No. 02-626

In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL WATER RESOURCES ASSOCIATION, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT, ARIZONA DEPARTMENT OF WATER RESOURCES, THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, THE WESTERN URBAN WATER COALITION, THE WESTERN COALITION OF ARID STATES, AND THE STATE WATER CONTRACTORS, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Virtually all waters contain pollutants, often naturally occurring ones. The question that *amici* will address is as follows: whether the conveyance of waters naturally containing pollutants from one water body to another requires a National Pollutant Discharge Elimination System permit under the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*

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INTEREST OF *AMICI CURIAE*

Amici curiae, the National Water Resources Association, the Metropolitan Water District of Southern California, the Central Arizona Water Conservation District, the Arizona Department of Water Resources, the Association of California Water Agencies, the Western Coalition of Arid States, the Western Urban Water Coalition, and the State Water Contractors submit this brief in support of Petitioner South Florida Water Management District seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (CA11 2002).[1] In *Miccosukee*, the Eleventh Circuit held that a National Pollutant Discharge Elimination System ("NPDES") permit is required when water, which naturally contains pollutants, is diverted and conveyed into another distinct body of navigable water. *Id.* at 1368-69.

In the West, diversion of water in the spring as mountain snows melt, its transport through tunnels, canals, pipelines and natural stream systems to the place of need, and its storage in reservoirs are all essential steps in meeting water supply requirements.[2] To the extent

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. The parties' counsel have consented to the filing of this brief and letters reflecting that consent are submitted to the clerk's office with this brief.

[2] Although transbasin diversions are primarily for the benefit of the diverter, water rights in the receiving basin also benefit from transbasin return flows. In many cases, these return flows satisfy senior water rights, allowing "junior" in-basin diverters to remain in priority and take additional water.

these waters, which contain a particular set of constituents, are conveyed from one basin of water into another basin with different natural constituents, a "regulated" discharge of pollutants would be found to exist under the *Miccosukee* decision. In such circumstances, the operators of such transbasin conveyances would find it necessary to either significantly modify their operations, build and operate expensive water treatment systems, or curtail their operations altogether.[3] This would be the case even though they did nothing to "add" pollutants to the diverted waters.

The National Water Resources Association ("NWRA") is a voluntary organization of state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the Reclamation States of the Western United States. Its members range from the Metropolitan Water District of Southern California, which serves most of California's south coast, to Dirk Parkinson, a member of the Idaho Water Users Association and the owner of the McCormick Rowe Ditch in St. Anthony, Idaho, which is

[3] The Clean Water Act also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected states) to sue for injunctions to enforce the statute. 33 U.S.C. §§ 1319, 1365.

used to irrigate 240 acres of farmland.[4] NWRA members directly engage in, or rely on, water from innumerable transbasin water diversion projects.[5] If these diversion and storage activities were effectively halted or became prohibitively expensive to operate due to NPDES permitting conditions, NWRA members would be unable to meet essential domestic, agricultural and industrial water demands.

The Metropolitan Water District of Southern California ("MWD") is a public corporation that, through its 26 member public agencies, provides water to 18 million people in Southern California. MWD owns and operates an extensive system of transbasin aqueducts, canals and water conveyance structures that are essential to supply the water needs of Southern California, including the

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[4] Other NWRA members include the Arizona Cattlemen's Association (AZ), the Central Arizona Water Conservation District (AZ), Coachella Valley Water District (CA), Glen-Colusa Irrigation District (CA), Imperial Irrigation District (CA), East Bay Municipal Utility District (CA), San Diego County Water Authority (CA), Colorado River Water Conservation District (CO), City of Fort Collins (CO), Montana Water Users Association (MT), Garrison Diversion Conservation District (ND), Middle Rio Grande Conservancy District (NM), Las Vegas Valley Water District (NV), Talent Irrigation District (OR), Brazos River Authority (TX), Provo River Water Users Association (UT), and Methow Valley Irrigation District (WA).

[5] NWRA has maintained a close working relationship with the U.S. Bureau of Reclamation, as many of its members are the operators or beneficiaries of Reclamation water projects, including projects with significant transbasin components. *See, e.g.*, Colorado's Frying-Pan Arkansas Project, California's Friant-Kern Canal (part of Central Valley Project), and New Mexico's San Juan-Chama Project.

Colorado River Aqueduct, which can draw in excess of one million acre-feet[6] per year.

The Central Arizona Water Conservation District ("CAWCD") is a multi-county water conservation district responsible for managing Arizona's largest renewable water supply – approximately 1.5 million acre-feet of Colorado River water. CAWCD operates the Central Arizona Project ("CAP"), a 336-mile long transbasin conveyance system of pumping plants, concrete-lined canals, inverted siphons, tunnels and pipelines, constructed for the purpose of transporting water from Lake Havasu on the Colorado River to central and southern Arizona.[7] CAWCD's service area encompasses 80 percent of Arizona's water users and taxpayers, including the Phoenix and Tucson metropolitan areas.

The Arizona Department of Water Resources is responsible for the comprehensive management of the waters of the State of Arizona throughout the state, including surface water, groundwater and effluent. The Department is also the successor to the state agency that entered into the 1944 Contract for delivery of Colorado

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[6] An acre-foot is the amount of water needed to cover an acre to a depth of one foot, or 325,850 gallons. This is approximately the amount of water used by a family of four in a year.

[7] In 1964, the Court issued a decree that confirmed Arizona's right to 2.8 million acre-feet of mainstream Colorado River water annually. *Arizona v. California*, 376 U.S. 340 (1964) (the "1964 Decree"). Although Arizona's entitlement to water from the Colorado River was confirmed by the 1964 Decree, the state had no practical means of using all of that water because it lacked a water delivery system capable of transporting water from the Colorado River to the more populated regions of central Arizona until completion of the CAP.

[redacted]

River water to Arizona pursuant to interstate compacts, Acts of Congress, and U.S. Supreme Court decisions, and is authorized to prosecute and defend all rights, claims and privileges of the state respecting interstate streams.

The Western Coalition of Arid States ("WESTCAS") is an advocate for laws, regulations and policies that ensure sustainable supplies of water for the Arid West and protect public health and the environment. WESTCAS was formed over ten years ago in order to appropriately address water quality issues in an area of the country where precipitation is oftentimes less than ten inches per year and, as a consequence, unique arid ecosystems are the norm. Many WESTCAS members[8] depend upon transbasin water diversions both to meet municipal water supply requirements and to sustain, by virtue of water transport or wastewater discharge, riparian ecosystems that have developed in ephemeral or intermittent stream systems.

The Western Urban Water Coalition ("WUWC") is an association of the largest municipal water utilities in the Western United States. The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. WUWC members[9] own

[8] WESTCAS members include numerous water and wastewater agencies, such as the City of Phoenix (AZ), Tucson Water (AZ), the Salt River Project (AZ), Eastern Municipal Water District (CA), Los Angeles County Sanitation District (CA), the Sweetwater Authority (CA), Denver Metro Wastewater District (CO), Clark County Water Reclamation District (NV), the cities of Albuquerque and Santa Fe (NM), and El Paso Water Utilities (TX).

[9] WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Utah and Washington, including those residing within the cities of Phoenix,

(Continued on following page)

and operate water management, water supply and hydro-electric projects. These projects consist of water conduits and reservoirs, including transbasin water diversion facilities. The continued, unimpeded operation of these facilities is essential to the continued ability of WUWC members to serve the water needs of the major population centers of the Western States.

The Association of California Water Agencies ("ACWA") is a voluntary, statewide non-profit association comprised of 488 public water agencies that was founded in 1910. Together, these agencies are responsible for more than 90 percent of the water delivered in the state. In addition to public agency members, ACWA also includes 28 affiliate members, consisting of mutual water companies and other non-public, non-profit water related agencies, and 302 associate members including firms and corporations in the law and engineering fields with an interest in California water issues. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner.

The State Water Contractors ("SWC") represents 27 of the 29 public water agencies operating within California who contract with the California Department of Water Resources for water supplies from the State Water Project ("SWP").[10] The SWP diverts water from the

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Denver, San Diego, Los Angeles, San Francisco, Oakland, Las Vegas, Salt Lake City, Tucson and Seattle.

[10] The agencies that comprise the State Contractors are the following: Alameda County Flood Control and Water Conservation

(Continued on following page)

Sacramento-San Joaquin Delta through the California Aqueduct for distribution to the San Joaquin Valley and delivery over the Tehachapi Mountains into southern California. The Project supplies water for drinking, commercial, industrial and agricultural purposes to public water agencies, encompassing a population of over 22 million Californians – about two-thirds of the State's population – and over 750,000 acres of farm land throughout the San Francisco Bay area, the Central Valley, and Southern California. The SWP constitutes a significant portion of the supplies available to SWC members. As a result, the SWC is very concerned with matters affecting the SWP, the Sacramento-San Joaquin Delta, and tributaries to the Delta.

Transbasin conveyances may be as mundane as the diversion of water from a river into a nearby (but hydrologically separate) stream bed for delivery to a nearby town or field, or as massive as the transport of the vast

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District, Zone 7, Alameda County Water District, Antelope Valley-East Kern Water Agency, Casitas Municipal Water District, Castaic Lake Water Agency, Central Coast Water Authority, City of Yuba City, Coachella Valley Water District, County of Kings, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Dudley Ridge Water District, Empire-West Side Irrigation District, Kern County Water Agency, Littlerock Creek Irrigation District, Metropolitan Water District of Southern California, Mojave Water Agency, Napa County Flood Control and Water Conservation District, Oak Flat Water District, Palmdale Water District, San Bernardino Valley Municipal Water District, San Gabriel Valley Municipal Water District, San Gorgonio Pass Water Agency, San Luis Obispo County Flood Control and Water Conservation District, Santa Clara Valley Water District, Solano County Water Agency, and Tulare Lake Basin Water Storage District.

waters of Northern California through the San Francisco Delta. By way of example, in the Upper Colorado River Basin alone there are at least 36 major transbasin conveyances that move approximately 700,000 acre-feet of water per year from the basin of origin for use in another basin. Included within these diversions are the waterworks of the City of Colorado Springs, whose transbasin diversions in 2001 totaled approximately 75,000 acre-feet, representing almost eighty (80) percent of the City's total water supply, and the City of Denver's Roberts and Moffat Tunnels, which convey in excess of 200,000 acre-feet annually for municipal use, thereby meeting forty-five (45) percent of the Denver municipal system demand.

The Colorado-Big Thompson Project ("C-BT"), operated by the Northern Colorado Water Conservancy District in Colorado, conveys an average of 228,000 acre-feet per year through the Rocky Mountains and the Continental Divide to irrigate over 600,000 acres.[11] C-BT 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 17 different streams, rivers, lakes and reservoirs, as illustrated below.[12]

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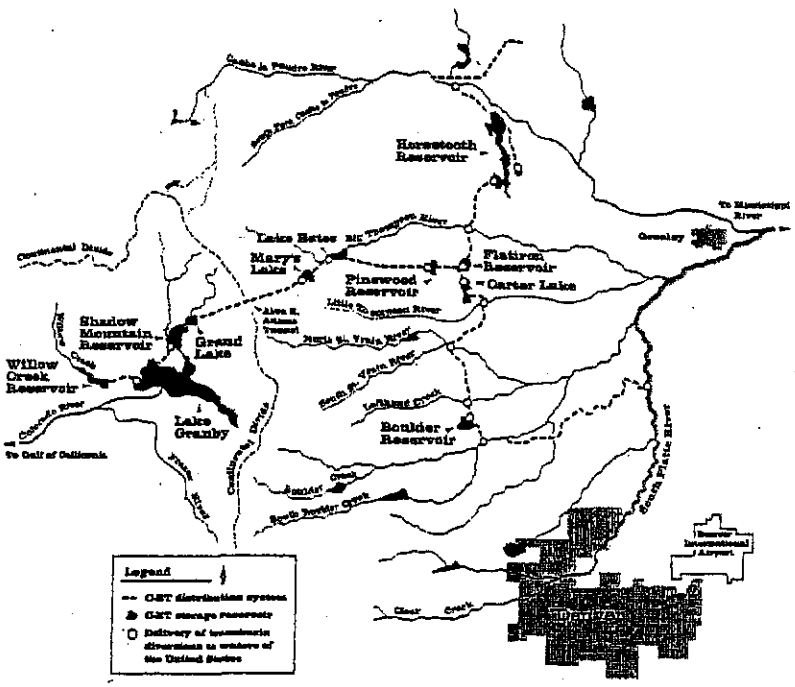
[11] The Municipal Subdistrict of the Northern Colorado Water Conservancy District, an NWRA member, also operates the Windy Gap transbasin diversion project that is designed to provide approximately 48,000 acre-feet of water per year on average for municipal/industrial use.

[12] Although C-BT is the largest transbasin diversion in Colorado, it is not unusually complex in comparison to other western systems.



Other examples of transbasin diversions include the Provo River Project in Utah, which imports over 100,000 acre-feet per year for use in the Salt Lake City metropolitan area, and New Mexico's San Juan-Chama Project, which diverts from the San Juan River Basin to the Rio Grande River Basin, supplying water to Santa Fe, Albuquerque, and various Indian tribes. Similarly, the Bureau of Reclamation's Central (California) Valley Project diverts, stores and transfers Sacramento River water to nearly a million acres of fertile land on the west side of the San Joaquin Valley and replaces San Joaquin River water diverted through the Madera and Friant-Kern canals to more than a million acres of mainly perennial crops on the

east side of the San Joaquin Valley. Although the largest conveyance facilities in California are often the focus of the Court's attention, the Eleventh Circuit's rationale would cripple the literally thousands of small conveyance systems in the state whose operators have relied on California law[13] to use natural channels to convey developed waters for over a century.

SUMMARY OF ARGUMENT

The ability to freely divert, transport, store and use water in accordance with state law and state-established water allocations is vital to the well-being of the West. Water users must be able to move water from one river basin or sub-basin to another, utilizing pipelines, canals, ditches and natural stream systems to meet municipal, agricultural and industrial water demands. Requiring each transbasin conveyance to operate under an NPDES permit under section 402 of the Clean Water Act, 33 U.S.C. § 1342, would reduce or end many diversions because permitting requirements could not be met.

Both Congress and this Court have historically deferred to the states in matters of water use, and have assiduously avoided impinging upon state and local

[13] CALIFORNIA WATER CODE § 7075 (2002) provides "[w]ater which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed. . . ." *See also, e.g.*, IDAHO CODE § 42-105(1) (2003) ("The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed. . . .").

authority to allocate water. The Clean Water Act does not contain any "plain statement" indicating a contrary intent. Instead, the plain language of the Act expresses Congress' continued intent to honor state and local decision-making in the management of water resources. Recognition of that intent is particularly important where, as here, application of the regulatory mechanism of the Clean Water Act would result in direct federal control of, not merely an incidental impact upon, state water allocations and state-established water rights.

Requiring NPDES permits for transbasin conveyances of water creates an unnecessary layer of federal control that is antithetical to the purposeful and continued deference by Congress to state water law. Congress included provisions in the Clean Water Act to ensure that water quality impacts from water involved in transbasin conveyances are addressed at the state level. These provisions appropriately allow the states to manage the quality of these waters in concert with state water allocation principles.

As the Court of Appeals for the District of Columbia observed, "[r]ead as a whole, the Clean Water Act shows not only Congress' determined effort to clean up our polluted lakes and rivers, but also its practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (CADC 1982). Simply stated, it is not practical for transbasin conveyances to operate under NPDES permitting requirements.

The language of the Clean Water Act does not support the premise that the mere movement of water in order to meet critical water needs, in the absence of the addition of

any pollutants by the water conveyor, constitutes a regulated point source discharge. The water quality impacts associated with such water diversion activities are most appropriately addressed at the state level through the nonpoint source programs of the Clean Water Act.

ARGUMENT

I. The Eleventh Circuit Opinion is Contrary to the Federal/State Balance Governing the Use of Water.

The Eleventh Circuit opinion ignores historical federal deference to the states in matters affecting the allocation of water. Not only does the Clean Water Act lack a clear statement of Congressional intent to intrude upon such traditional state authority, it contains unequivocal language reflecting Congress' desire to respect state water laws. This Congressional intent is well supported by the legislative history.

A. Congress and the Courts Have Historically Deferred to State Law in the Allocation of Water.

As this Court observed 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 the 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.

(emphasis added). *See also, e.g., California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162, 164 (1935) (the Desert Lands Act severed all waters from the public domain and reserved such water for use under the laws of the states). This principle of "purposeful and continued deference to state water law" is present throughout the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, including congressional statements of intent in sections 101(a), 101(g) and 510, as well as in specific programmatic elements in sections 208, 304 and 319, as discussed below.

Of greatest significance to this case, section 101(g) of the Clean Water Act explicitly provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

33 U.S.C. § 1251(g). Section 510 reiterates this federal deference to state law in matters implicating water use:

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370.

Thus, Congress was careful in enacting the Clean Water Act not to impair the states' ability to allocate water as they deem appropriate.[14] More importantly for this case, once those *flows* are allocated, Congress did not intend that the Clean Water Act be used to impair their placement to beneficial use. In fact, Congress intended precisely the opposite. Federal regulation of the "movement" of water through the requirement of an NPDES permit, as mandated by *Miccosukee*, would interfere with this well-established balance between federal and state interests. Moreover, this interference would be direct and immediate, not just incidental. Federal control of transbasin conveyances (through the NPDES permit process) goes to the heart of state water allocation laws and would eviscerate state-granted water rights that are the product of those laws.

B. NPDES Permitting of Simple Transbasin Conveyances of Water Would Impair Existing State Water Allocations.

The Eleventh Circuit's opinion requires *every* transbasin conveyance to waters of the United States to obtain an NPDES permit. This is true regardless of the chemical makeup of the water being transferred. Multiple permits would likely be necessary for a project, which, like the

[14] In the West, some form of the "prior appropriation" doctrine is the predominant method of water allocation. *See* Corbridge and Rice, VRANESH'S COLORADO WATER LAW, § 1.2 (1999). Under this doctrine, users divert water out of natural channels, convey that water to the place of use, and then put the water to beneficial use. The place of use is often in an entirely different river basin, and may be hundreds of miles from the point of diversion.

Colorado-Big Thompson Project, diverts water and then conveys it into and out of multiple natural waterways to the place of use.[15]

The problem with the reasoning of the Eleventh Circuit is apparent in an earlier decision of the Ninth Circuit, which concluded "[t]he [Clean Water] Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the *Act categorically prohibits any discharge of pollutants from a point source without a permit.*" *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (CA9 1993) (emphasis added). *But see, Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (CADC 1982) ("for an addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into the navigable water from the outside world"). Since all waters *naturally* contain regulated constituents ("pollutants"), all water conveyors would be subject to the potentially onerous mandates of the NPDES permitting process. More importantly, a very real possibility exists that the transfer of water may be prohibited or limited simply due to the presence of naturally occurring constituents.[16]

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[15] *See* discussion and schematic diagram of the C-BT project, *supra* at p. 9.

[16] Assuming that a permit would be necessary for mere water transfers, EPA regulations mandate conditions in NPDES permits that require dischargers to "control all pollutants or pollutant parameters . . . which . . . are or may be discharged at a level which *will cause, have* the *reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria* for water quality." 40 C.F.R. § 122.44(d)(1)(i) (emphasis added). Thus, if a transbasin water conveyance merely has "the potential to cause . . . an

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For example, runoff from snowmelt[17] and thunderstorms may contain elevated levels of total suspended solids (particles of soil and sediment, i.e., mud), and turbidity (i.e., muddy water) as a result of erosion caused by snow melt and high flows. Although suspended solids carried into a stream or open ditch will eventually settle out,[18] their temporary presence could cause an excursion above water quality standards triggering regulatory consequences. Additionally, the source water (the Colorado River, for example) may be *naturally* high in total dissolved solids (salts) as a result of its passage through certain types of soils and inflows from saline hot springs. In either event, an NPDES permit applied to a transbasin conveyance would have to contain appropriate conditions

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excursion above any State water quality standard," its NPDES permit, as required by *Miccosukee*, must contain a condition requiring dischargers to control all contributing pollutants or pollutant parameters. EPA has established over 94 water quality criteria – from arsenic to temperature, turbidity, and zinc – for waters of the United States. EPA, QUALITY CRITERIA FOR WATER 1983 (1986). It would be a rare situation where the source waterbody did not contain concentrations of at least one of these constituents above the ambient concentrations of the receiving water during a significant part of the year.

EPA regulations also require effluent limits on permits where there is "the reasonable potential to cause, or contribute" to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant. . . ." 40 C.F.R. § 122.44(d)(1)(iii). The effect of this requirement would be to restrict transbasin conveyances whenever the source waters contained any constituent at a level above a water quality standard in the receiving waterbody.

[17] Up to 80 percent of the precipitation in the western states falls as snow.

[18] It is important to understand that it is physically impossible to turn diversions on and off instantly in response to runoff conditions. It can also take many days and/or miles for a muddied waterway to clear.

limiting the quantity of *natural* pollutants delivered to the receiving water body. *See* 40 C.F.R. § 122.44(d)(1)(i).

If a permit for a transbasin conveyance contained limits on *natural* pollutants, the diverter would have to either construct a treatment facility or limit the volume of water diverted. Either option would interfere with the diversion, conveyance and use of water. Treatment is problematic given the location of many transbasin diversions in high mountain or low desert areas[19] and the volume of water involved,[20] making it economically and/or technically impossible.[21] Instead, diverters would be forced to curtail their diversions. Because diverters would bypass water downstream to which they were entitled, they would relinquish a part of their state allocated water whenever they curtailed their diversions to meet NPDES permit conditions. Similarly, if diversions were made from tidally influenced estuaries, as they are from the Sacramento-San Joaquin Delta in California, either tidal barriers or abbreviated pumping patterns would be necessary to avoid the conveyance of salts to higher quality waters. In short, a

[19] The Homestake Tunnel, owned by the cities of Colorado Springs and Aurora, Colo., lies above 10,000 feet, traversing the Continental Divide beneath the Holy Cross Wilderness Area. The Metropolitan Water District's Colorado Aqueduct traverses the Mojave Desert on its journey from the Colorado River to Los Angeles.

[20] The California Aqueduct moves over three million acre-feet per year (1,000 million gallons). The Central Arizona Project moves over 1.5 million acre-feet per year.

[21] While settling basins can remove suspended solids, land may no longer be available near the mouths of ditches and canals constructed more than 100 years ago. And although reverse osmosis is a process that can remove dissolved solids, it is energy intensive and creates large volumes of waste brines, which entail difficult and costly disposal.

serious unintended consequence of requiring NPDES permits for transbasin conveyances would be the reduction of water supplies for municipal, agricultural and industrial uses in an already water-short region of the United States.

By way of further explication, if transbasin water conveyances constituted the addition of pollutants, such water movements would be subject to the total maximum daily load (TMDL) provisions of the Clean Water Act, 33 U.S.C. § 1313(d),[22] and federal antidegradation regulations, 33 U.S.C. § 1313(d)(4)(B).[23] In the case of a TMDL, if the waters being introduced into the basin contain a constituent (total suspended solids, for example) that

[22] TMDL provisions apply to "areas with insufficient controls" to meet water quality standards with effluent limitations alone. 33 U.S.C. § 1313(d). A TMDL defines the specified maximum amount of a pollutant that can be discharged ("loaded") into the water from all combined sources while meeting water quality standards. 40 C.F.R. § 130.7. The TMDL is then allocated among the sources so that water quality standards can be achieved. Each point source receives a specific waste load allocation, which is implemented through a section 402 discharge permit. *Id.*

[23] EPA has promulgated regulations implementing section 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require states to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy. . . ." 40 C.F.R. § 131.12 (2003). "These 'implementation methods shall, at a minimum, be consistent with the . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.'" *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 718 (1994) (quoting 40 C.F.R. § 131.12). Issuance of an NPDES permit may trigger antidegradation analysis. EPA, WATER QUALITY STANDARDS HANDBOOK: SECOND EDITION (1994). "EPA believes that its antidegradation policy should be interpreted on a pollutant-by-pollutant and waterbody-by-waterbody basis." *Id.* at 4-8.

exceeds standards in the receiving waters, the diverter would receive a "load allocation" under the TMDL regulatory requirements. 33 U.S.C. § 1313(d). In many cases, the only practical way to curtail so-called improper pollutant loadings would be to reduce the amount of the diversion. If antidegradation review is triggered, dischargers cannot lower existing water quality absent a "necessity" determination, which would include an alternatives analysis for the diversion activity. 40 C.F.R. § 131.12(2). Again, this may result in the abrogation of a portion of a state-allocated water right in contravention of § 101(g), 33 U.S.C. § 1251(g).

In sum, the imposition of NPDES permitting requirements would directly and immediately interfere with the transbasin conveyance of water allocated pursuant to state law and reduce water available for beneficial use. It would upend the settled expectations that have led to vast water infrastructure investments that literally sustain the West. Such a dramatic impact upon state and local water supplies could not have been within the contemplation of Congress when it enacted the NPDES point source permit requirements, 33 U.S.C. § 1342; indeed, Congress' enactment of section 101(g) of the Act demonstrates that it was *not*.

C. There Exists No Clear Congressional Statement of Intent Endorsing Such Interference with State Laws.

Land and water use is traditionally and primarily a state prerogative. *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Requiring NPDES permits for mere *water collection and delivery activities* would intrude upon

matters which are, as discussed above, "subject to the plenary control of the designated States." *California Oregon Power Co.*, 295 U.S. at 164. Under the Eleventh Circuit's opinion, this unwarranted intrusion on state sovereignty would occur in the absence of any clear directive from Congress that it intended this type of federal interference with the ability of states to control and manage their water resources.[24] Without such a "clear indication" the Eleventh Circuit opinion cannot stand. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As this Court recently reiterated in *SWANCC*, where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its intent. *SWANCC*, at 173. Not only does the Clean Water Act lack a clear message of Congress' intent to alter the federal-state framework, the opening provision of the Act is explicitly to the contrary, as this court recently recognized:

> Congress passed the CWA for the stated purpose of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In so doing, Congress chose 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

[24] It should not be forgotten that the owners and operators of the water systems are not adding pollutants to any waters prior to the water transport – they are simply moving the natural waters from one waterbody to another.

> water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

SWANCC, at 166-67, *quoting*, 33 U.S.C. § 1251(b). In short, Congress intended to honor traditional federal deference to both state water law and individual water rights allocated thereunder.

D. The Legislative History of the Clean Water Act Demonstrates Congress' Intent Not to Interfere in State Laws Governing the Use of Water.

Congress added Section 101(g), 33 U.S.C. § 1251(g), to the Clean Water Act in 1977 to (1) reaffirm the long-standing primacy of the states over water allocation, (2) protect water rights established by the states, and (3) direct federal agencies to cooperate with the states to develop pollution control programs that operate in concert with state water allocation programs. S. CONF. REP. No. 95, *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, pp. 186, 236 (1978) (hereinafter "1977 LEGISLATIVE HISTORY"). That Congress found it necessary to add section 101(g) after just five years to clarify an existing provision of the Act (section 510) underscores how serious it was about honoring state authority over water use. *Id.* at 531-32.

Senators Wallop and Hart co-sponsored the Senate floor amendment that became Section 101(g) in conference. S. DEB.: August 4, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY, at 1030. Senator Wallop, a conferee,

explained to the Senate that Section 101(g) of the conference substitute "speaks only – but significantly – to the rights of States to allocate quantities of their water and to determine priority uses." S. DEB.: December 15, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY, at 532. Senator Wallop emphasized:

> The amendment simply states that it's the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by the Act. It also states that it is the further policy of Congress that *nothing in this act will be construed for the purpose of superceding or abrogating rights to quantities of water which have been established by the States.*

1977 LEGISLATIVE HISTORY, at 532 (emphasis added).

E. Legitimate Water Quality Measures May Only Incidentally Affect the Use of Water.

Senator Wallop emphasized that the purpose of section 101(g) was to protect state water rights creation and administration from "[f]ederal land use planning," while at the same time to allow "[l]egitimate water quality measures" that may have "some effect on the method of water usage" and "may *incidentally affect* the use of water under an individual water right." 1977 LEGISLATIVE HISTORY, at 532 (emphasis added). Citing this legislative history, the Court addressed *state authority* under section

401, 33 U.S.C. § 1341,[25] to limit diversions by a hydropower project that proposed a minimum stream flow deemed inadequate by the State of Washington. *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). The Court reasoned that while "[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of [State] water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *Id.* at 720. The Court then held "that the State may include minimum stream flow requirements in a [state water quality] certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard." *Id.* at 723.

In what was at bottom a water allocation dispute between the developer and the state, the Court held that the *state* could impose a limitation – a minimum stream flow – on a state-issued water right. That this was only an *incidental effect* on the individual water right under the Clean Water Act is because neither the Court nor the Act mandated the result, which was reached by the state under section 401. Indeed, the Court did not, and in light of section 101(g) could not, endorse the use of the Clean

[25] Section 401 certification is required for a federal license or permit to conduct any activity that will discharge into navigable waters. 33 U.S.C. § 1341(a)(1). Notably, state certification under section 401 is *not* subject to EPA oversight, unlike section 402 NPDES permitting. *Compare* 33 U.S.C. § 1341 *with* § 1342(d). This embodies congressional deference to the states in situations likely to involve the use of water allocated pursuant to state law.

Water Act to deprive a water user of the ability to use water allocated pursuant to state water law.

The holding of *Miccosukee* threatens considerably more than incidental effects on state water allocations; it threatens wholesale derogation of state systems of water allocation and the abrogation of state recognized water rights. Rather than operating pursuant to state water law, transbasin diverters would have to forgo some diversions in order to avoid conveying *naturally* occurring pollutants into receiving water bodies. Depriving a water right of one or more of its essential elements – its source of supply, priority, quantity, or beneficial use – is not an "incidental effect," but goes to the heart of the right itself. In short, the real effect of *Miccosukee* is not incidental, it is a unilateral federal reallocation of water in derogation of state water laws.

II. Other Provisions of the Clean Water Act Address Water Quality Impacts from the Movement of Water.

EPA has recognized that pollution associated with dams and diversions "may not be amenable to the nationally uniform controls contemplated by section 402 because pollution problems are highly site-specific. . . ." *Gorsuch*, 693 F.2d at 177 n.62. In fact, Congress anticipated this problem of attempting to apply nationally uniform controls to the movement of water when it enacted the Clean Water Act. Rather than attempt to use the NPDES program, Congress structured the Act to give states flexibility in matters likely to affect the exercise of water rights through a program of non-point source controls.

A. Section 304(f) of the Clean Water Act Addresses the Control of Pollution from Changes in the Movement, Flow or Circulation of Waters Caused by Dams, Channels, Causeways, or Flow Diversion Facilities.

Section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), of the Clean Water Act provides that the EPA shall issue information on

> 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*.

Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 587 (CA6 1988) (quoting 33 U.S.C. § 1314(f)(2)(F)) (emphasis added). According to the Sixth Circuit, this language "supports the District of Columbia Circuit's view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the nonpoint source category of pollution." *Consumers Power*, at 588 (citing *Gorsuch*, at 177.) *See also* H. R. REP. No. 92-911, *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Printed for the use of the Committee on Public Works) Ser. No. 93-1, p. 796 (1973). Congress gave the states specific tools in the Clean Water Act to address nonpoint sources and to control "pollution resulting from ... changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F).

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

Along with the provisions of Section 304(f), Section 319 of the Clean Water Act "imposes on the states planning responsibilities, including the preparation of a nonpoint source management plan, commonly referred to as the § 319 report." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1027 (CA11 2002). In this report, a state[26] must identify waters which can reasonably meet water quality standards only through additional action to control nonpoint source pollution, and identify the categories, subcategories and particular sources of such pollution. 33 U.S.C. § 1329(a)(1). States[27] must also prepare a management plan that identifies "best management practices[28] and measures," i.e., implementation programs, to reduce pollutant loading, and a schedule of annual implementation milestones. *Id.* at § 1329(b). EPA provides grants to the states to implement such "319 management plans." In short, rather than mandate section 402 point source permit controls on the diversion and conveyance of water pursuant to state water law, Congress chose to utilize

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[26] In the absence of state action, EPA shall prepare the report. 33 U.S.C. § 1329(d)(3).

[27] A local water quality agency may prepare the management plan with the consent of the state where EPA has prepared the § 319 report. 33 U.S.C. § 1329(e).

[28] 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).

section 319 to foster the preparation and implementation of comprehensive *state* programs to control nonpoint sources of pollution, including dams and flow diversion facilities. *See* EPA, WATER QUALITY STANDARDS HANDBOOK, CH.2, Nonpoint Source Controls and Water Quality Standards (1987) (While the Clean Water Act does not establish a Federal regulatory program for nonpoint sources, it clearly intended that proper installation of state approved best management practices will achieve water quality standards). The states have ongoing "319 programs" that appropriately address nonpoint sources in a manner consistent with state water law.

C. Section 208 of the Clean Water Act Further Requires States or Local Governments to Prepare Areawide Waste Treatment Management Plans to Control Pollution from Major Categories of Nonpoint Sources.

According to the Court of Appeals for the District of Columbia, state and local control over the use of water resources represents sound public policy:

> [D]ams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that [§ 208] state areawide water quality plans are the better regulatory tool.

Gorsuch, 693 F.2d at 182.

Section 208 requires states to identify geographic areas with substantial water quality control problems and to designate "208 planning agencies" to prepare areawide

wastewater treatment management plans. 33 U.S.C. § 1288(a)(2). So-called "208 plans" must include processes to identify agricultural, silvicultural, mining, and construction sources of pollution, and "procedures and methods (*including land use requirements*[29])" to control such sources. *Id.* at § 1288(b)(2) (emphasis added).[30] Areawide plans thus identify priority water quality problems, and recommend control measures. In the context of this case, areawide plans can address not only pollution problems in the receiving waters from transbasin conveyances, but also the control of water quality problems in source waters before it is diverted. Areawide plans thus provide another appropriate tool for states to use to control nonpoint sources of pollution. The states have long had approved areawide plans in place to address nonpoint sources of pollution.

CONCLUSION

Few issues are more critical to states, municipalities, conservancy and conservation districts, canal and ditch companies, individual farmers, ranchers and residents in the West than their continued ability to use scarce water resources when and where needed. This necessarily involves the diversion and transbasin conveyance of water

[29] Like water allocation decisions, land use regulations are primarily a state prerogative, most appropriately handled by the states and local governments when necessary to control water pollution. *SWANCC*, 531 U.S. at 174.

[30] EPA makes grants to the states to develop and operate such plans. 33 U.S.C. § 1288(f).

through manmade pipelines, tunnels and canals, and natural water bodies. Such water management activities have always been, and must remain, a state prerogative.

The Eleventh Circuit's conclusion that the movement of *natural* waters from one stream or river to another constitutes a regulated "addition" of pollutants is at odds with federal deference to state water laws and the Clean Water Act. The movement of water containing pollutants from one watercourse to another is not a point source discharge subject to permitting, but is properly dealt with by the states pursuant to the nonpoint source provisons of the Act.

There is no doubt that the Eleventh Circuit's decision would significantly interfere with the federal/state balance relative to the use of water, and reduce water supplies in the arid west. *Amici* therefore urge the Court to reverse the decision.

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