

03-7203

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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,

v.

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**

BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES,
NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, AND
ASSOCIATION OF METROPOLITAN WATER AGENCIES

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Dated June 21, 2004

JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,
Defendant-Appellant-Cross-Appellee,

v.

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-Appellees.

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INTERESTS OF THE *AMICI CURIAE*

Amici curiae submit this brief in support of Petitioners City of New York and New York City Department of Environmental Protection. *Amici* represent local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring clean and safe water in our country. However, *amici* also have an interest in ensuring that suitable laws and regulations apply to their activities, and believe that the District Court's ruling impermissibly interferes with local water management decisions.

Transfers and diversions of untreated water are essential to the design and operation of public water supply systems, municipal and regional flood control and water management efforts, and structures designed to assist in inland navigation. Countless water management systems throughout the country transfer water to areas that need water, or away from areas in danger of flooding. Operation of canals, locks, and other structures involves movement of water from one body – whether natural or constructed – to others. The District Court's decision because it threatens the operation of all such systems and is inconsistent with the language and intent of the Clean Water Act (CWA).

Amici are also troubled by this Court's earlier decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), because, although it specifically held only that the discharge of water from the

Shandaken Tunnel constitutes the “addition” of a pollutant within the meaning of CWA § 502(12), 33 U.S.C. § 1362(12), the holding might be interpreted to change the regulatory structure for local governments and other water management authorities by holding that inter-basin transfers of untreated water, in the context of routine water management activities, can only be authorized by National Pollutant Discharge Elimination System (NPDES) permits. Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments and public utilities for ordinary management of water, for public water supply, flood control, navigation, and other governmental and public purposes, currently operates pursuant to such a federal permit. Based on the numerous water management structures that predate the enactment of the Clean Water Act in 1972, it was clear to Congress at that time the statute was developed that the nation depended on such facilities. There is no indication in the language or history of the Clean Water Act that Congress intended the new law to apply to or to interfere with these structures’ basic functions and historic operations. The statute was comprehensively amended in 1987, and has been surgically amended several times since, yet Congress has never indicated that it believed the NPDES program should apply to these water management structures. Congress retains the authority to amend the Act in the future if it determines that additional or more specific regulatory controls are needed to address this issue.

Amicus the National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. NLC serves as a national resource and advocate on behalf of over 1,800 member cities and for 49 state municipal leagues whose membership totals more than 18,000 cities and towns across the country. The specific interest of the National League of Cities – which advocates for municipal interests at the federal level – in this case lies in the fact that municipal governments have historic authority and responsibilities to protect public safety and the health of their citizens in the management of their resources.

Amicus the New York State Conference of Mayors and Municipal Officials (NYCOM) is a not-for-profit, voluntary membership association consisting of 566 of New York State's 616 cities and villages, thereby representing the overwhelming majority of such municipalities. NYCOM provides its members with legislative advocacy at both the state and federal levels on issues of concern to local government. A critical component of NYCOM's annual legislative program has been the support of state and federal legislation that protects public health, ensures the high quality of drinking water in New York State, and includes adequate funding for local implementation.

The issue before the Court is of significant concern to all NYCOM members – cities and villages of the State – not just New York City. The District Court's

ruling impermissibly interferes with the home rule authority of local governments regarding water management. Further, the issue of whether active transferring of water from one area to another needs an NPDES permit could have serious financial consequences for municipalities in New York State, especially in the context of newly developed stormwater management programs.

Amicus the Association of Metropolitan Sewerage Agencies (AMSA) represents the nation's publicly-owned wastewater treatment agencies (POTWs). AMSA's nearly 300 member agencies provide the majority of the U.S. population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. AMSA members operate their POTWs under the Clean Water Act's NPDES permitting program. AMSA members are concerned, however, that the District Court's decision unnecessarily will subject new aspects of their operations to NPDES permitting for the first time.

Amicus the Association of Metropolitan Water Agencies (AMWA) represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and

other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another.

SUMMARY OF ARGUMENT

The District Court's interpretation of this Court's earlier decision would burden tens of thousands of water authorities and municipal water departments and agencies with unnecessary, and in many cases unattainable, regulatory requirements. In perhaps the majority of cases, local water management agencies would be unable to obtain or comply with NPDES permits for facilities that are essential to many public safety and uses, including flood control, to ensuring a reliable supply of water for domestic, commercial, and industrial uses, and fire suppression.

Municipal and regional water management systems existed in the United States for decades before the enactment of the Clean Water Act in 1972. These systems are designed to move water from one body to another, or to change the flow of water. During the 30-plus years since its enactment, the Clean Water Act has never, until recently, been interpreted to regulate such transfers and diversions of untreated water. The United States Environmental Protection Agency (U.S.

EPA) has never required that such transfers and diversions operate pursuant to Clean Water Act NPDES permits.¹ As demonstrated in this brief, the NPDES permit program is the wrong tool to regulate water transfers and diversions, and the consequences of requiring NPDES permits for such activities will be devastating to water suppliers, local governmental water managers, and the citizens they serve every day across the nation.

Amici wish to emphasize that at the core, our fundamental interest is in protecting our nation's waters and providing safe drinking water to our citizens. We and our member organizations, governments, and utilities recognize our nation's dependence on a clean and safe supply of water. In some way, *amici* are all engaged in activities that protect, treat, reclaim, improve, or otherwise respect water quality. In arguing that the NPDES program is not the appropriate mechanism for regulating transfers and diversions of untreated water, we do not suggest that such transfers and diversions should not be subject to regulation or that their water quality impacts should not be mitigated. However, as discussed below, there are other existing provisions in both federal and state law that were

¹ Indeed, the United States Solicitor General recently argued in the *Miccosukee* case, discussed in Section I.A below, that NPDES permits should not be required for the operation of such water control facilities, which merely convey or connect one navigable water to another. See Brief for the United States as Amicus Curiae Supporting Petitioner, *South Florida Water Management District v. Miccosukee S. Ct.* Case No. 02-626 (filed September 2003), available at <http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2002-626.pet.ami.inv.pdf>.

designed to assure that water transfers and diversions are managed responsibly. In most cases, these other provisions can regulate transfers and diversions more appropriately and effectively than the ill-suited NPDES program. We believe that proper use of these existing measures will address the fundamental concerns of respondents in this case and avoid the significant problems created by the District Court's decision that this Court's previous ruling required it to apply the NPDES program to these water transfers in a new way, far outside the program's intended scope.

Indeed, in promulgating the Clean Water Act itself, Congress established a separate provision – independent of the NPDES program – that specifically addresses water transfers and diversions. Congress directed EPA to develop “processes, procedures, and methods 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.” CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F). This provision makes clear that Congress recognized that water management facilities should be treated differently from other dischargers, so as to ensure that water management for such public purposes as water supply, flood control, and navigation was not unreasonably restricted.

Moreover, requiring flow diversions to receive NPDES permits will overwhelm the already under-resourced NPDES permit program. Over the past thirty years, EPA and the NPDES-delegated states combined have issued some 135,000 Clean Water Act permits for existing discharges. If, as the District Court’s holding implies, the entire universe of water transfer and diversion structures across the nation require NPDES permits, a fundamental restructuring of the administration of such permits – far beyond what Congress envisioned when it created the NPDES program – unquestionably will be required.

Amici submit, however, that Section 101(g) of the Clean Water Act, and decisions by several other courts including the U.S. Supreme Court, require that an “accommodation” be made between the Clean Water Act’s NPDES program requirements and the traditional authority of the States to allocate their water resources without unnecessary interference by federal regulation. *Amici* therefore urge this Court to reverse the District Court’s decision and to clarify its previous remand to instruct the court below that such an accommodation must be made.

ARGUMENT

This Court held in its earlier decision that the discharge from the Shandaken Tunnel constituted the “addition” of a pollutant from a point source, consistent with the definition in CWA § 502(12), 33 U.S.C. § 1362(12). The District Court interpreted this ruling to mean that the City of New York was required to obtain an

NPDES permit for its discharge. Furthermore, the District Court found that the City was liable for a civil penalty of \$5,749,000 for its failure to obtain such a permit in the past.

This ruling goes too far, and violates the savings clause in CWA § 101(g), 33 U.S.C. § 1251(g), which was intended to insure that the Act would not interfere with the states' authority to manage their own water resources. Subsequent to this Court's previous ruling, the Supreme Court of the United States considered a similar case involving the transfer of water in South Florida. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. ____, 124 S. Ct. 1537 (2004). The Supreme Court found in *Miccosukee* that, if the discharge in that case involved an inter-basin transfer between two distinct bodies of water, it might constitute the "addition" of a pollutant from a "point source" potentially subject to regulation under the Clean Water Act. However, the Supreme Court specifically recognized that, even if this were the case, requiring an NPDES permit for such discharges could impermissibly interfere with local water resource management decisions that Congress intended to protect. *Id.*, 124 S. Ct. at 1545. The court noted that such an outcome would have a particularly troublesome impact in the western States, whose water supply networks often rely on engineered transfers among various natural water bodies. *Id.*

I. CWA § 101(g) PROHIBITS THE RESULT REACHED BY THE DISTRICT COURT

A. The Wallop Amendment

By holding that the City must obtain an NPDES permit for the discharge from the Shandaken Tunnel, and that it is liable for a substantial penalty for failing to have done so in the past, the District Court's decision comes into direct conflict with Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g). That section, also known as the "Wallop Amendment," was added by Congress in 1977 to ensure that otherwise applicable requirements of the Act would not be applied in such a manner as to impermissibly interfere with state water rights. The section provides that:

It is the policy of Congress that the authority of each State to allocate 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.

The sponsor of the amendment, Senator Wallop, explained during the Senate debates over the 1977 Clean Water Act that:

The conferees adopted an amendment which will reassure the State 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. . . . This amendment is not intended to create a new cause of action. It is not intended to change present law, for a similar prohibition is contained in section 510 of the act. This amendment

does seek to clarify the policy of Congress concerning the proper role of Federal water quality legislation in relation to State water law. Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights. Management practices developed through State or local 208 planning units may also incidentally effect [sic] the use of water under an individual water right. It is not the purpose of this amendment to prohibit those incidental effects. ***It is the purpose of this amendment to insure that State allocation systems are not subverted,*** and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

Senate Debate, Dec. 15, 1977 (remarks of S. Wallop), *reprinted in 3 A 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 (1978), at 531 (emphasis added).

As noted by Senator Wallop, Section 510 of the Clean Water Act, 33 U.S.C. § 1370, already provided 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.” The 1977 amendment was designed to make it clear that, although the requirements of the Act might “incidentally” affect individual water rights, state water allocation systems cannot be “subverted” by those incidental effects. The exact language of the amendment itself dictates that state water rights shall not be “superseded, abrogated or impaired” even by the legitimate purposes of the Act. Instead, state and federal

agencies are directed to develop “comprehensive solutions” to control pollution “in concert with” programs for managing water resources.

Thus, although local government systems for the allocation of water are not immune or exempt from the Clean Water Act’s requirements, where those requirements would have the effect of impairing the state’s water rights some other solution or accommodation must be found. Several courts have recognized this principle. In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 179 (D.C. Cir. 1982), the D.C. Circuit Court of Appeals considered the policy implications of requiring NPDES permits for dams. Although it recognized that Congress had not addressed the question directly, the court did find Section 101(g) to provide a “specific indication in the Act that Congress did not want to interfere any more than necessary with state water management, of which dams are an important component.” The court noted that, while Section 101(g) “was not intended to take precedence over ‘legitimate and necessary water quality considerations,’” Congress had incorporated several other provisions in the Act that were “intended to prevent water quality goals from interfering with state water allocation plans.” *Id.* at 179 n. 67. The court also found that U.S. EPA’s decision not to require NPDES permits for dams, and to leave dam regulation to the states, was reasonable and not inconsistent with Congressional policy in the Act because

. . . dam-caused pollution is unique because its severity depends partly on whether other sources have polluted the upstream river. The

NPDES program, however, requires EPA to issue nationally uniform standards, and thus would not allow the agency to take full account of the interrelationship between dam-caused pollution and other pollution sources. Moreover, dams 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 state areawide water quality plans are the better regulatory tool.

Id. at 180.

Similarly, in *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 510 (10th Cir. 1985), the Tenth Circuit Court of Appeals held that the Corps of Engineers did not exceed its authority in denying a “nationwide permit” (similar to a “general permit” or permit-by-rule) for the construction of the Wildcat Dam and Reservoir in Colorado and requiring the state to apply for an individual permit instead. In doing so, however, the court noted that

The Wallop Amendment does, however, indicate "that Congress did not want to interfere any more than necessary with state water management." *National Wildlife Federation v. Gorsuch*, 224 U.S. App. D.C. 41, 693 F.2d 156, 178 (D.C.Cir.1982). A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation.

Although it avoided, as “premature,” the question of what would happen if the state could not obtain a permit, or if the permit imposed infeasible conditions or restrictions, the court recognized that such an eventuality might have the impermissible effect of abrogating an interstate compact and denying Colorado its right to water use under the South Platte River Compact. *Id.*

More recently, the United States Supreme Court explicitly addressed the potential conflict between the Wallop Amendment and the application of the NPDES permit program to state water transfer projects. Although it remanded the case on other grounds, the Supreme Court recognized that:

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. §1251(g).

Miccosukee, 541 U.S. at ____, 124 S. Ct. 1537, 1545.

The precise point at which the imposition of otherwise applicable permitting or pollution control requirements of the Clean Water Act would become so costly or burdensome as to violate Section 101(g) has never been directly confronted by any court. *Amici* submit, however, that the decision of the District Court in this case has crossed that line. The District Court has ordered, without qualification, that the City must obtain a permit that, based on the record in this case, either cannot be obtained at all or else would require the imposition of controls that are neither technologically feasible nor economically achievable. The District Court has also assessed a fine that is reportedly the largest civil penalty ever imposed on

a municipality under the Clean Water Act. *See* Caher, “NYC Ordered to Pay \$6M Penalty for Polluting Water,” *New York Law Journal* (Feb. 7, 2003). In doing so, the District Court has unquestionably “superseded, abrogated or impaired” the rights of this state-sanctioned water supply program.

As noted above, Clean Water Act permits must, by law, include effluent limits to “achieve water quality standards ... including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1). The state water quality standard for discharges of turbid waters in New York is “no increase that will cause a substantial visible contrast to natural conditions.” N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (2003). Because there may not be a practicable way to ensure that discharges from the Shandaken Tunnel are never more turbid than the receiving waters, it is possible that New York City will be unable to obtain a Clean Water Act permit for its transfer of water through the Tunnel. Under the reasoning of the District Court, New York City is in violation of the Clean Water Act every time it transfers water through the Tunnel. This could lead to a prohibition against New York City’s continued use of this source of approximately 16% of its water supply, jeopardizing the City’s ability to ensure an adequate supply of water to meet its daily demand.

B. NPDES Permits Must Require Compliance with All Technology-Based and Water Quality-Based Effluent Limitations

Even without the record established in this case, any categorical ruling that the type of water transfer system at issue must be regulated under the NPDES permit program would give rise to the same conflict. This conflict arises because the Clean Water Act explicitly dictates that NPDES permits *cannot* be issued to point source dischargers unless the discharge so authorized will meet “all applicable requirements” of the Act, including those established in CWA § 301, 33 U.S.C. 1311. *See* CWA § 402(a)(1), 33 U.S.C. 1342(a)(1). CWA § 301 imposes two distinct types of controls on point source discharges to waters of the United States, requiring both "technology-based" and "water quality-based" effluent limitations. The first type of controls involves a "series of progressively more demanding technology-based standards," applicable to different categories of dischargers and subject to different statutory deadlines. *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). Each of these standards involves some consideration of economic and technical feasibility. The second type of controls, however, requires that all discharges must also achieve "any more stringent limitation" necessary to meet water quality standards established pursuant to state law. In contrast with technology-based standards, these water quality-based effluent limitations must be achieved without regard to feasibility or cost. *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163, as

amended by 197 F.3d 1035 (9th Cir. 1999). Thus, EPA "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability," *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *See also Ackels v. U.S. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (holding that a permit must require compliance with state water quality standards for turbidity, even if it was not feasible to control this parameter, because "economic and technological restraints are not a valid consideration").

U.S. EPA's implementing regulations for the NPDES permit program embody this requirement in 40 CFR § 122.44(d). This requirement is applicable to *all* NPDES permits, both "individual" and "general." The Supreme Court's suggestion in *Miccosukee* that EPA could "control regulatory costs" by issuing general permits to point sources associated with water distribution programs" is, therefore, misplaced. Although general permits can reduce the administrative burden by authorizing discharges from a specified category of dischargers, they cannot deviate from the technology- and water quality-based effluent limitations that are required for the issuance of all NPDES permits under the clean Water Act and its implementing regulations. Moreover, even if a general permit program could be devised in the future that might reduce the burden on state water

allocation systems, no such permit option exists today and a ruling that such systems must obtain either an individual or a general NPDES permit would inevitably run afoul of the prohibition in CWA § 101(g).

The biochemical constituents of distinct, untreated bodies of water will often be different from one to another, whether the water bodies are in naturally connected watersheds or not. Thus, diversions or transfers of untreated water are likely to involve transfers of water containing certain different constituents, and constituents in different concentrations, than may occur in the receiving waters. If the District Court's decision is left to stand, the myriad water management facilities involved in analogous diversions and transfers of natural, untreated water for water supply and flood control purposes (including other portions of New York City's water supply system) face an impossible dilemma: either to be subject to continual enforcement actions under the Clean Water Act, potentially involving extensive civil and even criminal penalties, or to be required to cease fundamental public water supply and water management activities. For the reasons set forth herein, therefore, the *amici* urge this Court to find that such movement of untreated water need not be regulated through the ill-suited NPDES permit program, and that an accommodation must be reached that will preserve the rights of local government to allocate water for the use of its citizens.

II. THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO INTER-BASIN TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES.

Because the NPDES program lacks both the administrative capacity and the regulatory flexibility necessary to deal appropriately with transfers and diversions of untreated water, the District Court's decision would compromise the continued operation of water supply and management systems across the nation. There are numerous federal and state laws that more appropriately and effectively regulate water transfers and diversions than the NPDES provisions of the Clean Water Act.

A. The NPDES Program Is Not an Appropriate Mechanism for Regulating Diversions of Water.

The District Court's decision threatens the continued operations of certain facilities that are vital for water supply, local government water management, flood control, and navigation. This decision runs counter to Congress' intent that states and local governments retain primary control over local water management decisions.

If the decision is not reversed, the scope of the Clean Water Act's NPDES permit program will far exceed the capacities of EPA and states with delegated authority to administer the program. According to EPA, "more than 135,000 facilities nationwide" currently have NPDES permits. See <http://www.epa.gov/compliance/planning/data/water/index.html> (last updated February 10, 2004). Even with the current universe of permitted entities, EPA and

the delegated states have not been able to administer the NPDES program in accordance with the statutory requirement that NPDES permits be issued for no more than five years. See 33 U.S.C. § 1342(b)(1)(B). In fact, in December 1998, EPA identified NPDES permit backlog as a “material weakness” at the Agency. See USEPA, Fiscal Year 1998 Integrity Act Report to the President and Congress, <http://epa.gov/ocfo/integrity/integrity.pdf> at B-3 (December 29, 1998). The deficiency has not been cured as of the Fiscal Year 2002 Report. See http://epa.gov/ocfo/finstatement/2002ar/ar02_goal2.pdf (last updated June 10, 2003). EPA has established a goal of reducing the backlog of all permits to 10 percent by the end of 2004. See <http://cfpub2.epa.gov/npdes/permitissuance/backlog.cfm> (last updated October 17, 2003). As of March 31, 2003, 18 percent of the approximately 116,000 NPDES permits analyzed had expired. See http://epa.gov/npdes/images/permit_backlog.pdf. EPA’s Strategic Plan for 2003-2008, at 45, submitted to Congress on September 30, 2003, includes reducing the NPDES permit backlog as a key Clean Water Act goal. See <http://www.epa.gov/ocfo/plan/plan.htm> (last updated February 18, 2004).

Under the District Court’s interpretation of the Clean Water Act, millions of water transfer facilities and diversion structures across the nation currently operating without NPDES permits would be added to the already backlogged and

overburdened NPDES program. *See, e.g., Gorsuch*, 693 F.2d 156, 182. In light of the manifest administrative problems with the NPDES program today, a 15-fold increase in the number of entities requiring Clean Water Act permits would without question overwhelm permitting agencies across the nation. The scope of the NPDES program under this approach is an order of magnitude greater than either Congress or EPA has envisioned in the more than 30 years since the Clean Water Act took effect.

Moreover, because NPDES permits must, by law, include effluent limits to “achieve water quality standards ... including State narrative criteria for water quality,” 40 C.F.R. § 122.44(d)(1), the NPDES program lacks the flexibility to deal appropriately with transfers of untreated water. Where the transferred water contains pollutants that are not introduced by the entity operating the transfer, as in *Miccosukee* (where the water contains phosphorus from urban runoff) and in this case (where the water contains naturally occurring turbidity), this requirement can place an impossible burden on the transferor. As noted above, there may be no feasible mechanism for ensuring that Schoharie water released from the Shandaken Tunnel meets the New York State water quality standard of no substantial visible increase in turbidity. If the City proves to be unable to obtain a NPDES permit and this Court does not reverse the decisions of the District Court, 16% of the City’s water supply may be in jeopardy.

B. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water.

Under the Clean Water Act, Congress directed EPA to study and make recommendations concerning “changes in the movement, flow, or circulation” of navigable waters, including those caused by “flow diversion facilities,” in one of several statutory provisions addressing nonpoint sources of pollution. 33 U.S.C. § 1314(f)(2)(F). In recommending consultation with appropriate Federal and State agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, 33 U.S.C. § 1314(f), Congress clearly contemplated that facilities that change the flow of water would be evaluated differently from point sources of pollutants. See *National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 588 (6th Cir. 1988) (“This supports ... the view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under ‘nonpoint source’ category of pollution”) (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 177 (D.C. Cir. 1982)).

In other words, while Congress contemplated that pollutants might be moved within the nation’s waters as a result of facilities diverting flow, like the S-9 pumps in *Miccosukee* and the Shandaken Tunnel in this case, the Clean Water Act is structured to evaluate transfers of pollutants resulting from such diversions in a

different manner from additions subject to the NPDES permitting requirements of 33 U.S.C. § 1342.

C. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water.

In urging rejection of the NPDES program as the tool to manage the incidental water quality impacts of myriad water movement structures such as the Shandaken Tunnel or the S-9 pumps at issue in *Miccosukee, amici* do not suggest that such structures should not be evaluated and regulated to address water quality impacts. Rather, we ask the Court to recognize that many other provisions of federal and state law provide sufficient, and in fact more appropriate, regulatory frameworks to address any water quality impacts from inter-basin transfers of untreated water. The following section provides examples of such other provisions.

1. Federal Programs

a. Total Maximum Daily Loads and State Water Quality Management Plans

In most cases, a receiving water that fails to meet applicable water quality standards for a particular pollutant will be placed on the state's impaired waters list under the Clean Water Act and therefore subject to the development of total maximum daily loads (TMDL). 33 U.S.C. § 1313(d). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating those pollutants to their various contributors. TMDLs are implemented for point sources

via NPDES permits, and for nonpoint sources through state best management practices.

The TMDL program, in contrast to the NPDES permitting program, is an appropriate planning tool to assess pollutant loadings and to select the mechanisms that will regulate and control pollutants in the water bodies at issue both *Miccosukee* and in this case, because, in both instance, the pollutants were originally added to the water being transferred by nonpoint sources, and the TMDL program, unlike the NPDES program, considers the relative contributions of both point and nonpoint sources of pollution, as well as a “margin of safety” to truly protect water quality and to account for any uncertainties.

In addition to the TMDL program, states must establish Water Quality Management (WQM) Plans to address water bodies for which water quality standards cannot be attained or maintained without the control of nonpoint sources. 33 U.S.C. § 1329(a)(1)(A). A WQM Plan “identifies those categories and subcategories of nonpoint sources, or, where appropriate, particular nonpoint sources which add significant pollution ... in amounts which contribute” to the failure to meet water quality standards. 33 U.S.C. § 1329(a)(1)(B). A WQM Plan includes a process for identifying best management practices to reduce pollution from the significant individual nonpoint sources or categories of sources, and describes the programs that have been implemented to control pollution from those

sources. 33 U.S.C. §§ 1329(a)(1)(C) and (D). A WQM Plan includes both regulatory and non-regulatory means to control nonpoint source pollution. 40 C.F.R. §§ 130.6(c)(4)(i) and (ii). Moreover, the TMDLs that are established under 33 U.S.C. § 1313 are incorporated into a state’s WQM Plan. 40 C.F.R. § 130.7(a).

For example, the major source of the phosphorus of concern in *Miccosukee* was urban runoff, generally a nonpoint source. Similarly, in this case, the turbidity and suspended solids of concern enter the Schoharie Reservoir mainly through nonpoint sources, and result from both natural conditions in the Schoharie watershed and human activity such as farming, logging, development, and streambank and streambed disturbances. Thus, the appropriate place to address the pollutants in both cases is where they enter the water. The means to address them are the Clean Water Act’s nonpoint source programs, including the TMDL program and state WQM plans.

b. Municipal Separate Storm Sewer System Permits

The NPDES program itself includes provisions that are better tailored to addressing pollutants originating in urban runoff than requiring individual NPDES permits for the transfers of water containing such pollutants.² Under the

² Many stormwater discharges are regulated as “point sources” under the NPDES program because stormwater from activities most likely to cause pollution is typically controlled by storm sewers or other stormwater management systems with controlled discharge points. See, e.g., http://cfpub.epa.gov/npdes/home.cfm?program_id=6 (last updated May 28, 2004).

stormwater provisions of the Clean Water Act, EPA has established permit programs to protect water quality by reducing the pollutants in stormwater runoff from municipalities and other populated areas – initially for areas with populations of 100,000 or greater³ (the Phase I Program, implemented in the early 1990s) and more recently for areas designated as “urbanized” by the latest census (the Phase II Program, implemented earlier this year).⁴

Municipalities required to obtain permits for their municipal separate storm sewer systems (MS4s) are required implement best management practices to reduce stormwater pollutants to the “maximum extent practicable” (MEP) 33 U.S.C. § 1342(p)(3)(B)(iii). Thus, to the extent that the pollutants of concern in a water transfer or diversion come from urban stormwater runoff, the MS4 permit program as well as nonpoint source best management practices can appropriately address the pollutants at their sources. The District Court’s decision, in contrast, would regulate such pollutants after they have entered the waters of the United States, essentially requiring water transfer facilities to “treat” these pollutants in the course of diverting, pumping, or moving the water. This indirect and impractical approach to addressing the underlying water quality concern focuses regulation at the wrong location, and may place pollutant removal responsibilities on the wrong parties.

³ See 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26.

⁴ See 33 U.S.C. § 1342(p)(6); 40 C.F.R. § 122.32(a)(1).

c. The Safe Drinking Water Act and Surface Water Treatment Rule

Municipal water supply systems are closely regulated under the federal Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(f) et seq., and its implementing regulations, the so-called Surface Water Treatment Rule (SWTR), 40 C.F.R. § 141.70 et seq. The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems, and set forth the criteria that must be met for a public water system to avoid filtration. See 40 C.F.R. §§ 141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity to 5 NTU immediately prior to the first point of disinfection. 40 C.F.R. § 141.71(a)(2).

The facts of this case provide an example of how water transfers are already appropriately reviewed, managed, and regulated. Because New York City's Catskill system supplies unfiltered water to the City of New York, it operates under a Filtration Avoidance Determination (FAD) issued by the EPA under 40 C.F.R. §§ 141.71 and 141.171. The FAD contains several provisions that require the City to address and control pollution entering the City's Catskill and Delaware water supply systems from both point and nonpoint sources. It specifically requires the City to address suspended solids and turbidity entering the source waters of the Schoharie Reservoir, and to implement any feasible, effective and

cost-effective means to reduce turbidity in waters released through the Shandaken Tunnel.

Thus, the pollutants at issue in this case are being addressed under the SDWA and SWTR, both 1) at the location where they enter the water system and 2) after water is released through the Shandaken Tunnel. Because the entire supply system, including the Shandaken Tunnel, is effectively regulated under the SDWA and SWTR, it should not be subjected to the intransigence and inflexibility of the NPDES point source permitting program which, if applied to the City's water supply system, will jeopardize the City's ability to provide a safe supply of water to the nine million residents, and countless commercial users and workers, who rely on it. Although the specific source control measures in New York City's FAD are not required of filtered public water systems under the SDWA, many filtered systems in the U.S. employ similar measures under state and/or local law or regulation.

2. State Laws and Regulations

As mentioned above, in addition to the federal requirements, a number of state laws and regulations address and control pollutants in the context of municipal water management and water transfers. Section 510 of the Clean Water Act, 33 U.S.C. § 1370, preserves the rights of each state to adopt or enforce pollution control requirements that are more stringent than those imposed by the

federal government. Pennsylvania, for example, through the state's general permit program, applies certain best management practice requirements to inter-basin water transfers. *See Miccosukee*, 541 U.S. at ____, 124 S. Ct. 1537, 1545.

The regulatory programs applicable in New York are an example of the types of programs that exist in varying forms throughout the nation. These provisions operate independently from the NPDES program. Consistent with its delegated authority to administer the Clean Water Act, New York State has adopted and enforces water quality standards. See New York State Environmental Conservation Law (ECL) § 15-1313(2); see also ECL § 17-0301, N.Y. Comp. Codes R. & Regs. tit. 6, § 700 *et seq.* The State classifies bodies of water in accordance with their best use, and adopts and enforces water quality standards for specific water bodies, including the Esopus Creek, based on those classifications. *See id.* Releases that violate the state water quality standards are subject to enforcement by the Commissioner of the New York State Department of Environmental Conservation. ECL § 17-0501. Releases from the Shandaken Tunnel are subject to these provisions, independent of the NPDES or New York's State Pollutant Discharge Elimination System (SPDES) program.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. ECL § 15-1501. Under another provision, a permit is required to excavate or place fill in navigable waters.

ECL § 15-0505. These laws, if enforced properly, are specifically tailored to address many of the activities that create turbidity in source waters of the Schoharie reservoir, and thus in releases from the Shandaken Tunnel. Finally, New York State regulates releases from reservoirs in order to protect natural resources and recreational uses in the receiving waters. ECL §§ 15-0801 and 15-0805.⁵

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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⁵ Indeed, New York City is required, under regulations promulgated by New York State pursuant to these statutes, to make releases from its Shandaken Tunnel, to enhance recreational use of the Esopus Creek. N.Y. Comp. Codes R. & Regs. tit. 6, Part 670.

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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 6952 words, not including the table of contents, table of authorities, this certificate, the cover, and the inside caption.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amici Curiae the National League of Cities, New York State Conference of Mayors and Municipal Officials Association of Metropolitan Sewerage Agencies, and Association of Metropolitan Water Agencies was served via regular first class mail, postage prepaid on this 21st day of June, 2004, upon the following:

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