

# 03-7203

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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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., and RIVERKEEPER, INC.

Plaintiffs-Appellees-Cross-Appellants,

-against-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION.

Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees,

*(for Continuation of Caption See Reverse Side of Cover)*

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

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**BRIEF AMICI CURIAE OF THE STATES OF COLORADO, NEW MEXICO, IDAHO, NEBRASKA, NORTH DAKOTA, AND UTAH URGING REVERSAL IN SUPPORT OF THE CITY OF NEW YORK**

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Defendant- Appellant-Cross-Appellee,

-against-

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION and ERIN M. CROTTY, Commissioner of the New York State Department of  
Environmental Conservation.

Third-Party-Defendants-Appellcs.

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## QUESTION PRESENTED

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

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## INTEREST OF AMICI CURIAE

*Amici curiae*, the Attorneys General of Colorado, New Mexico, Idaho, Nebraska, North Dakota, and Utah submit this brief in support of Appellant New York City seeking reversal of the lower court's decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F.Supp.2d 41 (N.D.N.Y. 2003).

The district court decision would penalize New York City for the engineered transfer<sup>1</sup> of water in its unaltered condition from one waterbody to a different waterbody without a National Pollutant Discharge Elimination System ("NPDES") permit under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387. Mandating the extension of the NPDES program to engineered transfers of water for beneficial use is a radical reinterpretation of a statute enacted for the opposite purpose, that is, to control the disposal of wastewater. This unwarranted program extension would impair the states' ability to meet the unique and varied needs of their residents and to meet their obligations under interstate water compacts. In addition, individual water rights owners may be faced with constructing prohibitively expensive facilities to meet unnecessary permitting requirements or

forfeiting part or all of their water. Finally, the huge volumes and variability of many engineered water transfers are simply not susceptible to treatment.

Extending this program would effectively supersede, abrogate, or impair the ability to use water allocated pursuant to state law, in violation of Congress' direction.

This interference with state water allocations would occur whether or not the engineered transfer actually impaired the water quality of the receiving waterbody.

Under individual water rights determined pursuant to state water law, countless public and private entities divert water from natural streams and lakes. Many then deliver water through engineered transfers – manmade tunnels, canals, and pipelines – into other natural streams and lakes to meet the domestic, agricultural, and industrial water needs of residents in another watershed. These engineered water transfers range from a few acre-feet per year needed to irrigate a high-mountain pasture to 7.3 million acre-feet per year delivered by California's Central Valley Project for municipal, irrigation, and other uses. Many engineered water transfers involve stream systems subject to interstate compacts, such as the Colorado River Aqueduct, which delivers up to 1.1 million acre-feet per year to Southern Californians. Extending the NPDES program to engineered transfers

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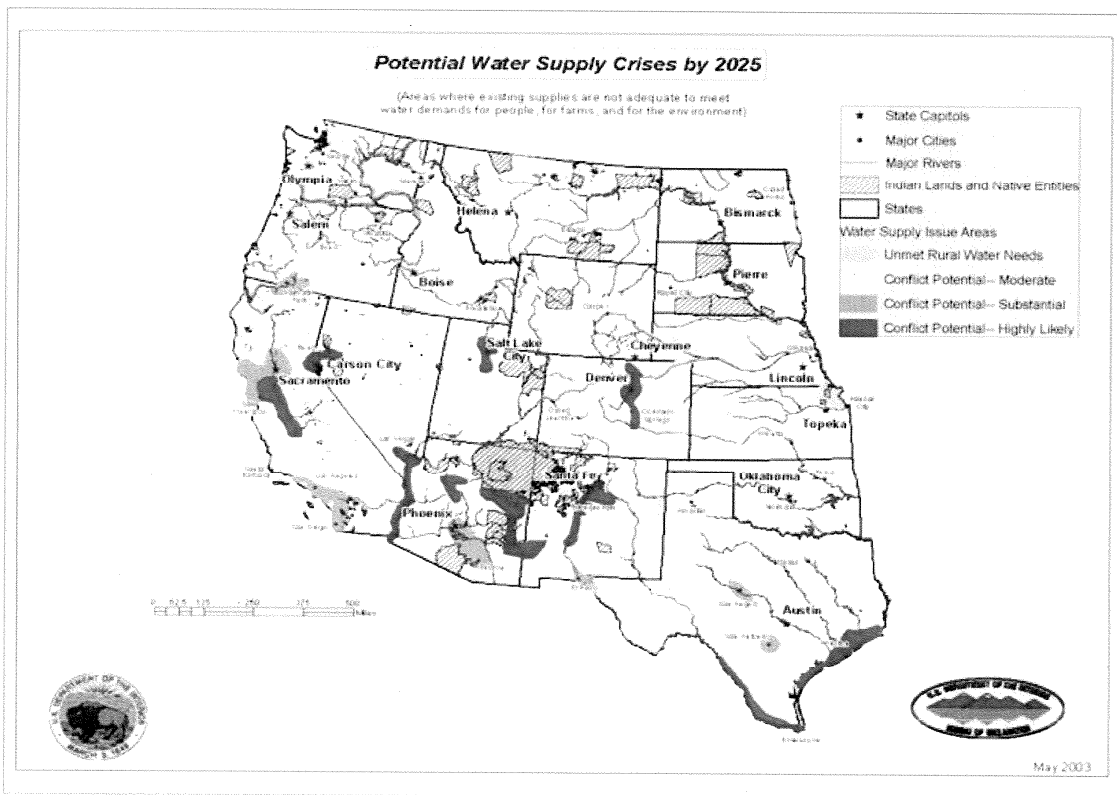
<sup>1</sup> For the purpose of this brief, an engineered transfer is a diversion of unaltered water from one water body to another in which it would not naturally appear.

potentially supersedes, abrogates, or impairs each of these projects, contrary to the Clean Water Act.

West of the 100th Meridian, the nation is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Since most precipitation in the West falls as snow, water must be captured when and where the snow melts, far from urban and agricultural centers that need the water. Hence, it is necessary to divert and deliver water through a complex system of manmade and natural conveyances and reservoirs. This allows the West to sustain its cities, farms, and ranches. Without this system, many nationally important agricultural regions could not support crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, the Snake River Valley of Idaho, and the Yakima Valley of Washington. Similarly, many of the nation's great cities, in addition to New York City, would not have flourished, including Albuquerque, Denver, Las Vegas, Los Angeles, Phoenix, San Francisco, and Salt Lake City.

The Department of the Interior predicts water supply crises in the West by 2025 as a result of competing demands from explosive population growth in arid areas, emerging needs for environmental and recreational uses, and the growing importance of food and fiber production from western farms and ranches. *See,*

<http://www.doi.gov/water2025/>. Unfortunately, existing water supplies that rely on engineered transfers are inadequate even in years with normal precipitation. *Id.* A map of major engineered water transfers would look strikingly similar to Department of Interior's map of potential water crises.



Extension of the NPDES program to engineered transfers would exacerbate the looming crises by reducing the volume of these transfers.

Under the “outside world” test of this court,<sup>2</sup> at each point where a ditch, canal, tunnel, or pipeline introduces water to a stream or reservoir for use, a permit including terms and conditions would be required. The size and complexity of engineered water transfers in the West make it impractical to mandate such a program. For example, at least thirty-six engineered transfers move 700,000 acre-feet per year of Colorado River water into other basins in Colorado, New Mexico, Utah, and Wyoming.

Within Colorado alone, twenty-eight major engineered transfers move an average of 550,000 acre-feet per year to supplement supplies among other basins. These engineered transfers provide at least sixty percent of domestic supplies and water for over fifty percent of Colorado’s irrigated farmland.

In New Mexico, the San Juan-Chama Project diverts 90,500 acre-feet per year on average from the Colorado River basin through transmountain tunnels to the Rio Grande basin. The Project provides water to the cities of Albuquerque and Santa Fe, to farmers in the Middle Rio Grande Conservancy District, and to Indian tribes and pueblos. In the absence of this Project, the City of Albuquerque would be forced to rely upon pumping from non-renewable and arsenic-laden aquifers.

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<sup>2</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001).

Other cities and pueblos would be critically short of water, and thousands of acres of irrigated farmland in the Middle Rio Grande valley would be without water.

The Central Arizona Project transfers 1.5 million acre-feet per year from the Colorado River into central and southern Arizona. The Project provides about one-third of the state's annual renewable water supplies, serving eighty percent of the state's water users.

California's State Water Project and Central Valley Project use the largest engineered transfers in the country. The State Water Project diverts two to 2.5 million acre-feet per year for distribution to over twenty-two million Californians and 750,000 acres of irrigated farmland. The Central Valley Project delivers about 7.3 million acre-feet per year for municipal, irrigation, and other uses. Also, California imports water from other river basins, e.g., over 4.4 million acre-feet per year from the Colorado River.

In sum, the ability to divert, transport, store, and use water is critical to the social and economic well-being of the West. Moving water from one basin to another through engineered transfers is essential to meet municipal, industrial, and agricultural demands. Extension of the NPDES program to engineered transfers threatens the continued vitality of this system.

## SUMMARY OF ARGUMENT

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Supreme Court recognized that the imposition of discharge permit requirements on engineered transfers of water from one water body to another is a complex issue, particularly in the Western states.

If we read the Clean Water Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western states, whose water supply networks often rely on engineered transfers among various natural water bodies. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. On the other hand, it may be that such permitting authority is necessary to protect water quality, and that States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs. Indeed, that is the position of the one State [Pennsylvania] that *has* interpreted the Act to cover interbasin water transfers.

\_\_\_ U.S. \_\_\_, 124 S.Ct. 1537, 1544-45 (2004) [citations omitted]. The Court accurately acknowledged that expanding NPDES permitting requirements to include engineered water transfers implicates two potentially contradictory mandates of the Clean Water Act. First, Congress provided a specific instruction not to supersede, abrogate, or impair either the authority of each State to allocate

water or individual water allocations. Second, Congress set forth a mandate to protect water quality. Although the Court expressed the hope that general permits could resolve any conflict, general permits would not solve the essential problem that it is impractical for most engineered water transfers to meet NPDES program requirements.

Congress anticipated this potential conflict between state water allocations and water quality when it enacted the Clean Water Act. Rather than extending the NPDES program to water transfers, Congress structured the Act to give states primacy in matters likely to affect state water allocations while simultaneously providing other legal tools to protect water quality. Congress left decisions as to the appropriate regulation of engineered transfers to the States, although the federal government has extensive oversight and independent authority. In so doing, Congress wisely recognized that integrating water quantity and water quality must occur at the state level.

Extending the NPDES program to cover engineered transfers would subject every such transfer to the requirements discussed below – water quality standards and antidegradation provisions. NPDES program requirements would force many entities, including cities, special districts, and irrigators, to forgo transfers, effectively forfeiting part of their state-allocated water right and depriving existing



beneficial uses of needed water. Use of general permits and best management practices would not ameliorate this draconian result, because each engineered transfer would be subject to the same water quality standards as wastewater dischargers. That is why Congress and the states have chosen to authorize other regulatory and voluntary means to control any water quality impacts associated with engineered transfers.

The states and EPA have adequate authority under federal and state law to address water quality impairments caused by engineered transfers without the mandatory application of the NPDES program. The relative infrequency of reported water quality problems involving engineered transfers confirms that this system has generally been adequate. And while engineered transfers do not cause widespread impairment, they do add significant water to many streams, including Esopus Creek, and lakes and reservoirs that would otherwise experience extreme low flows and often constitute the majority of the flow in summer months or drought years. The reduction or loss of flows resulting from extending the NPDES program to engineered transfers would deleteriously affect the environment of these water bodies. This unintended consequence is unnecessary because there are a number of other legal tools available to protect water quality.

There is neither a legal justification nor a factual basis for extending the NPDES program to engineered transfers.

## ARGUMENT

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

Congress clearly expressed its direction to honor state water allocation law and water allocations in the plain language of the Clean Water Act, as confirmed by the Act's legislative history. Requiring an NPDES permit for engineered transfers where compliance with such permits would conflict with state water law or allocations directly conflicts with Congress' mandate. There is no clear statement in the Act that Congress intended to interfere with the historical federal-state balance concerning the allocation of water.

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

Land and water uses are traditionally and primarily state prerogatives. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("SWANCC"). As the Supreme Court stated there, where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its

intent. *Id.* at 173. *See also, Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *U.S. v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935).

The Clean Water Act clearly states Congress' intent to preserve the federal-state framework and the Supreme Court recognizes that intent. *SWANCC*, 166-67 (citing 33 U.S.C. § 1251(b)). Congress preserved the traditional federal-state balance with the intent that the Act not interfere with the role of the states in water allocation.<sup>3</sup> Imposing NPDES permitting requirements on engineered transfers would be in derogation of that congressional directive.

In the complicated field of federal-state relations, the Supreme Court and Congress have spoken with clear and consistent voices regarding the allocation of water. As the Court observed in its 1978 landmark decision in *California v. United States*, 438 U.S. 645, 653 (1978):

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

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<sup>3</sup> States, in the promulgation of state law, may require engineered transfers to be permitted and impose water quality conditions. *See, infra* III.A. However, this is a far cry from requiring states to do so.

Federal deference to state water allocation law began with 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. 46, 94 (1907); *Fox River Paper Co. v. R.R. Comm’n of Wisconsin*, 274 U.S. 651, 655 (1927). The provisions of the Clean Water Act have in no way changed this traditional deference. This can only mean that states have the authority to choose how they respond to water quality impairments based on their unique hydrologic, geographic, economic, and social circumstances.

**B. Section 1251(g) of the Clean Water Act Expresses a Clear Directive to Protect State Water Allocations and Individual Water Rights.**

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

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

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

As discussed below, the states employ a number of legal tools to protect water quality that do not involve extending the NPDES program to engineered transfers. Use of these tools implements Congress' specific instruction not to supersede, abrogate, or impair state water allocation law and allocations. The federal government is to cooperate with the States in developing such solutions, not preempt them by extending the NPDES program to engineered transfers.

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

Section 1251(g) arose as a response by Senators Wallop of Wyoming and Hart of Colorado to suggestions that reducing water transfers under state water law

might be necessary to solve water quality problems.<sup>4</sup> The Conference Committee made minor changes to the amendment and added it to the Act's legislative declaration, explaining:

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

H.R. CONF. REP. No. 95-830, at 52 (1977), *reprinted in* 3 Legislative History of the Clean Water Act of 1977 (committee print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 236 (1978). *See also*, S. DEB.: August 4, 1977, *Id.* 1030 (Remarks of Sen. Wallop during Senate debate on the amendment); S. DEB.: Dec. 15, 1977, *Id.* 531 (Remarks of Sen. Wallop explaining conference report). In adopting section 1251(g), Congress reacted quickly and decisively to the suggestion that reducing water transfers under state water rights might be necessary to solve water quality problems.

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<sup>4</sup>The amendment was prompted in part by concerns over proposals in a Water Resource Council policy study released three weeks earlier. 42 Fed. Reg. at 36788 (July 15, 1977). Among other assaults on the integrity of the states' water allocation laws, the WRC study concluded that reducing water transfers under state water rights might be necessary to solve water quality problems. *Id.* at 36793.

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

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

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

The legislative history of section 1251(g) and its predecessors demonstrates that Congress intended to defer to state water law, while recognizing a more general federal role in protecting water quality. Congress clearly instructed that decisions about integration of water quality and quantity needs should be made at the state level to accommodate unique circumstances.

**II. Extending NPDES Permits to Engineered Transfers Could Interfere With the States' Water Allocation Laws and with the Exercise of Individual Water Rights.**

Extending the NPDES program to engineered transfers would eviscerate fundamental aspects of state water allocation law because in many instances the only practical way of meeting program requirements would be to either limit or stop the transfer of water. Permit conditions that prevent or render prohibitively costly the transfer of some or all of the water legally available to individual water rights allocated under state law would directly abrogate state water law. Such federal interference also has important implications for comity among the states under interstate water compacts and equitable apportionments and for the maximum utilization of scarce water resources in arid regions.

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

The Supreme Court's thinking in *Miccosukee, supra*, that general permits might ameliorate the impact of extending the NPDES program was wishful. General permits might alleviate the administrative burden upon state permit-issuing agencies, but they would not address the impact on water rights owners. If required to operate under NPDES permits, many water rights owners would have



no alternative but to curtail their transfers to meet water quality standards and antidegradation requirements of the Clean Water Act. These substantive provisions would apply regardless of how simplified the administrative process might be.

*Water quality standards*

If a discharge merely has the “potential to cause . . . an excursion above any State water quality standard,” its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i). Thus, an NPDES permit necessarily contains conditions that limit the amount of pollutants delivered to the receiving water body regardless of whether standards are in fact exceeded or whether the transfer is the sole cause of the exceedance. For example, Colorado has adopted water quality standards for thirty-six different naturally-occurring parameters, including suspended solids and temperature, 5 Colo. Code Regs. § 1002-31.16, which are influenced by runoff and storage. Water quality standards also apply to aluminum, cadmium, copper, gold, iron, lead, silver, and zinc, *id.*, metals commonly present downstream from Colorado’s ubiquitous abandoned mines. Further, water quality almost inevitably varies between basins. Potentially,

the only sure way an operator of an engineered transfer could control all pollutants would be to transfer no water at all.

Eighty percent of the precipitation in the western states falls as snow. Runoff from snowmelt and thunderstorms often contains elevated levels of total suspended solids, i.e. particles of soil and sediment, and turbidity, i.e. muddy water, from erosion caused by snowmelt and high flows. Although suspended solids carried into a stream or open ditch will eventually settle out, their temporary presence could cause an excursion above water quality standards and trigger regulatory consequences. And, the source water, such as the Colorado River, may be naturally high in total dissolved solids, i.e., salts, as a result of its passage through certain geological formations and inflows from saline hot springs. Finally, engineered conveyances typically are open canals and ditches, which receive pollutants directly from surface runoff.

#### *The impact on engineered transfers*

To avoid the potential to cause an excursion above the water quality standards of the receiving water body during spring runoff or following a thunderstorm, a single diverter might have to expend hundreds of millions of dollars to construct one or more treatment facilities or implement best management

practices<sup>5</sup> to reduce the presence of even natural pollutants with the “potential to cause . . . an excursion above any State water quality standard.” 40 C.F.R. § 122.44(d)(1)(i). Each facility would be required to treat peak flows, which might occur just one or two days a year, in order to match the water quality of the receiving water body. Further, many treatment plants constructed at huge capital cost would need to operate for only a few weeks or months. Transferable water is usually available only during snowmelt because fifty percent of mountain stream flow occurs in just three months: May, June and July. Meeting temperature and nutrient standards of receiving waters would pose particular challenges for reservoir releases to receiving waters with different water quality.

The Colorado-Big Thompson (“C-BT”) Project transfers water from the Colorado River and delivers it through the Continental Divide for municipal, agricultural, and other uses in northeastern Colorado. The Project diverts water from four source lakes, reservoirs, and streams, and conveys that water with gravity and three pump stations through two tunnels and nine canals into and then

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<sup>5</sup> Best management practices are methods and practices, including structural and nonstructural controls and operation and maintenance procedures, applied before, during, or after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters. *See, e.g.*, 40 C.F.R. § 130.2(m).

out of at least thirteen different natural streams and rivers, integral parts of the engineered transfer. Transfers average 203 million gallons per day (“MGD”), i.e., 220,000 acre-feet per year, although transfers peak-at 358 MGD, 176 percent of average. The potential capital cost to treat this quantity of water once could exceed \$315 million, double the initial cost of the entire C-BT Project.<sup>6</sup> Without the ability to treat peaking flows, the Project could be forced to forgo exercise of its water rights. Furthermore, the Project might have to treat essentially the same water seventeen times in seventeen different treatment plants, that is, at every point water is discharged to a lake, reservoir, or stream for later delivery. Water users, however, would still receive untreated water. Such treatment, even if possible, would be prohibitively expensive.

Treatment plants generally cannot handle large fluctuations in volume; they require gradual changes. Therefore, most treatment plants use a fore bay, i.e., a surge reservoir, to buffer variable flows. In addition, the removal of any constituents by the treatment plant produces a “sludge,” which requires disposal.

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<sup>6</sup> The Engineering Department of Denver Water, which transfers an average of 120,000 acre-feet per year to meet the needs of the Denver Metro area, estimates that the capital costs of treating engineered transfers for total suspended solids, metals, and phosphorus could be as much as \$0.90 per gallon per day of capacity, depending on plant location and complexity of necessary treatment.

These facilities also require access for people and equipment. Possible site requirements to treat C-BT Project water, as described above, could exceed 240 acres. This space may not be physically available where needed.

Many engineered transfers, such as the C-BT Project, traverse federal land, including national parks and national forests adjacent to wilderness areas. Given the location of many transfers in pristine areas and the need for large sites, the NPDES approach may not be economically, technically, or politically feasible, or environmentally desirable. Permitting a treatment facility, sludge disposal, and/or a surge reservoir would invoke the dredge-and-fill provisions of the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. Obtaining necessary approvals would be costly, time-consuming, and, likely, impossible.

Under any of these circumstances, diverters may have no alternative but to curtail transfers at least part of the year to meet water quality standards. In so doing, they would effectively forfeit part of their state-allocated water right, contrary to Congress' direction throughout the Clean Water Act.

### *Antidegradation*

Where the quality of waters “exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water,” antidegradation provisions apply to maintain and protect existing quality. 40 C.F.R. § 131.12(a)(2). Although transferred water is often suitable for beneficial use without treatment, engineered transfers would nonetheless be subject to this requirement if an NPDES permit were required. Many waters in the West are subject to antidegradation requirements simply because the quality of at least one water quality constituent is better than the corresponding water quality standard. The only practical way for many diverters to meet antidegradation requirements for high quality waters might be to curtail transfers and forgo the use of a portion of their state water right.<sup>7</sup>

### *General permits*

All NPDES permits – general as well as individual permits – must include limitations to comply with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C),

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<sup>7</sup> A state may allow degradation only if it finds, following an analysis of alternatives, that “allowing lower water quality is necessary to accommodate important economic or social development in the areas where the waters are located.” 40 C.F.R. § 131.12(2). Necessity determinations are both difficult and rare.

1313(e)(3)(A). “No permit may be issued . . . [w]hen the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA.” 40 C.F.R. § 122.4. Thus, the general permit process would not change NPDES program requirements that would force many transferors to forgo the full exercise of their state water rights, as explained above.

While the Supreme Court noted in *Miccosukee, supra*, that States or EPA could control governmental regulatory costs by issuing general permits, the burden is still substantial. In Colorado alone, there are at least 1,730 engineered transfers, almost fifty percent more than the state’s 1,194 NPDES permits, which include just 370 individual permits. The mandated extension of the NPDES program to engineered transfers would more than double the number of permits, and could triple the number of general permits.

*Best Management Practices*

NPDES permits may include numeric effluent limitations on the concentration of pollutants as necessary to comply with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. § 122.4(d). NPDES permits also may require best management practices (“BMPs”). 33 U.S.C. § 1314(e).

Adherence to BMPs – generally simpler and less costly than the usual technological controls – does not automatically assure compliance with water quality standards. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 589 (9th Cir. 1985). The option to impose BMPs on engineered transfers does not relieve transferors from complying with the requirements identified above of the Clean Water Act or ensure that transferors may fully exercise their state water rights.

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

A significant number of engineered water transfers occur on interstate stream systems, the waters of which are allocated among the States by interstate compact or Supreme Court decree.<sup>8</sup> Extending the NPDES program to engineered transfers would pose significant problems for such interstate allocations.

States may not be able to fully utilize their compact entitlements if they cannot make engineered transfers of surplus water to other basins with unmet demands due to technically or economically impossible NPDES program

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<sup>8</sup> See, e.g., Colorado River Compact, 42 Stat. 171 (1921) (Ariz., Cal., Colo., Nev., N.M., Utah, Wyo.); *Arizona v. California*, 373 U.S. 546 (1963) (allocating the lower Colo. River among Ariz., Cal., and Nev.).



requirements. For example, Colorado uses much of its surplus Colorado River Compact entitlement to meet needs in the South Platte and Arkansas River basins, which lack adequate native water. Similarly, New Mexico uses much of its Colorado River entitlement in the Rio Grande basin, Arizona uses most of its entitlement in the Gila and Salt River basins, and California transfers much of its Compact water outside the basin to serve coastal municipalities.

The converse situation is equally important. Transbasin transfers can mitigate the impact of water diversions in the receiving basin. Return flows from transbasin transfers can be essential for a state to meet interstate obligations to downstream states. These return flows satisfy native water rights and allow a state to meet its compact obligations in the receiving basin. For example, New Mexico indirectly relies on engineered transfers from the Colorado River Basin to satisfy native Rio Grande water rights, leaving native Rio Grande water to meet the state's compact obligations to Texas. In severe droughts, such as in 2003, New Mexico is forbidden from storing water in the Rio Grande Basin. As a result, cities such as Santa Fe may be critically dry without water from engineered transfers.

**C. NPDES Permitting for Engineered Transfers Would Interfere with the Maximum Utilization of the States' Water Resources.**

The devastating western droughts and accompanying wildfires of the past seven years have produced a pressing need to maximize the use of scarce water resources. "Maximum utilization" is enhanced by innovative state programs, such as dry-year transfers of water from agricultural to urban use, conjunctive, i.e. cooperative, use of surface and groundwater, and aquifer recharge. States and water users regularly bank, exchange, and augment their water supplies, and increasingly reclaim and reuse wastewater. These strategies employ water that is underutilized or that would otherwise be wasted and turns it into a valuable asset to meet agricultural, municipal, and industrial water needs. In arid states, this may be the only water available to meet these needs as populations grow and climate changes. In many western states, such water supply innovations are available only as a direct consequence of the ability to transport water from a basin with an excess to a basin with a shortage. The use of natural watercourses to convey water is likewise necessary for water delivery. Extending the NPDES program to each engineered transfer would stifle these critical water management initiatives, since permit requirements would stand in the way of simply moving the water from one basin or sub-basin to another.

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

States have a number of tools available to address water quality problems from engineered transfers without the need to subject those transfers to the NPDES program. Using these tools, states can protect both water rights allocated under state law and water quality.

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

Many states have enacted water quality laws to supplement the Clean Water Act, as recognized by 33 U.S.C. § 1370. New York, for example, regulates the Shandaken Tunnel outside the NPDES program. City of New York, et al. Brief, at 44.

Colorado statute similarly contains authority to regulate any “activity” that causes “the quality of any state waters to be in violation of any applicable water quality standard.” Colo. Rev. Stat. § 25-8-205(1)(c) (2003). Colorado statute also contains specific regulatory authority empowering the state to protect water quality

through the adoption of control regulations<sup>9</sup> for discharges from the “diversion, carriage, and exchange of water from or into streams, lakes, reservoirs, or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures.” *Id.* § 25-8-503(5). The state may also adopt control regulations when necessary to assure compliance with water quality standards and classifications. *Id.* § 25-8-202(7)(b)(II)(A).<sup>10</sup>

California’s State Water Project and Central Valley Project are the largest engineered transfers in the country. These transfers are regulated under state water rights laws that may impose requirements to protect water quality, e.g., Cal. Water Code §§ 1257 and 1258 (2004), and, under state water quality law, *id.* § 13000 *et seq.*

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<sup>9</sup> Control regulations may, for example, “describe precautionary measures, both mandatory and prohibitory, that must be taken by any person . . . [who] could reasonably be expected to cause pollution of any state waters . . . or . . . be in violation of any applicable water quality standard.” Colo. Rev. Stat. § 25-8-205(1)(c) (2003).

<sup>10</sup> While conveyances are not subject to NPDES permitting, Colorado statute prohibits the discharge of any pollutant into a ditch or man-made conveyance for the purposes of evading NPDES permitting requirements. Colo. Rev. Stat. § 25-8-501(1) (2003). Thus, a discharger could not evade permitting by discharging pollutants to an engineered water conveyance rather than a stream.

Statutory authority such as the above allows states to control the discharge of pollutants in situations analogous to *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (transfer of water containing pollutants into “relatively pristine” pond), and *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003) (disposal of wastewater from production of coal bed methane), while simultaneously ensuring that water rights are not impaired. *See, e.g.*, Colo. Rev. Stat. § 25-8-104. Thus, state laws can and do appropriately address water quality problems potentially associated with engineered transfers, while respecting state water allocations. In contrast, expansion of the NPDES program would be duplicative and impair water rights exercised through engineered transfers.

A number of states can also apply a “public interest test” to protect water quality when granting a water right. For example, in Idaho, “if an applicant’s appropriation of water will conflict with the local public interest . . . then the Director may reject such application and refuse a permit therefor . . . or may grant a permit on conditions.” *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 448 (1985) (internal quotations omitted). Similarly, Alaska “may not issue a permit unless doing so is in the public interest,” considering the “impacts of water appropriation on fish and game resources, and public health.” *Tulkisarmute Native*

*Cnty. Council v. Heinze*, 898 P.2d 935, 950 (Alaska 1995). California's State Water Resources Control Board "has been granted broad authority to control and condition water use, insuring utilization consistent with the public interest . . . . The [board's] powers extend to regulation of water quality." *Envtl. Def. Fund, Inc. v. E. Bay Mun. Dist.*, 26 Cal.3d 183, 198, 605 P.2d 1, 9 (1980).

In each of the examples described in this section, the states have mechanisms available to protect water quality as well as the vital transfer of water for beneficial use. If a state determines that discharge permits for engineered transfers are needed and workable, then that state is free to adopt such a program but states should not be mandated to do so.

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

Any applicant for a federal license or permit must obtain a state certification that the requested activity will comply with state water quality standards under section 401 of the Clean Water Act. 33 U.S.C. § 1341 (a)(1); 33 C.F.R. §§ 325.2(b), 330.4(c). Through state water quality certification, states can prevent and address adverse water quality impacts that could otherwise result from these activities. Section 401(d) allows states to impose "other limitations" to assure compliance with state water quality standards and with "any other appropriate

requirement of State law.” *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 713-14 (1994). For example, states may limit the construction and operation of an engineered transfer based on state water quality standards, including conditions to protect designated uses, water quality criteria, and antidegradation. *Id.* at 715-16, 719.

Diversion and discharge facilities are usually located by necessity in the waters of the United States and, hence, regulated under section 404 of the Act. 33 U.S.C. § 1344. Section 404, in turn, triggers the need for state reviews under section 401 of the Act, discussed above. Typical engineered transfers, therefore, require state water quality certification at the time of construction, later improvement, or modification. This process provides states with the authority to regulate the discharge of pollutants from engineered transfers if appropriate to meet applicable water quality requirements.

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

Section 1288 of the Clean Water Act encourages states to identify geographic areas with substantial water quality control problems and to designate planning agencies to prepare areawide wastewater treatment management plans.

33 U.S.C. § 1288(a)(2). So-called “208 plans” must include a process to control

the disposition of all residual waste generated in the area that could affect water quality. *Id.* § 1288(b)(2)(J). These areawide plans identify priority water quality problems and recommend control measures. In the context of engineered transfers, they can address not only pollution problems in the receiving waters from such transfers, but also water quality problems in source waters before the transfer. Areawide plans thus provide another, flexible tool for states to use to control any water quality problems created by engineered transfers.

#### **D. The States' Common Laws Protect Water Quality**

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

In Colorado, "a common law theory . . . prohibits the discharge of contaminants into streams where doing so makes the water unsuitable for an[other] appropriator's normal use of water." *In re Concerning Application for Plan for Augmentation of the City and County of Denver*, 44 P.3d 1019, 1028 (Colo. 2002). Other states reach similar results. *See, e.g., Phillips v. Davis Timber Co., Inc.*, 468 So.2d 72, 79 (Miss. 1985) (plaintiff "entitled to an injunction enjoining and prohibiting further PCP pollution into his lake"); *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291, 538 N.Y.S.2d 844, 846 (1989) (commercial fishermen have standing



to sue for nuisance and obtain an injunction to prevent water pollution); *Dingwell v. Town of Litchfield*, 4 Conn. App. 621, 496 A.2d 213 (1985) (upholding injunction against town's pollution of well); *Penn. R.R. v. Sagamore Coal Co.*, 281 Pa. 233, 238, 126 A. 386, 387 (1924) (pollution of stream creates an enjoivable nuisance).

### SUMMARY

Extending the NPDES permitting program to engineered transfers would be legally unjustifiable and would contravene the clear instruction of Congress not to supersede, abrogate, or impair state water allocation authority. Permit requirements would largely duplicate existing state programs and impair individual state water allocations. Extending the NPDES program is unnecessary because states have more than adequate authority to regulate any water quality problems posed by engineered transfers.

The *amici curiae* respectfully urge the Court to reject extension of the National Pollutant Discharge Elimination System to engineered transfers of water.

Respectfully submitted,

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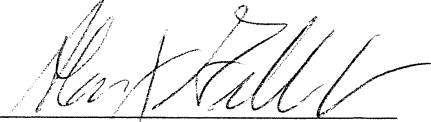


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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 6,418 words, not including the table of contents, the table of authorities, this certificate, the cover, and the inside caption.



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF *AMICUS CURIAE* OF STATES OF COLORADO, NEW MEXICO, IDAHO, NEBRASKA, NORTH DAKOTA, AND UTAH URGING REVERSAL IN SUPPORT OF THE CITY OF NEW YORK upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 21st day of June 2004 addressed as follows:

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