e.g.*, Colorado River Compact [between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming], ch. 72, 42 Stat. 171 (1921); *Colorado v. New Mexico*, 459 U.S. 176 (1982) (Vermejo River); and Boulder Canyon Project Act, 43 U.S.C. § 617 (allocating the lower Colorado River among Arizona, California, and Nevada); *see also, e.g.*, Colo. Rev. Stat. §§ 37-61-101 through 37-61-104. (Colorado River Compact).

Basin. Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96, § 8 (1962). New Mexico relies on interstate transfers by the Project to receive its full entitlement to water under the Upper Colorado River Compact, Pub. L. No. 37, 63 Stat. 31, art. XIV (1949). New Mexico then uses this Colorado River Basin water to satisfy its needs in the Rio Grande Basin, thus ensuring that the state has adequate native water to meet its obligations to Texas under the Rio Grande Compact, Pub. L. No. 96, 53 Stat. 785 (1939).

Similarly, pursuant to *New Jersey v. New York*, 347 U.S. 995 (1954), New York City may take up to 800 million gallons of water per day from the Delaware River Basin, subject to certain conditions. *Id*. at 997. The City diverts this water, which constitutes a substantial portion of the City's daily needs, to reservoirs outside the Delaware River Basin. The Decree also authorizes the State of New Jersey to take up to an annual average of 100 million gallons of water per day out of the Basin, also subject to conditions. *Id*. at 1001–02.

Subjecting such transfers to NPDES requirements may impermissibly abrogate an interstate compact or Supreme Court decree and deny the state its water use rights thereunder. *See, e.g.*, *Riverside*, 758 F.2d at 513.

IV. States Are Free to Utilize the Act's Nonpoint Source Control Program to Address Potential Problems Caused by Water Transfers.

The practical effect of EPA's Water Transfers Rule is to recognize water transfers as nonpoint sources. Congress left direct regulation of nonpoint pollution sources to the States because controlling them "was so dependent on . . . site-specific factors . . . that uniform federal regulation was virtually impossible." *Shanty Town Assocs., Ltd. P'Ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988).

Congress gave the states specific tools in the Act to address nonpoint sources and to control "pollution resulting from— . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities," such as water transfers. 33 U.S.C. § 1314(f)(2)(F) (emphasis added).

A. Section 208 Requires States to Prepare Areawide Waste Treatment Management Plans to Control Nonpoint Source Pollution.

Section 208 requires states to identify geographic areas with substantial water quality control problems and to designate "208 planning agencies" to prepare areawide wastewater treatment management plans. 33 U.S.C. § 1288(a)(2). So-called "208 plans" must include processes to identify agricultural, silvicultural, mining, and construction sources of pollution, and "procedures and methods (including land use requirements)" to control such sources. *Id.* at § 1288(b)(2). Areawide plans thus prioritize water quality problems, and recommend control measures.

Courts have indeed recognized the appropriateness of using § 208 in the context of water management issues. "[D]ams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that [§ 208] state areawide water quality plans are the better regulatory tool." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 182 (D.C. Cir. 1982). Like dams, water transfers are an integral part of the states' water allocation systems, and thus § 208 is an effective mechanism to address any water quality issues associated with such transfers. Areawide plans can address not only pollution problems in the receiving waters, but also control water quality problems in source waters before it is transferred. Areawide plans thus provide an effective tool that states can use to control pollution associated with water transfers.

B. Section 319 Requires the States to Develop Management Programs for Controlling Pollution Added by Nonpoint Sources.

The Act "imposes on the states planning responsibilities, including the preparation of a non-point source management plan, commonly referred to as a § 319 report." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); 33 U.S.C. § 1329(a)(1). In the report, states must identify waters that can reasonably meet water quality standards only through additional action to control nonpoint source pollution, and identify the categories, subcategories and particular sources

of such pollution. *Id.* States must then prepare a management program that identifies best management practices and measures that will be undertaken to reduce pollution from the identified sources. *Id.* at § 1329(b)(2). Section 319 authorizes the states to obtain federal funding to manage nonpoint source pollution, with oversight from EPA. *Id.* at § 1329(h).

C. States May Establish Total Maximum Daily Loads to Control Nonpoint Sources of Pollution.

States bear primary responsibility for assessing the quality of their waters. 33 U.S.C. § 1313(d). Every two years states must submit § 303(d) Lists that identify "water quality limited segments" that fail to meet any water quality standard. 40 C.F.R. § 130.7(d)(1). States must also develop "total maximum daily loads" ("TMDLs") for any waters identified as not meeting applicable water quality standards and then implement TMDLs through waste load allocations to point sources and load allocations to nonpoint sources. 33 U.S.C. § 1313(d)(1)(A) – (D).

EPA has interpreted § 303(d) as requiring TMDLs for both point and nonpoint sources. 40 C.F.R. § 130.2(g)–(i); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1132–33 (9th Cir. 2002). Implementation of load allocations on nonpoint sources is at the discretion of the states, however. *Id.* at 1140. Load allocations for nonpoint sources within TMDLs are implemented through a wide variety of state, local, tribal, and federal programs (which may be regulatory, non-

regulatory, or incentive-based), as well as voluntary action by committed citizens. *See, e.g.*, Memorandum from Robert Perciasepe, Assistant [EPA] Administrator, *New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)* (Aug. 8, 1997), *available at* http://www.epa.gov/lawsregs/lawsguidance/cwa/tmdl/ratepace.cfm. Colorado, for example, uses its "control regulation" authority to address nutrient loads from nonpoint sources into impaired reservoirs. *See* Colo. Rev. Stat. § 25-8-205(1)(a). Thus, TMDLs are yet another tool states can use to address any water quality problems posed by water transfers.

V. The Act Recognizes that States May Impose Their Own Pollution Controls on Water Transfers.

Despite the District Court's implications to the contrary, NPDES permitting authority is not necessary to address potential water quality issues posed by water transfers. In addition to the option of using the Act's nonpoint source management program, states can and do use their own laws to address such issues where they deem it is appropriate. Congress explicitly recognized this state authority in the Act. *See, e.g.*, 33 U.S.C. § 1370. Moreover, as discussed previously, the Supreme Court affirmed the authority of states at their option to impose water pollution controls through § 401 on state water allocations. *PUD No. 1*, 511 U.S. at 712–13; *S.D. Warren*, 547 U.S. at 386.

A. States Have Independent Legal Authority to Regulate the Quality of Water Transfers.

The 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. *See* 33 U.S.C. § 1370. In fact, there exist multiple, overlapping authorities of each State to regulate water transfers. *See, e.g.*, J.A. at 1542. The District Court acknowledged this separate state authority, Special App. at 77, but erred in failing to recognize that § 510 of the Act contemplates that states may exercise such independent authority in areas where a state feels the need to be more stringent or to regulate more broadly than the federal Act.

For example, since 1981 Colorado has had its own mechanism in place for regulating the quality of water transfers: the State Water Quality Control Commission's authority to promulgate "control regulations" to describe any mandatory or prohibitory precautionary measures relative to any activity that causes the quality of state waters to be in violation of any water quality standard. J.A. at 321 (citing Colo. Rev. Stat. §§ 25-8-503(5); 25-8-205(1)(c)). New Mexico provides another example of the type of regulation that extends beyond the Act that Congress authorized by § 510. 33 U.S.C. § 1370. The New Mexico State Engineer has authority under state law to deny a transfer of surface or ground water if he finds that the transfer will impair existing water rights or be detrimental

to the public welfare of the State, which includes the protection of water quality. N.M. Stat. Ann. §§ 72-5-23, 72-5-26, 72-12-7; *see also Stokes v. Morgan*, 680 P.2d 335, 341 (N.M. 1984) (State Engineer could deny permit where "intrusion of poor quality water could result in impairment of existing rights.").

In addition to these examples, each state has authority under its own laws to protect water quality, as well as to provide for the vital transfer of water for beneficial use.[5] J.A. at 1542. Much of this state authority has a broader reach than the Act. All but one of the Appellee states extends state authority beyond the Act's "navigable waters" to ground water, *inter alia*. *See, e.g.*, N.Y. Envtl. Conserv. Law § 17-0105(2); Conn. Gen. Stat. § 22a-423; Del. Code Ann. tit. 7, § 6003(a)(2); Me. Rev. Stat. tit. 38, § 361-A(7); Mich. Comp. Laws § 324.3101(z); Minn. Stat. § 103G.005 (17); Mo. Rev. Stat. § 644.016(27). These statutes demonstrate that the states can address specific water quality issues that are not

[5] Additionally, the states' common laws regard water pollution as a trespass against the complainant's right to use water. The fundamental doctrine is that water quality cannot be impaired to an extent that would injure subsequent uses. For example, in Colorado, "a common law theory. . . prohibits the discharge of contaminants into streams where doing so makes the water unsuitable for an [other] appropriator's normal use of water." *In re Concerning Application for Plan for Augmentation of City and Ctny. 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").

addressed by the Act but that are important to them, exactly as Congress intended and authorized in § 510. 33 U.S.C. § 1370.

B. States Have Authority to Address Water Transfers Affecting Interstate and International Waters.

The District Court criticized EPA for failing to demonstrate that the Rule would not frustrate state concerns with interstate water pollution. Special App. at 101. The administrative record and Western States' briefing, however, contained substantial relevant material – discussed below – that supported EPA's approach. J.A. at 309–11; AR 1415.20, at 23–26; AR 1433, at 13–14; Western States' Mem. of L. in Supp. of Cross-Mot. Summ. J. [Doc. 171]; Western States' Mem. of L. in Reply to Pls.' Opp'n to Cross-Mot. Summ. J. [Doc. 204].

The District Court erroneously concluded that NPDES authority is the only meaningful mechanism to regulate water pollution that crosses state lines, finding fault with EPA's "fail[ure] to explain how [the Water Transfers Rule] is consistent with Congress's specific intent that the NPDES program would provide a forum for resolving [interstate] disputes . . . ." Special App. at 56–57, 96. The Court's conclusion, however, presupposes that Congress intended for water transfer activities to be regulated under the permitting program as point sources. The Act does, indeed, provide for an administrative forum in which affected states may voice objections in the context of NPDES permits. 33 U.S.C. § 1342(b)(3). The Court ignored the fact that Congress included alternative – and effective –

mechanisms in the Act to provide a framework for resolution of cross-boundary disputes in the context of nonpoint sources such as water transfer activities.

1. Authority Over Transfers that Cross State Lines

Despite the District Court's concerns regarding hypothetical scenarios, water transfers pose few if any interstate water quality issues. Indeed, the Appellees in the case below alleged only one water transfer with interstate implications: North Dakota's transfers from Devils Lake into the Sheyenne River, which is a tributary to the Red River—North Dakota's boundary with Minnesota—which then flows north into Canada's Lake Winnipeg.

Appellees implied that North Dakota's Devils Lake Drainage Project threatens to introduce harmful levels of naturally-occurring chemical constituents, as well as toxic algae and fish parasites into the Red River and Lake Winnipeg. The project, however, operates under a state "permit to drain waters," which contains protective conditions. N.D. Cent. Code § 61-32-03. Another state statute requires water transfers to comply with the "state's water quality standards established to protect aquatic life." *Id*. at § 61-28-09(1). Violation of the state's water quality standards would expose the project to civil and criminal enforcement and/or an injunction. *Id*. at §§ 61-28-08 and 61-28-09(1).

The District Court erred in its failure to acknowledge that there are alternative mechanisms – both under and independent of the Act – that may be

utilized to address nonpoint source pollution that affects a downstream State. In the Act, Congress 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). The District Court apparently does not believe that interstate compacts are sufficient in the realm of protecting downstream states from any negative impacts of water transfers. But this ignores the fact that there are more than a dozen compacts involving more than twenty-five states that facilitate interstate pollution control.[6] The states must take responsibility in entering into and enforcing such compacts, just as they do with compacts involving interstate water allocations. *See, e.g.*, *New Jersey v. Delaware*, 552 U.S. 597, 623–24 (2007) (action to enforce the 1905 Delaware River Compact); *Kansas v. Colorado*, 543 U.S. 86, 90–92 (2004) (action to enforce the 1949 Arkansas River Compact); *Virginia v. Maryland*, 540 U.S. 56, 79 (2003) (action to enforce the 1785 Potomac River Compact).

[6] *See, e.g.*, Red River of the North Compact between the State of South Dakota, the State of North Dakota, and the State of Minnesota, Pub. L. No. 456, 52 Stat. 150, art. II (Apr. 2, 1938) ("Each of the States . . . undertake to cooperate . . . for the control of the flood waters of this [Red] river and for the prevention of the pollution of such waters."); Delaware River Basin Interstate Compact, between the State of Delaware, the State of New Jersey, the State of New York, and the Commonwealth of Pennsylvania, Pub. L. No. 87-328, 75 Stat. 688, art. 3 (Sept. 27, 1961) (The Delaware River Basin Commission has a substantial role, consistent with the terms of the Supreme Court's Decree, in the management of New York City and New Jersey's diversions out of the Delaware River).

Congress included other provisions in the Act to encourage interstate cooperation as well, and in some instances mandated it. For example, the governors of interstate waters with substantial water quality control problems "shall consult and cooperate" to develop an area-wide waste treatment management plan. 33 U.S.C. § 1288(a)(4). Further, EPA "shall" make grants at the request of a majority of governors to develop a comprehensive water quality plan for an interstate basin or sub-basin. *Id.* at § 1252(c). EPA is also authorized to make grants to states or interstate agencies to demonstrate advanced treatment and environmental enhancement techniques to control pollution from all sources in an interstate basin or sub-basin. *Id.* at § 1255(b).

EPA must convene a management conference if requested by a state that is not meeting applicable water quality standards to address nonpoint source pollution originating in another State. 33 U.S.C. § 1329(g). The purpose of the conference is to develop an interstate agreement to reduce nonpoint source pollution and improve water quality. *Id.* Although the states must revise their nonpoint source management programs to implement such an agreement, they receive priority funding to control interstate pollution. *Id.*

It is worth noting that the mechanism in the Act touted as favorable by the Court for addressing permit issues does not guarantee final resolution in favor of downstream states. *See* 33 U.S.C. § 1342(b)(3). This provision simply provides a

forum for affected states to voice their objections to an NPDES permit through a public hearing, with the EPA Administrator having absolute discretion to make a final determination on the discharge permit at issue. *Id.*; s*ee also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) ("Even though it may be harmed by the discharges, an affected State only has an advisory role [under the Act] in regulating pollution that originates beyond its borders.").

In the very rare circumstance where a water transfer activity causes an interstate water quality problem, affected states also have the option of seeking relief under state or federal common law. *See Ouellette*, 479 U.S. at 490–91 (holding that remedies in state common law are available to entities affected by out-of-state sources); *cf. Milwaukee v. Illinois*, 451 U.S. 304, 319–20 (1981) (holding that the Act preempts federal common law claims where the claim was against a discharger covered by the Act's NPDES provisions, as opposed to a nonpoint source of pollution).

In summary, state statutes can and do work in concert with interstate compacts and other provisions of the Act to address interstate water quality issues posed by water transfers, and affected states also have the option to pursue common law remedies for resolution of grievances related to nonpoint sources of pollution such as water transfers.

2. Authority Over Transfers that Cross International Boundaries

There are also long-standing mechanisms in place to address any problems with water transfers affecting international waters. For example, the North Boundary Waters Treaty of 1909 between the United States and Canada established an International Joint Commission ("IJC") to assist governments *inter alia* in finding solutions to problems in waters that flow across the border between the United States and Canada, such as the Red River to which Devils Lake discharges (via the Sheyenne River).[7] *See Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada*, Int'l Joint Comm'n, art. VII, (May 13, 1910), http://www.ijc.org/en_/BWT. The Treaty provides that "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." *Id*. at art. IV.

The IJC has set up more than twenty boards of experts from the two countries, including the International Red River Board ("IRRB"), to help it carry out its responsibilities. *See Mandate of IJC to IRRB*, Int'l Red River Bd. (Feb 7, 2001), http://www.ijc.org/en_/irrb/Mandate. IRRB members include

[7] The Water Utilization Treaty of 1944 between the United States and Mexico similarly addresses water quality issues across the nation's southern border. Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, T.S. 994, 59 Stat. 1219 (Nov. 14, 1944).

representatives from North Dakota and Minnesota, in addition to the United States, Canada, and Manitoba. The IJC recommended, and the two nations approved, the establishment of water quality objectives for a number of constituents at the international boundary of the Red River. *See Status Report on the Activities of the International Red River Board,* Int'l Red River Bd., 2 (Apr. 1, 2009), http://www.ijc.org/rel/boards/irrb/IRRBstatus09.pdf.

Moreover, § 310 of the Act authorizes EPA, upon request of the Secretary of State, to abate international pollution, to notify the state(s) and interstate agencies where such pollution originates, and appoint a hearing board to consider the specific issue raised. 33 U.S.C. § 1320. The board must make findings and recommendations after a hearing, and EPA may institute enforcement proceedings to compel abatement of the pollution. *Id*.

In sum, the Boundary Waters Treaty and the Act function to address water quality problems alleged below by Appellees. Moreover, the IJC and IRRB are proactively addressing a broad array of water quality concerns, such as parasites, pathogens and invasive species that the NPDES program does not address because there are no corresponding water quality standards for these biological constituents.

CONCLUSION

The Western States respectfully urge the Court to respect historical federal deference to the states' traditional authority to manage their water resources, reverse the Opinion and Order of the District Court, and uphold EPA's Water Transfers Rule.

RESPECTFULLY SUBMITTED,

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