EARTHJUSTICE
COMMENTS ON PROPOSED RULE
PART V

The following section outlines the process by which the EPA's proposed rule on water transfers came to be drafted. As shown below, the process was heavily influenced by lobbying efforts of a very small group of Western water owners.

VII. THE PROCESS LEADING UP TO THE PROPOSED RULE REVEALS THAT IT WAS INTENDED TO ADMINISTRATIVELY OVERRULE THE SUPREME COURT'S DECISION IN THE *MICCOSUKEE* CASE THAT CONVEYANCES THAT DO NOT THEMSELVES GENERATE POLLUTANTS REQUIIRE NPDES PERMITS

The process by which the proposed rule was created reveals that the rule's purpose and intent are to overrule S-9 and create a blanket exemption to the Clean Water Act. As detailed below, large western water users have made a concerted effort to secure such an exemption. In one document given by western interests to EPA, numerous different escape routes are outlined to avoid NPDES regulation, including a myriad of interpretations the agency could use to create a loophole for water transfers.[1] All of these tactics—changing the definition of addition, changing the definition of discharge, creating an exemption in 40 CFR 122.3, etc.—are variations on the 'convey' theory made and lost in the *Miccosukee* case. Unfortunately, EPA has acquiesced in this attempt and adopted an interpretation advocated by these interests.

A. Backdrop

Dating back to 1975, the EPA interpreted section 402 as applying to discharges from one navigable water to another.[2] Further, the agency concluded that section 101(g) did not bar NPDES regulation of water allocations.[3] Over and over again, the courts agreed with these conclusions and found that the Clean Water Act mandated regulation of interbasin water transfers.[4]

1. EPA adjudicates the issue: The Clean Water Act requires an NPDES permit for navigable water to navigable water

On June 27, 1975 EPA issued an agency opinion concluding that irrigation ditches that discharge to navigable waters require NPDES permits even if the ditches themselves qualify as navigable waters. *In re: Riverside Irrigation Dist.*, 1975 WL 23864 (Off. Gen. Couns., June 27, 1975). The opinion states that its findings are based on the plain meaning and legislative intent of the Act. *Riverside Irrigation District* at * 1. This opinion was authored pursuant to the provisions of former 40 CFR 125.36, which contained rules governing evidentiary hearings for NPDES permits. *In the Matter of 446 Alaska Placer Mines More of Less, NPDES Appeal No. 84-13, November 6, 1985*, 1985 WL 287131 (E.P.A.). These rules expressly excluded issues of law from the adjudicatory proceeding by requiring the presiding officer to refer issues of law to the General Counsel for a decision. *In the Matter of 446 Alaska Placer Mines More of Less, NPDES Appeal No. 84-13, November 6, 1985*, 1985 WL 287131 (E.P.A.). 40 CFR 125.36(m)(1) specifically required referral of "questions relating to the interpretation of provisions of the Act, and the legality and interpretation of regulations promulgated pursuant to the Act." The purpose of this section was "to achieve Agency-wide consistency in the interpretation of the Act. . . ." *In the Matter of National Steel Corporation, NPDES Appeal No. 75-15, January 7, 1976*, 1976 WL 38367 (E.P.A.). The decisions of the General Counsel were final and binding on the Regional Administrator (who made the initial decision), but could be reviewed by the Administrator in his discretion if the decision was appealed. *In the Matter of: National Pollutant Discharge Elimination System Permit For: Beker Phosphate Corporation Manatee County, Florida,*

NPDES Appeal No. 78-5, February 22, 1979, 1979 WL 22678 (E.P.A.). The opinion itself states that the parties had an opportunity to provide written briefs in support of their respective positions. *Riverside Irrigation District* at *1. Thus the opinion results from a formal adjudicatory proceeding and was written with the intent of creating a consistent Agency-wide interpretation on the issue of whether the discharge of pollutants from one navigable water to another required an NPDES permit.

2. EPA interprets the Act: § 101(g) does not trump NPDES regulation of water allocations

On November 7, 1978, EPA clarified it's position as to the bearing of section 101(g) on NPDES regulation in a memorandum issued to all EPA Regional Administrators from Thomas C. Jorling, Assistant Administrator for Water, and Joan Z. Berrstein, General Counsel. EPA Memorandum, *State Authority to Allocate Water Quantities – Section 101(g) of the Clean Water Act*, available at http://www.epa.gov/waterscience/library/wqstandards/waterquantities.pdf (Nov. 7, 1978). EPA looked to the plain language and legislative history of these sections to determine that the requirements of NPDES permitting are not trumped by these provisions. EPA Memorandum at p. 3. The memorandum points out that NPDES regulation may incidentally affect water rights and uses without running afoul of § 101(g) and § 510(2), stating that "[m]any persons have interpreted §101(g) as prohibiting EPA from taking any action which might effect water usage. You should be aware that such an interpretation is incorrect." EPA Memorandum at p. 1.

3. The courts weigh in

Like the EPA interpretations, the courts have consistently held that NPDES permits are required when interbasin transfers discharge pollutants into navigable waters and that section 101(g) is not a bar to regulation.[5] In 1994, the Supreme Court held that sections 101(g) and 510(2) preserve state authority to allocate water between users, but do not limit the scope of pollution controls that can be imposed on users who obtain state water allocations. *PUD No. 1 v. Washington Dept of Ecology*, 511 U.S. 700, 720 (1994).

On December 19, 1996, the First Circuit addressed the pumping of polluted water from the Pemigewasset River into pristine Loon Pond, a drinking water source located in the White Mountain National Forest in New Hampshire. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). The trial court concluded "that the transfer should not be considered an addition of pollutants to Loon Pond because the river and the pond are all part of a singular entity, 'the waters of the United States.'" *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1296 (1st Cir. 1996). The First Circuit noted that under the lower court's analysis no permit would be required "regardless of how polluted the Pemigewasset was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result." *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1297 (1st Cir. 1996). Accordingly, the court held that the pond and river are two distinct waters and that the transfer from one to the other constitutes an addition requiring an NPDES permit. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996).

On October 23, 2001, the Second Circuit found that an NPDES permit was required when an interbasin transfer added pollutants to the receiving water body. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481 (2nd Cir. 2001). In *Catskill*, the City of New York used a tunnel to transport water from a reservoir to a creek and argued that no NPDES permit was required because the city was not adding pollutants to the waters of the United States when viewed as a unitary whole. The court discarded this approach because:

> Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word "addition."

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 493 (2nd Cir. 2001)

The Eleventh Circuit agreed on February 1, 2002 holding in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002) *reversed and remanded on other grounds* 541 U.S. 95 (2004), that an NPDES permit was required where the transfer of one body of water to another added pollutants when the transfer is the cause in fact of the release of pollutants, *i.e.* the transfer from one body of water to the other would not occur naturally.

In 2003, the Ninth Circuit held that the discharge of unaltered groundwater into surface water required an NPDES permit. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.,* 325 F.3d 1155 (9th Cir. 2003) *cert. denied* 540 U.S. 967 (2003). The court reasoned that because the groundwater altered the water quality of the receiving water, it was a pollutant. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.,* 325 F.3d 1155, 1162 (9th Cir. 2003) *cert. denied* 540 U.S. 967 (2003). Although the court analyzed the issue by reference to the definition of "pollutant" in the Clean Water Act, it noted that the analysis would be largely the same under the term "addition." *Northern Plains Resource Council v. Fidelity Exploration and Development Co.,* 325 F.3d 1155, 1163 (9th Cir. 2003) *cert. denied* 540 U.S. 967 (2003). Referring to the Eleventh Circuit's decision in *Miccosukee* and the Second Circuit's decision in *Catskill I,* the court wrote, "The cases apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another." *Northern Plains Resource Council v. Fidelity Exploration and Development Co.,* 325 F.3d 1155, 1163 (9th Cir. 2003) *cert. denied* 540 U.S. 967 (2003).

B. The Highjacking of EPA Policy

Despite the agreement between longstanding EPA interpretations and case law in numerous Circuits and the Supreme Court, EPA inexplicably changed its reading of sections 402 and 101(g) as not requiring regulation of interbasin water transfers in late 2003.[6] This change came after an intense lobbying effort by western water owners angling for an exemption from the

Act.[7] To justify the policy change, the agency at first argued that the plain meaning of the Clean Water Act required the term "navigable waters" to be read as a singular unit, thereby precluding regulation of discharges from one navigable water to another.[8] When this unitary waters theory failed to impress the courts, the agency argued the Act was ambiguous and decided to opt for a "holistic" reading of the Act, creating an exemption for water transfers entirely out of thin air.[9] As the following sections demonstrate, the western water owners continual failure in the courts triggered a movement to overturn S-9 through administrative action. Unfortunately, EPA acquiesced in this scheme at the expense of water quality and the directives of the courts.

1. The Supreme Court speaks; The Solicitor General flip-flops

Following the Eleventh Circuit's decision in *Miccosukee*, Defendant South Florida Water Management District petitioned the United States Supreme Court to grant a writ of certiorari. In May 2003 the Solicitor General filed a brief expressing the views of the United States in which the United States argued that certiorari should be denied given the lack of disagreement in the circuits and the limited national impact of the ruling.[10] This position was supported by the Florida Department of Environmental Protection and by EPA Region 4 as being consistent with prior permitting policy of looking at water transfers on a case by case basis.[11] The Solicitor General took this position despite being extensively informed of the possible effect of the decision on water transfers in the West.[12] As the representative of the United States, the Solicitor General's position was presumably influenced by the views of the EPA and other agencies.[13]

But, in an abrupt reversal of position, the Solicitor General, after certiorari was granted, filed a brief on the merits on September 10, 2003 arguing that the plain meaning of the Clean Water Act called for a reading of navigable waters as a singular entity.[14] This plain meaning had apparently previously escaped the Solicitor General. The reversal in position came after a concentrated lobbying effort by the law firm Trout, Raley, Montano, Witwer & Freeman, P.C. which included a letter writing campaign, conference calls and meetings with EPA, DOI and the Justice Department.[15] As noted in Board Minutes of the Municipal Subdistrict, Northern Colorado Water Conservancy District from September 12, 2003, the Trout firm "fostered western efforts to encourage the United States Solicitor General to strongly oppose the notion that a discharge permit is required for trans-basin diversions, which he did in his brief in support of the petitioner (after failing to do so in his brief on certiorari)."[16] These efforts included sending Mark Pifher, Director of the Colorado Water Quality Control Division and a former attorney with the Trout firm, to brief EPA and the Department of Justice in Washington on the issue.[17] Mr. Pifher's trip was paid for by the National Water Resources Association (NWRA) which was reimbursed by the Northern Colorado Water Conservancy District, both clients of the Trout firm.[18] Interestingly, Mr. Pifher, who was once considered for the job of Assistant Administrator for Water at EPA, also worked with the Water Quality Subcommittee of the Western States Water Council (WSWC) in formulating a resolution opposing the Eleventh Circuit's decision in August of 2003 and suggested that the resolution be forwarded to EPA, DOI and the Solicitor General's Office.[19]

Clean Water Act and federalism issues, such as the authority of the states to allocate the right to the use of water under state law. Legal counsel and staff, in coordination with Mr. Allen Freemyer, the District's and Subdistrict's Washington, D.C., lobbyist, have been leading and coordinating western efforts to influence the government's position, including letters from western attorneys general to Secretary Norton and Solicitor General Olson, conference calls and meetings with the Interior Department and the Environmental Protection Agency (EPA), and an NWRA-generated letter from 12 western senators to the Solicitor General. Legal counsel also arranged for Mr. Mark Pifher, Director of the Colorado Water Quality Control Division, to brief the EPA and Justice Department attorneys in Washington, D.C. Apparently, the Interior Department sent a strongly-worded letter to the Justice Department stating that NPDES permits should not be required for western trans-basin diversions. Mr. Trout concluded by stating that the *Miccosukee* case could have a direct impact on

Figure 29. Excerpt from legal briefing by Bob Trout, of Trout, Raley, Montano, Witwer & Freeman, P.C., to the Municipal Subdistrict, Northern Colorado Water Conservancy District.[20]

In addition to its various lobbying efforts, the Trout Firm, with help from Mark Pifher[21], drafted an *amicus* brief on behalf of National Water Resources Association (NWRA) and other western organizations.[22] The Central Arizona Water Conservation District (CAWCD) joined with NWRA in this effort to overturn the Eleventh Circuit's ruling.[23] Western interests had been recruited by the South Florida Water Management District and the City of New York to file *amicus* briefs, with the City to shoulder the majority of costs.[24] The Trout Firm also sought to ensure *amicus* briefs were filed by western states.[25] As seen in Figure 30, the firm was also responsible for drafting the *amicus* filings for the states of Colorado and New Mexico, which was joined by another eleven states.[26]

will be argued in January 2004. In coordination with Mr. Allen Freemyer, the Subdistrict's Washington, D.C., lobbyist, counsel is fostering western efforts encouraging the federal government to strongly oppose the notion that a discharge permit is required for trans-basin diversions, a position the Solicitor General failed to take in his brief on certiorari. Counsel will file an amicus brief for the National Water Resources Association (NWRA) and other western organizations, on behalf of western water users. Counsel will also be drafting an amicus brief for the western states, with the support of the Colorado Water Conservation Board (CWCB), to be filed under the auspices of the States of Colorado and New Mexico. Counsel is also monitoring *Catskill Mountains Chapter of*

Figure 30. Excerpt from legal briefing by Bob Trout, of Trout, Raley, Montano, Witwer & Freeman, P.C., to the Municipal Subdistrict, Northern Colorado Water Conservancy District.

At oral argument, Justice O'Connor characterized the unitary waters approach as "extreme" in an exchange with counsel for the South Florida Water Management District, as seen in Figure 31.

MR. BISHOP: We take the position, first of all, that all of the navigable waters of the United States are unitary for purposes of determining whether they are—

QUESTION: That's an extreme position, and you probably have a fall-back position.

MR. BISHOP: And the alternative—

(Laughter.)

Figure 31. Excerpt from Oral Argument in *Miccosukee* before the Supreme Court [27]

On March 23, 2004 the Supreme Court issued its decision in *Miccosukee. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla.*, 541 U.S. 95 (2004). Justice O'Connor writing for a unanimous Court held that NPDES regulation was required regardless of whether the pollution was generated by the point source or merely conveyed by it. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla.*, 541 U.S. 95, 105 (2004). This 'convey' argument made by the South Florida Water Management District was viewed as "untenable" by the Court and was the heart of the *Miccosukee* decision. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla.*, 541 U.S. 95, 105 (2004) (noting that the 'convey' theory was the "precise question on which we granted certiorari"). While the Court noted that requiring NPDES permits for water transfers may raise the costs of water transfers prohibitively, the Court wrote, "it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla.*, 541 U.S. 95, 108 (2004).

Additionally, the Court strongly criticized the unitary waters theory, a variation of the 'convey' theory, as inconsistent with the Act's stated purpose of protecting individual water bodies. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla.*, 541 U.S. 95, 107 (2004). Although the government argued that deference should be given to the longstanding view of the EPA that navigable waters into navigable waters did not constitute an addition under the Clean Water Act, the Court rejected this argument noting, "[T]he Government does not identify any administrative documents in which EPA has espoused that position. Indeed, an amicus brief filed by several former EPA officials argues that the agency once reached the opposite conclusion." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla.*, 541 U.S. 95, 107 (2004) (referring to the 1975 EPA Agency Opinion, *In re: Riverside Irrigation Dist.*, 1975 WL 23864 (Off. Gen. Couns., June 27, 1975), submitted in an *amicus* brief filed by former EPA Administrator Carol Browner et al.).

2. The wagons are circled

The Trout firm and other western water owners were put on the defense by the Supreme Court's decision in *Miccosukee.*[28] Trout had predicted a divided Court and wrote that it was "inconceivable" Justice O'Connor, an Arizona rancher, could rule against western interests and the administration.[29] A meeting was convened in Denver by the Trout Firm in which various western interests were present including the National Water Resources Association and the Central Arizona Water Conservation District (CAWCD).[30] The idea was to launch a united effort to overturn *Miccosukee* and related cases.[31] This effort would include the filing of *amicus* briefs in related cases and lobbying efforts in the legislative and executive branches.[32] The western interests recognized that action would be needed outside the courts.[33]

earlier decision. I'm not particularly optimistic, but we need to fight this issue wherever we can, we need to get some wins in a court somewhere or we're going to need administrative relief or we're going to need relief from Congress. There's just no

Figure 32. Excerpt from Board of Directors Meeting, CACWD.[34]

The effort envisioned spending tens of thousands of dollars in 2004 and 2005 alone.[35] Along with the law firm of Perkins Coie, LLP, the Trout Firm would take the lead.[36]

3. The *FWF* litigation and a new interpretation

Following the *Miccosukee* decision, the United States on behalf of the Army Corps of Engineers and the United States Environmental Protection Agency moved to intervene on March 11, 2005 in the *Florida Wildlife Federation v. South Florida Water Management District* litigation involving interbasin water transfers, then well under way.[37]

On August 3, 2005, EPA General Counsel Ann Klee contacted Peter Nichols, an attorney with Trout, Raley, Montano, Witwer & Freeman, P.C. to inform him that a brief would be filed in the *FWF* litigation based on a memo that would be signed as an agency interpretation intended to garner deference with the court.[38] According to Klee the delay in producing the document occurred because "we have been through several different approaches."[39] As Figure 33 illustrates, Klee also thanked Nichols for all the help he provided. Perkins Coie, the other law firm working with the western interests, also provided materials to the agency.[40] These documents outlined a slew of regulatory options and arguments the agency could take to exempt water transfers from NPDES permitting, all variations of the same theme—a recasting of the 'convey' theory made in *Miccosukee* and discarded by the Supreme Court.[41] They also noted that one of the downsides of EPA permitting was that EPA may develop more stringent permit terms than could be negotiated with state permitting authorities.[42]

P	TO: Peter Nichols		DATE: 8/3/05	TIME: 1:07 PM
H	FROM: Ann Klee		PHONE NUMBERS:	
O	OF: EPA			
N	M	Hi Peter, Ann Klee at EPA. I just wanted to follow up. I talked to Mark Limbaugh		
E	E	I guess the day before yesterday or yesterday and he mentioned that you two had		
	S	talked and I just wanted to circle back and tell you know that we are on track to file		
M	S	a brief on Friday in the Miccosukee litigation. It will be based on a memo that Ben		
E	A	Grumbles and I are going to be jointly signing as an agency interpretation on the		
M	G	question of whether or not water transfers require NPDES permits. He mentioned		
0	E	that you had expressed some concern about where we would be on unitary waters.		
We are not basing the interpretation or the memorandum on the unitary waters theory but instead are looking at a statutory construction based argument looking at 101g and 304f and the statute as a whole rather than simply trying to focus solely on the term addition and conclude, as you might expect, that the agency's view that the better interpretation of the entire statute is that Congress did not intend for water transfers to require NPDES permits. We do have some discussion of the case law, including the Miccosukee decision and the language of meaningful distinctness and what we think that might mean. And, the other thing that the statement does is that it indicates that the agency will initiate a rulemaking to address this issue. So, we are hoping that it will at least signal the court that if they don't give a Chevron deference which we would certainly like but recognize that this is more in the nature of an interpretive rule that it should proceed cautiously since the agency will be proceeding with a rulemaking. So, I would be happy to talk about it further but it probably won't be ready until Friday. We are still working on word smithing and we have been through several different approaches which is part of why it has has taken so long. I appreciate all of the help you have given along the way. Hope this is helpful. I will be out in Texas but if you want to call Steve Nugeborn on Friday he can get you a PDF version of the memo once it is signed. Thanks.				

Figure 33. Transcription of Ann Klee's Phone Message For Peter Nichols of the Trout Firm.

On August 5, 2005, the day summary judgment motions were due, the United States filed the newly created Agency Interpretation with the court.[43] In another change of position, the Interpretation argues that the Clean Water Act is ambiguous on the issue of NPDES permitting of water transfers and must be examined as a whole.[44] Creating a blanket exemption for water transfers, the interpretation argued that it was more appropriate to regulate water quality problems caused by interbasin transfers at the source of the pollution.[45] This new spin on the 'convey' argument foreclosed by *Miccosukee* was precisely the same as the argument made in

amicus briefs filed by the Trout Firm in *Miccosukee* and other cases.[46] The interpretation made no mention of the 1978 Agency Memorandum regarding section 101(g); nor was this document produced by the United States at trial. The interpretation also doesn't discuss the Solicitor's previous argument that the Act contained a plain meaning. The interpretation did, however, indicate that EPA would be doing a rule-making, apparently to bolster judicial regard for the interpretation.[47] Interestingly, the United States had previously raised a mootness defense in its answer in intervention.[48]

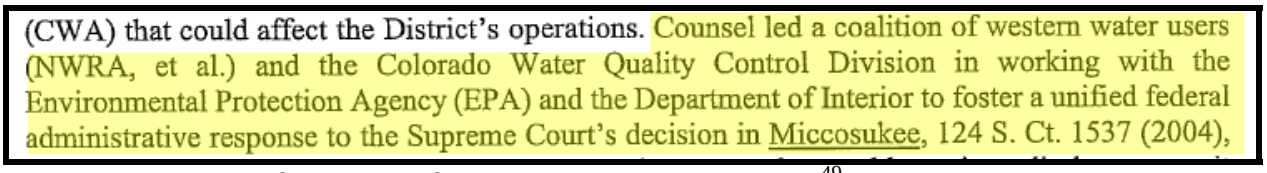
(CWA) that could affect the District's operations. Counsel led a coalition of western water users (NWRA, et al.) and the Colorado Water Quality Control Division in working with the Environmental Protection Agency (EPA) and the Department of Interior to foster a unified federal administrative response to the Supreme Court's decision in Miccosukee, 124 S. Ct. 1537 (2004),

Figure 34. Excerpt of Legal Briefing by Bob Trout to NCWCD[49]

On September 28, 2005 a coalition of western water groups including NWRA represented by Trout, Raley, Montano, Witwer & Freeman, P.C., moved to appear as *amicus curiae* and participate at the summary judgment hearing in the *FWF* litigation.[50] At oral argument counsel for *amici* presented a doomsday scenario arguing that the court's ruling would affect countless western water transfers.[51] The *amici* argued that extremely large numbers of new NPDES permits might be needed, especially for western water transfer projects, and that requiring NPDES permits for such projects would impose prohibitive costs and administrative burdens on western water users.

This argument had been presented several times by the Trout Firm and is clearly laid out in a CLE presentation by Peter Nichols of the Trout Firm, as seen in Figure 35.[52] In the document, Mr. Nichols points to the Bureau of Reclamation's Colorado-Big Thompson project as illustrative of the possible impacts of NPDES permitting of water transfers. His choice is not surprising, given that the project is operated by the Northern Colorado Water Conservancy District, a client of the Trout Firm.[53] Mr. Nichols has consistently argued a doomsday scenario in which: 1) every transfer would require enormous prohibitively expensive treatment facilities; or 2) treatment would be impossible; or 3) prohibitively expensive or impossible treatment would be required seventeen times for the same water.[54]

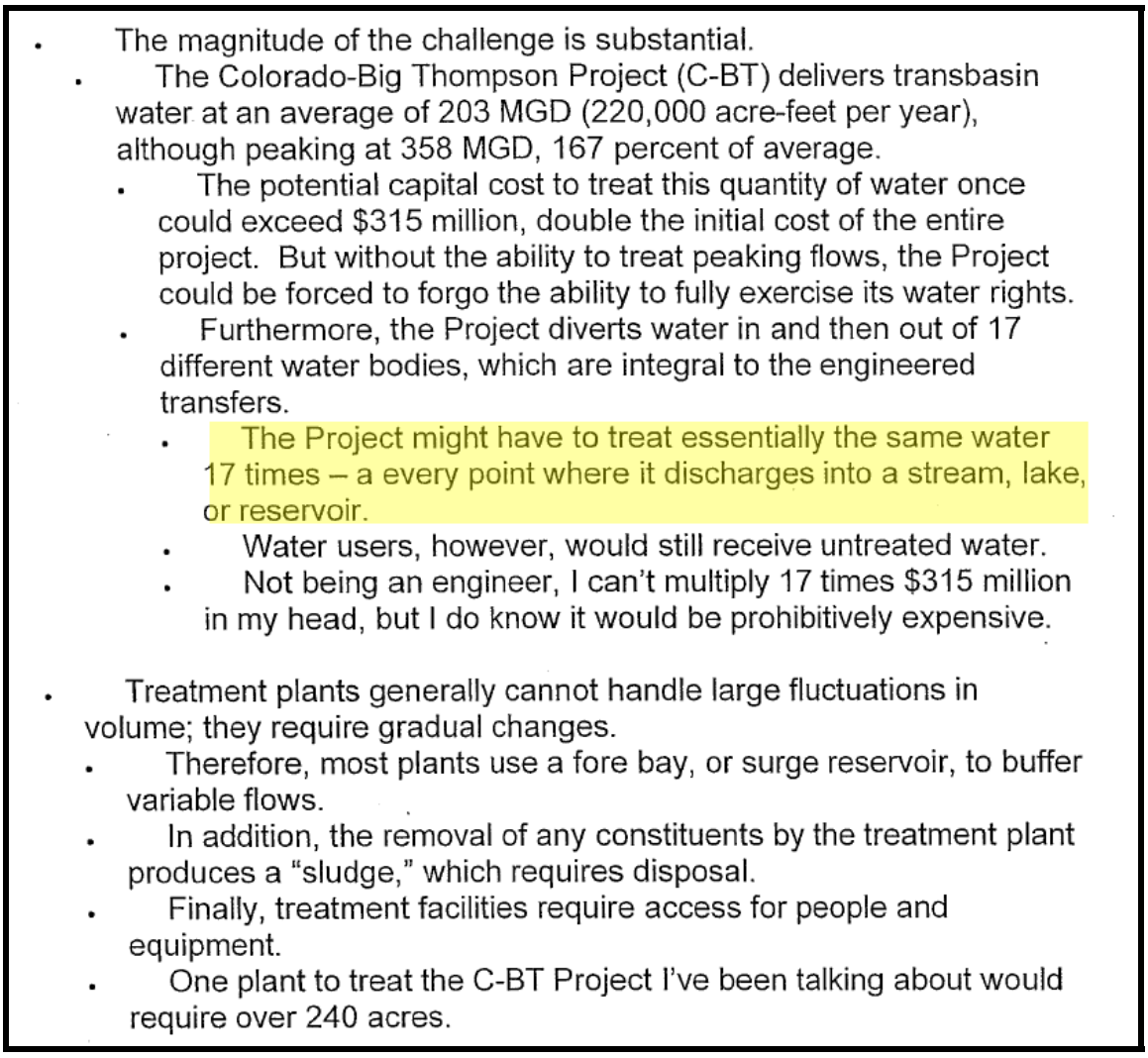

Figure 35. Excerpt of CLE materials prepared by Peter Nichols of the Trout Firm.

According to Mr. Nichols, the end result is that water transfers would effectively be halted in the West.[55] In a variation of this theme, the South Florida Water Management District produced experts on western water resources, who argued that NPDES permitting required the total elimination of all pollution from water bodies and would therefore shut down water transfers in the West.[56] This argument too has appeared before in writings of the Trout firm.[57]

Despite these mischaracterizations of both the Clean Water Act and the requirements of NPDES permitting by the District and *amici*, neither the depositions of the South Florida Water Management District's experts (one of which was recommended by *amici*), nor the depositions of experts for the United States revealed any water quality problems in receiving waters caused by western water transfers.[58] In fact at trial, the attorneys for the United States stipulated that none of the representative western water transfers they were presenting produced a single water quality problem in the receiving water which would violate water quality standards, as seen in Figure 36.[59]

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MS. RUDOLPH: The United States and the plaintiffs, including the Tribe, agree that there are engineered water transfers in the western United States. These next two witnesses will discuss four of them. The United States and the plaintiffs --

THE COURT: Four of what?

MS. RUDOLPH: Four water transfer projects.

The United States and the plaintiffs, including the Tribe, agree that there is no record evidence that any of the four trans-basin water transfers cause or contribute to any exceedence of any water quality standard in the receiving water body.

With respect to any of the other water transfers discussed by these two witnesses regarding these four projects, no party to this stipulation contends that any such transfer

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caused or contributed to a water quality standard exceedence in the receiving water body.

MR. ARANA: Your Honor, that's correct, we did enter into that stipulation, but we would like to make clear that we object to the testimony that they would like to put on because it is irrelevant. It has nothing to do with the pump stations at issue in this case.

THE COURT: Ms. Rudolph, what is the relevance of what you would like me to hear? None of these transfers contribute to water quality standard exceedence in the receiving water bodies.

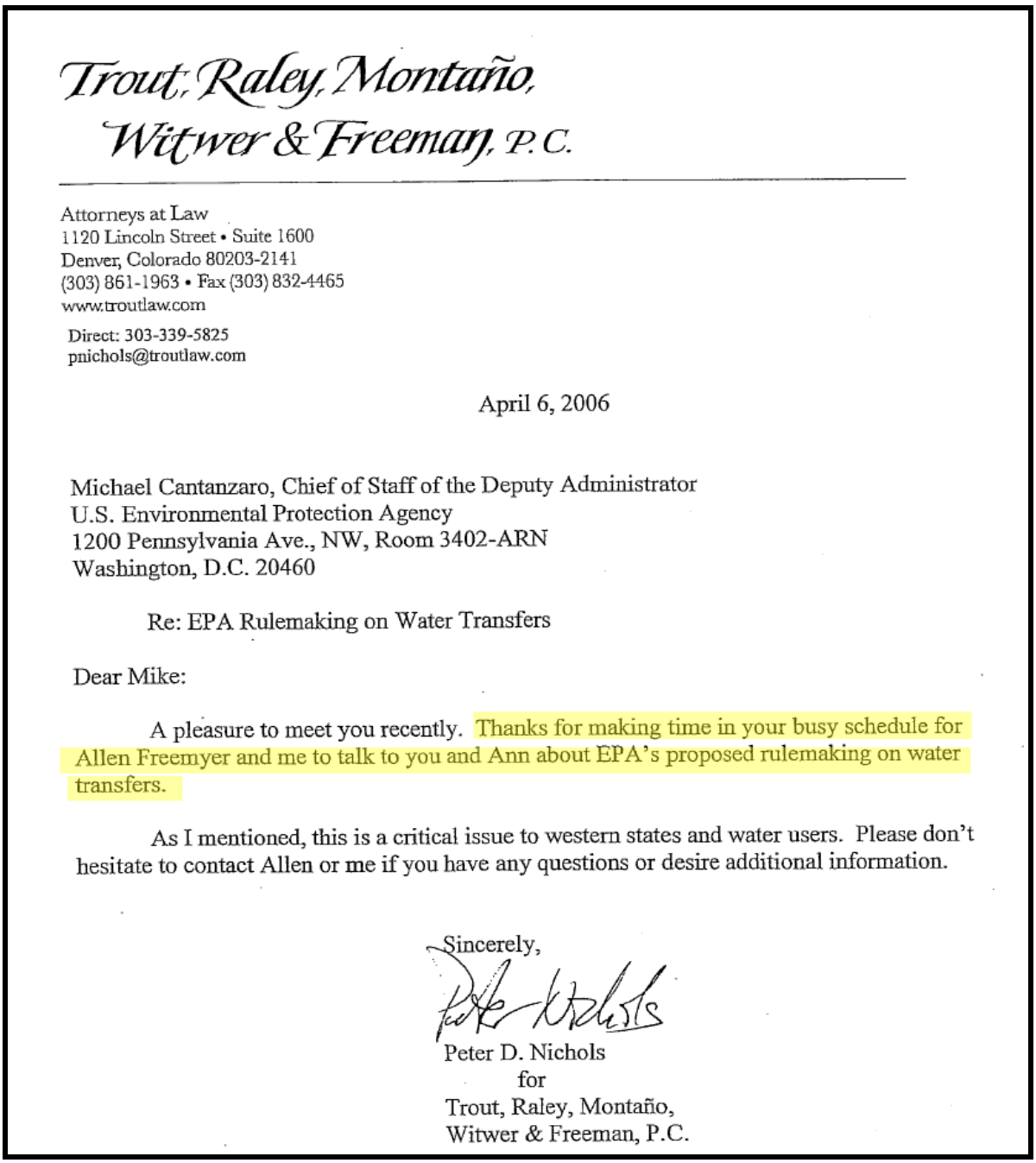
Figure 36. Excerpt of United States Stipulation from *FWF* Trial Transcript.

The experts presented by the United States at trial indicated that these western projects move water which is pretty much pure snow melt.[60] In fact at trial, the United States and the District failed to show any inordinate regulatory burden that would be caused by the NPDES permitting of interbasin water transfers. Of note is that the United States' did not offer a single witness from EPA to testify regarding permitting, western projects, or water quality issues related to water transfers.[61]

4. A rule is born

In keeping with the promise made in the August 5, 2005 interpretation, EPA initiated rulemaking and on June 1, 2006, the United States filed a copy of the proposed rule with the *FWF* court.[62] Once again, the agency spent its time listening to the western interests who had mobilized to seek an exemption.[63] As Figure 37 shows, EPA staff met with Peter Nichols of the

Trout Firm and Allen Freemyer, the Washington lobbyist for NCWCD, to discuss the rulemaking.[64]



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April 6, 2006

Michael Cantanzaro, Chief of Staff of the Deputy Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, Room 3402-ARN
Washington, D.C. 20460

Re: EPA Rulemaking on Water Transfers

Dear Mike:

A pleasure to meet you recently. Thanks for making time in your busy schedule for Allen Freemyer and me to talk to you and Ann about EPA's proposed rulemaking on water transfers.

As I mentioned, this is a critical issue to western states and water users. Please don't hesitate to contact Allen or me if you have any questions or desire additional information.

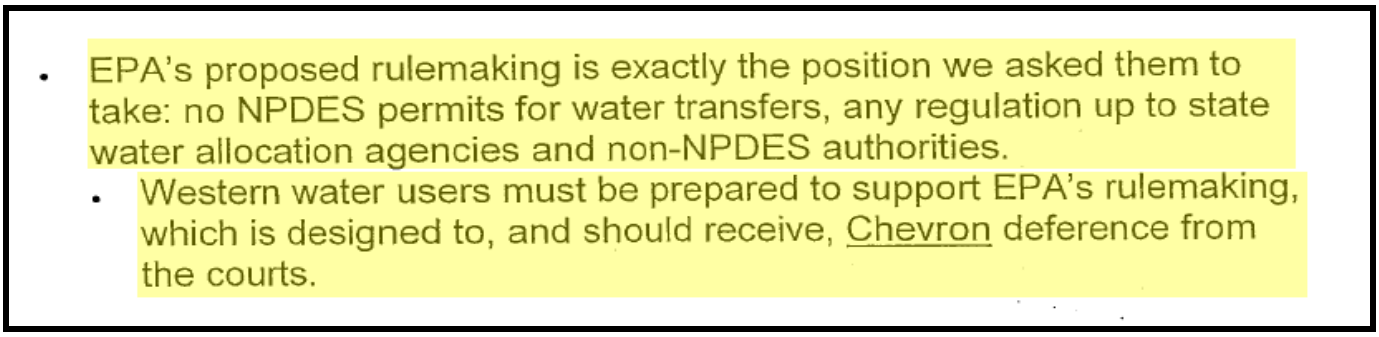
Sincerely,

Peter D. Nichols
for
Trout, Raley, Montaño,
Witwer & Freeman, P.C.

Figure 37. Letter to EPA from Peter Nichols of the Trout Firm

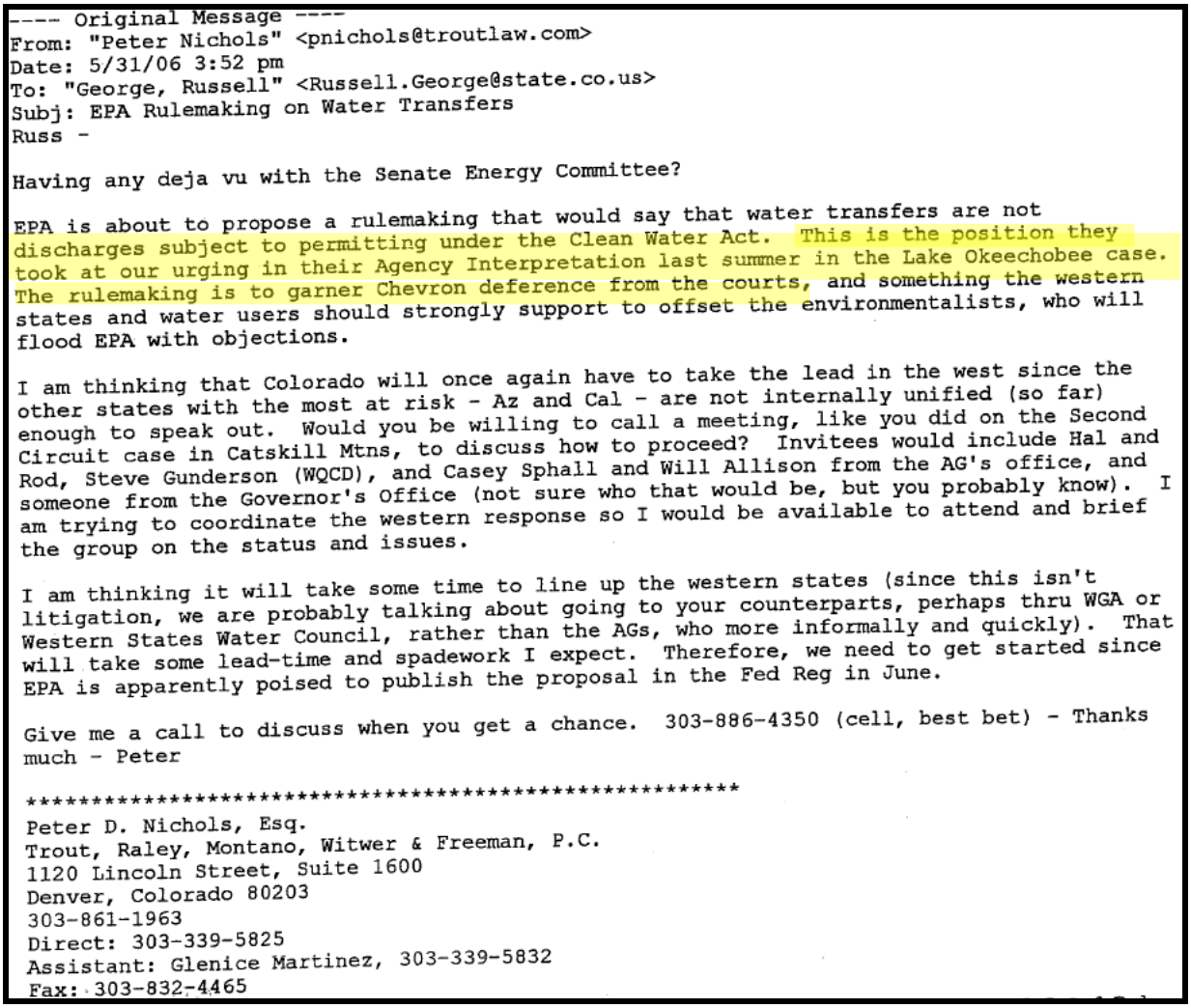
Interestingly, the proposed rule adopted one of the 'convey' strategies advocated by the Perkins Coie Firm, and invented an exemption for water transfers in 40 C.F.R. § 122.3.[65] However, even Perkins Coie recognized the weakness of the strategy selected by EPA and deemed it "very vulnerable to attack" because without express statutory authority, a new exemption is vulnerable to attack under *Costle*.[66] Despite this assessment, the proposed rule codified the position

advocated by the Trout, Raley, Montano, Witwer & Freeman Firm and designed to receive deference from the courts, as Nichols explains in the following CLE materials and email.[67]



- EPA's proposed rulemaking is exactly the position we asked them to take: no NPDES permits for water transfers, any regulation up to state water allocation agencies and non-NPDES authorities.
  - Western water users must be prepared to support EPA's rulemaking, which is designed to, and should receive, Chevron deference from the courts.

Figure 38. Excerpt form CLE materials prepared by Peter Nichols of the Trout Firm



---- Original Message ----
From: "Peter Nichols" <pnichols@troutlaw.com>
Date: 5/31/06 3:52 pm
To: "George, Russell" <Russell.George@state.co.us>
Subj: EPA Rulemaking on Water Transfers
Russ -

Having any deja vu with the Senate Energy Committee?

EPA is about to propose a rulemaking that would say that water transfers are not discharges subject to permitting under the Clean Water Act. This is the position they took at our urging in their Agency Interpretation last summer in the Lake Okeechobee case. The rulemaking is to garner Chevron deference from the courts, and something the western states and water users should strongly support to offset the environmentalists, who will flood EPA with objections.

I am thinking that Colorado will once again have to take the lead in the west since the other states with the most at risk - Az and Cal - are not internally unified (so far) enough to speak out. Would you be willing to call a meeting, like you did on the Second Circuit case in Catskill Mtns, to discuss how to proceed? Invitees would include Hal and Rod, Steve Gunderson (WQCD), and Casey Sphall and Will Allison from the AG's office, and someone from the Governor's Office (not sure who that would be, but you probably know). I am trying to coordinate the western response so I would be available to attend and brief the group on the status and issues.

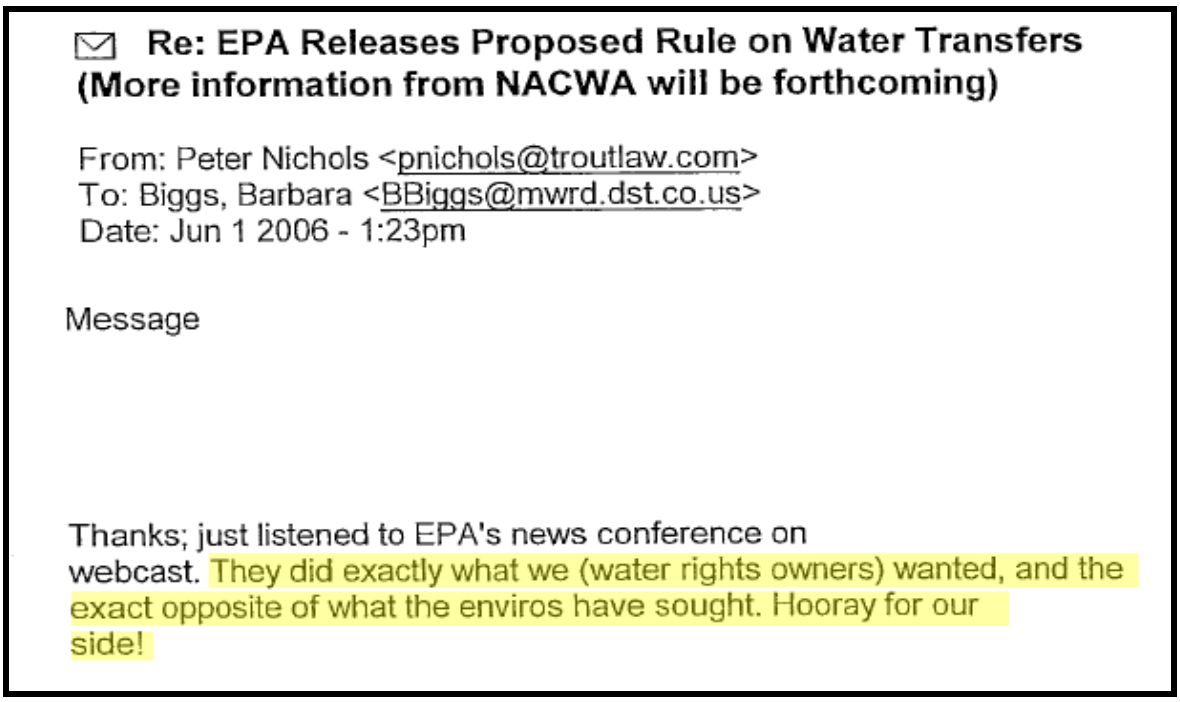
I am thinking it will take some time to line up the western states (since this isn't litigation, we are probably talking about going to your counterparts, perhaps thru WGA or Western States Water Council, rather than the AGs, who more informally and quickly). That will take some lead-time and spadework I expect. Therefore, we need to get started since EPA is apparently poised to publish the proposal in the Fed Reg in June.

Give me a call to discuss when you get a chance. 303-886-4350 (cell, best bet) - Thanks much - Peter

****
Peter D. Nichols, Esq.
Trout, Raley, Montano, Witwer & Freeman, P.C.
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963
Direct: 303-339-5825
Assistant: Glenice Martinez, 303-339-5832
Fax: 303-832-4465

Figure 39. Email from Peter Nichols of the Trout Firm to Russell George, Executive Director of the Colorado Department of Natural Resources.

Needless to say, as seen in Figure 40, Peter Nichols and the water rights owners were very pleased.[68]



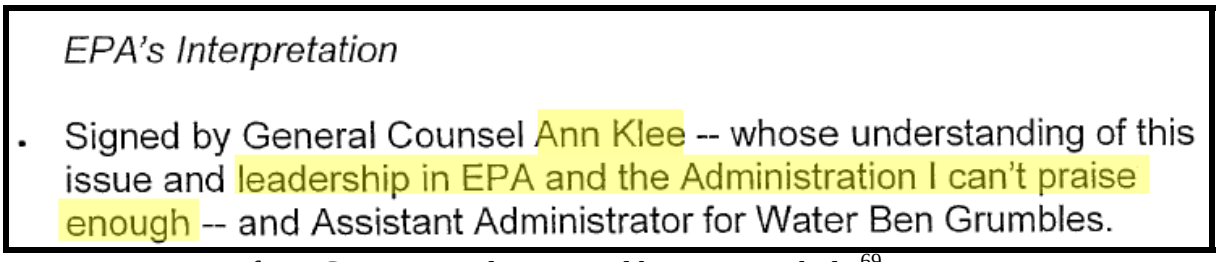
Re: EPA Releases Proposed Rule on Water Transfers (More information from NACWA will be forthcoming)

From: Peter Nichols <pnichols@troutlaw.com>
To: Biggs, Barbara <BBiggs@mwrd.dst.co.us>
Date: Jun 1 2006 - 1:23pm

Message

Thanks; just listened to EPA's news conference on webcast. They did exactly what we (water rights owners) wanted, and the exact opposite of what the enviros have sought. Hooray for our side!

Figure 40. Email from Peter Nichols of the Trout Firm to Barbara Biggs, head of the Governmental Affairs and Water Quality Divisions of the Metro Wastewater Reclamation District in Denver.



EPA's Interpretation

- Signed by General Counsel Ann Klee -- whose understanding of this issue and leadership in EPA and the Administration I can't praise enough -- and Assistant Administrator for Water Ben Grumbles.

Figure 41. Excerpt from CLE Materials Prepared by Peter Nichols.[69]

5. The Second Circuit rejects the August 5, 2005 Interpretation

On June 13, 2006, the Second Circuit again examined the issue of NPDES permits for water transfers after the remanded *Catskill* case worked its way back up to the court. *Catskill Mountains Chapter of Trout Unlmtd. V. City of New York*, 451 F. 3d 77 (2nd Cir. 2006). The Second Circuit expressly stated that the August 5, 2005 agency interpretation—another variation on the 'convey' theory--went against the plain meaning of the Clean Water Act. *Catskill Mountains Chapter of Trout Unlmtd. V. City of New York*, 451 F. 3d 77, 84 (2nd Cir. 2006). It is noteworthy that a few days prior to the issuance of its opinion in *Catskill*, the proposed rule (largely based on the reasoning of the August 5, 2005 agency interpretation) was filed with that court along with a request by the City to stay the decision pending EPA rulemaking.[70] In the

face of that request, the Court rejected the "holistic approach" advocated by the agency in the August 5 interpretation:

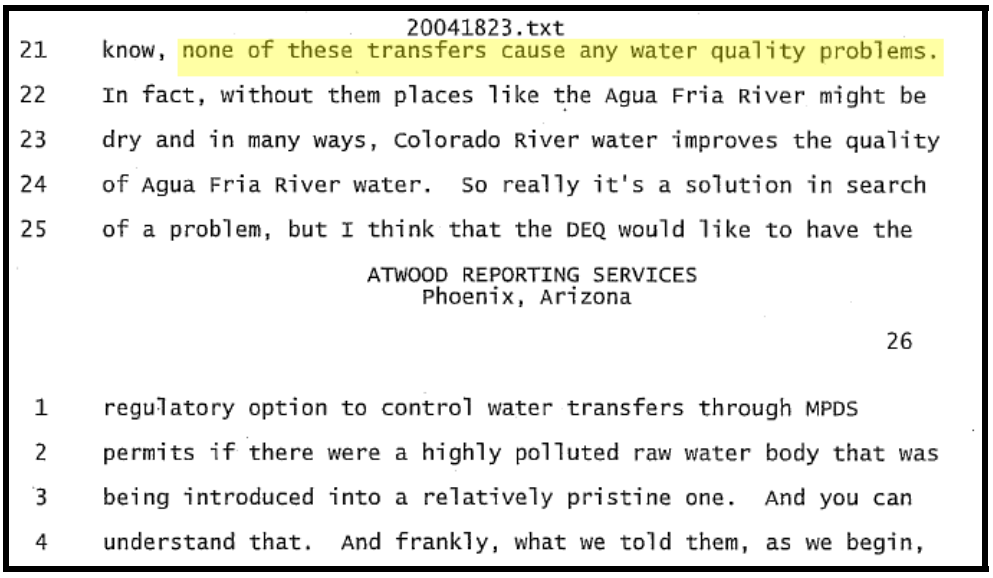
> In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for interbasin transfers of pollutants, these "holistic" arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for "the discharge of any pollutant," 33 U.S.C. § 1311(a), which is defined as "any addition of any pollutant to navigable waters from any point source," *id §*1362(12). It is the meaning of the word "addition" upon which the outcome of *Catskills I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context.

Catskill Mountains Chapter of Trout Unlmtd. v. City of New York, 451 F. 3d 77, 84 (2nd Cir. 2006).

Again, the Trout Firm prepared the separate *amicus* briefs for both the large western water owners and the western states themselves.[71] These briefs for both the water owners and the states were partially funded by the CAWCD.[72] As seen in the following excerpt from board minutes of the Central Arizona Water Conservation District, some western states remained internally divided on the issue of whether to join in the *amici* briefs.[73]

MR. MILLER: Well, they -- we had a very -- we had a good meeting with the AG's Office. It included representatives from their environmental division as well as their water division and their lands division. The person who's in charge of this is a woman named Mary O'Grady, she is the Arizona Solicitor General, she works for Terry. She gave several reasons why they're reluctant to join in. One is that it's not a Ninth Circuit case, it's a Second Circuit case. Two is they feel like they've not had adequate time to really evaluate it. I think they've had enough time by now. The third reason is that the Department of Environmental Quality is still resisting, is still reluctant to see Arizona weigh in and say MPDS permits should not be required for water transfers.

Now, as a practical matter, there are probably only three water transfers in the state, so this is a solution in search of a problem. The three water transfers are CAP, which is enormous and by far the most important, and then there are two others, one by ASARCO and one by Phelps Dodge. As far as we



20041823.txt

know, none of these transfers cause any water quality problems. In fact, without them places like the Agua Fria River might be dry and in many ways, Colorado River water improves the quality of Agua Fria River water. So really it's a solution in search of a problem, but I think that the DEQ would like to have the

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regulatory option to control water transfers through MPDS permits if there were a highly polluted raw water body that was being introduced into a relatively pristine one. And you can understand that. And frankly, what we told them, as we begin,

Figure 42. Excerpt of Legal Briefing by Douglas Miller, General Counsel to the Central Arizona Water Conservation District.

Eventually, the Arizona Department of Water Resources joined the western states *amicus* brief, independently of the State of Arizona and the Arizona Department of Environmental Quality which abstained from the effort.[74] Despite the extensive briefing by the western *amici*, the Second Circuit dismissed their arguments finding that: "The power of the states to allocate *quantities* of water within their borders is not inconsistent with federal regulation of water *quality*." *Catskill Mountains Chapter of Trout Unlmtd. v. City of New York*, 451 F. 3d 77, 84 (2nd Cir. 2006). These were the same arguments on which the August 5, 2005 interpretation was largely based.[75]

6. Epilogue

Despite the clear rejection of these issues in *Catskills II*, on June 26, 2006, the South Florida Water Management District represented to the *FWF* court that the Second Circuit was "pretending the language is 'plain.'"[76] Additionally, counsel wrote that this EPA rulemaking was "expressly designed" for cases such as the pending *FWF* litigation.[77] Given the complete acquiescence of EPA in the subversion by western interests of the Supreme Court's holding in *Miccosukee*, this statement unfortunately appears to be true.

Finally, please note that EPA has yet to provide all requested materials pursuant to a June FOIA request regarding the proposed rule and that such delay may necessitate a need to supplement these comments.[78]

An Index of Appendices 1- 138 (hand delivered to EPA) is attached as Exhibit 1.

[1] *See*, Martin, Guy, "Water Diversions and Conveyances Under the Clean Water Act" (January 7, 2005) (App. 105KK at p. 001373).
[2] App. 97 (1975 EPA Opinion).
[3] App. 98 (1978 EPA Memorandum).
[4] *See*, App. 99 (*Dubois)*, 100 (*Catskill I)*, 101 (11th Cir. *Miccosukee*), 102 (*Fidelity*), 108 (S. Ct. *Miccosukee*).
[5] *See*, App. 99 (*Dubois)*, 100 (*Catskill I*), 101 (11th Cir. *Miccosukee*), 102 (*Fidelity*), 108; *PUD No. 1 v. Washington Dept of Ecology*, 511 U.S. 700, 720 (1994).
[6] *See*, App. 106 (U.S. Brief on Merits).
[7] *See*, App. 105 A-LL (Public Records Responses).
[8] *See*, App. 106 (U.S. Brief on Merits).
[9] *See*, App. 112, Exhibit 1 (August 5 Interpretation).
[10] *See*, App. 103 (U.S. Brief on Certiorari).
[11] *See*, Email of Dec. 9, 2002 from James Nutt to Philip Mancusi-Ungaro, et al.; email of Jan. 27, 2003 from Jennifer Fitzwater to Winston Borkowski, et al.; and letter of Jan. 27, 2003 from Secretary David B. Struhs to Regional Administrator Jimmy Palmer (App. 104).
[12] *See*, App. 105 A-LL (Public Records Responses); Letter of February 21, 2003 from Senator Mike Crapo et al. to Solicitor General Olson (App. 105C at p. 000298); Letter of February 21, 2003 from Arizona Attorney General Terry Goddard to Solicitor General Olson (App. 105C at p. 000300); Letter of May 5, 2003 from Idaho Governor Dirk Kempthorne to Solicitor General Olson (App. 105C at p. 000303). ***Note that several states responses are continuing, including EPA's, which has failed to provide a privilege log with its response. Accordingly, these comments may need to be supplemented upon receipt of such documents.***
[13] S*ee also,* Email of January 28, 2003 from Lee Miller to James Broderick et al. re: NWRA Issues Update (App. 105K at p. 000758) (indicating some individuals in the Department of Interior felt NPDES permits would be helpful in regulating Everglades issues); Email of January 29, 2003 from Lee Miller to James Broderick et al. re: NWRA Issue Alert (App. 105K at p. 000765) (suggesting the DOI and EPA would be making their decisions regarding Miccosukee within 24 hours); Email of February 14, 2003 from Lee Miller to James Broderick et al re: Senate Letter Issue Alert (App. 105K at p. 000761) (EPA and DOI believed not to support certiorari).
[14] App. 106 (U.S. Brief on Merits).
[15] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, March 14, 2003, (App. 105K at p. 000538) p. 7-8 (describing lobbying efforts and expressing the belief that a strongly worded letter had been sent from DOI to the Justice Department arguing against NPDES permitting of western trans-basin projects); Email of January 28, 2003 from Lee Miller to James Broderick et al. re: NWRA Issues Update (App. 105K at p. 000758) (encouraging National Water Resources Association (NWRA) members to send letters to DOI); Email of January 29, 2003 from Lee Miller to James Broderick et al. re: NWRA Issue Alert (App. 105K at p. 000765) (encouraging NWRA members to send letters to DOI and EPA); Email of February 14, 2003 from Lee Miller to James Broderick et al re: Senate Letter Issue Alert (App. 105K at p. 000761) (urging NWRA members to contact their Senators regarding signing onto the letter to the Solicitor General).

[16] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, September 12, 2003, (App. 105K at p. 000531) p. 4.
[17] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, March 14, 2003, (App. 105K at p. 000538) p. 7-8.
[18] Letter of February 18, 2003 from Eric W. Wilkinson (NCWCD) to Tom Donnelly (NWRA) (App. 105K at p. 000752).
[19] *See*, Minutes of the 142nd Council Meeting of the Western States Water Council, July 30-August 1, 2003, (App. 105R at p. 000904) p. 13-16; Resolution of Western States Water Council of August 1, 2003 (App. 105A at p.000128). *See also,* Association of Metropolitan Water Agencies (AMWA), Monday Morning Briefing, *available at* http://www.amwa.net/archives/mm_briefing2001/mmf_3_26_01.html (noting that Mark Pifher was one of several names being considered for the job of Assistant Administrator for Water at EPA).
[20] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, March 14, 2003, (App. 105K at p. 000538) p. 7-8.
[21] Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act*, ACWA/CLE International, (App. 105K at p. 000509) p. 3 (May 11-12, 2006).
[22] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, August 8, 2003 (App. 105K at p. 000502) p. 4-5; *see also,* Email of December 23, 2003 from Garrett Wallace, SFWMD to Peter Nichols et al. (App. 105C at p. 000293) (thanking recipients for their help with editorial boards).
[23] Central Arizona Project, Regular Meeting of the Board of Directors, August 7, 2003 (App. 105D at p. 000337) p.5.
[24] Memorandum of October 16, 2002 from Mark Pifher to NWRA (App. 105K at p. 000732).
[25] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, July 11, 2003 (App. 105K at p. 000726) p. 4-5
[26] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, August 8, 2003 (App. 105K at p. 000502) p. 4..
[27] Oral Argument, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe,* 2004 WL 111643, at * 15.
[28] *See*, Memorandum of March 23, 2004 from Peter Nichols to Amici (App. 105C at p. 000258) (discussing the Court's decision and arguing that Western groups must remain vigilant).
[29] *See*, Memorandum of January 15, 2004 from Peter Nichols and Robert Trout to Amici (App. 105C at p. 000254)
[30] *See*, Memorandum of May 20, 2004 from Peter Nichols to Denver meeting participants (App. 105C at p. 000289);
[31] *See*, Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, May 14, 2004 (App. 105K at p. 000718) p. 5 ("Counsel is organizing discussions among western water leaders to develop a strategic response (legal, political and administrative) to the Miccosukee decision, including a western states amicus brief in Catskills."); Board Agenda Brief, Action Item, Central Arizona Project

(CAP), June 7, 2004 (App. 105D at p. 000327) (recommending CAWCD support efforts to overturn *Catskills*); Memorandum of August 3, 2004 from Douglas Miller to Board of Directors, Central Arizona Project (App. 105D at p. 000352) (outlining action plan to form a coalition to respond to the threat of increased federal regulation).

[32] *See*, Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, May 14, 2004 (App. 105K at p. 000718) p. 5 ("Counsel is organizing discussions among western water leaders to develop a strategic response (legal, political and administrative) to the Miccosukee decision, including a western states amicus brief in Catskills."); Memorandum of August 3, 2004 from Douglas Miller to Board of Directors, Central Arizona Project (App. 105D at p. 000352) (outlining proposed action plan for a Western coalition).

[33] Arizona Water Law Powerpoint, CACWD (August 12, 2004) (App. 105D at p. 000374).

[34] Board of Directors of the Central Arizona Water Conservation District, June 17, 2004 (App. 105D at p. 000360) p. 22. S*ee*, Board of Directors of the Central Arizona Water Conservation District, August 5, 2004 (App. 105D at p. 000368) p. 39.

[35] *See*, Memorandum of August 3, 2004 from Douglas Miller to Board of Directors, Central Arizona Project (App. 105D at p. 000352) p. 1, 4 (CAWCD to spend $22,500 in 2004 and 2005; Coalition costs to run $50,000 plus costs in 2004 and $130,000 in 2005).

[36] *See*, Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, May 14, 2004 (App. 105K at p. 000718) p. 5 ("Counsel is organizing discussions among western water leaders to develop a strategic response (legal, political and administrative) to the Miccosukee decision, including a western states amicus brief in Catskills."); Memorandum of August 3, 2004 from Douglas Miller to Board of Directors, Central Arizona Project (App. 105D at p. 000352) (Perkins Coie to lead the effort).

[37] *See*, App. 109 (Motion to Intervene).

[38] Email of August 3, 2005 from Glenice Martinez to Peter Nichols with attached transcribed phone message from Ann Klee (App. 105K at p. 000529).

[39] Email of August 3, 2005 from Glenice Martinez to Peter Nichols with attached transcribed phone message from Ann Klee (App. 105K at p. 000529)*; see also*, Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act*, ACWA/CLE International, (App. 105K at p. 000509) p. 15 (May 11-12, 2006) ("Delay was a result of debate within EPA, particularly between Office of General Counsel and the Office of Water, which wanted a 'designation option,' which would have allow [sic] states to designate certain transfers for permitting.").

[40] *See*, Memo of April 10, 2005 Re: State Water Quality Authority over Water Transfers (App. 105KK at p. 001412) (document identified by EPA as prepared by Perkins Coie in App. 105KK at p. 001370); Martin, Guy, "Water Diversions and Conveyances Under the Clean Water Act" (January 7, 2005) (App. 105KK at p. 001373) (note that Mr. Martin is an attorney with Perkins Coie).

[41] *See*, Memo of April 10, 2005 Re: State Water Quality Authority over Water Transfers (App. 105KK at p. 001412) (document identified by EPA as prepared by Perkins Coie in App. 105KK at p. 001370); Martin, Guy, "Water Diversions and Conveyances Under the Clean Water Act" (January 7, 2005) (App. 105KK at p. 001373) (note that Mr. Martin is an attorney with Perkins Coie).

[42] *See*, Martin, Guy, "Water Diversions and Conveyances Under the Clean Water Act" (January 7, 2005) (App. 105KK at p. 001373) pp. 32-33.
[43] *See*, App. 112, Exhibit 1 (August 5 Interpretation).
[44] *See*, App. 112, Exhibit 1 (August 5 Interpretation). S*ee also*, App. 113,, pp. 73-76 (closing remarks of attorney David Guest pointing to the mercurial changes in EPA's position).
[45] *See*, App. 112, Exhibit 1 (August 5 Interpretation).
[46] *See*, Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, December 9, 2005 (App. 105K at p. 000586) (explaining that EPA filed an interpretation "adopting arguments counsel made on behalf of western water users and western attorneys general in Miccosukee and Catskill . . . .").
[47] *See*, App. 112, Exhibit 1, p. 19 (August 5 Interpretation); Nichols, Peter, "Update on Continuing Litigation Over Whether the Federal Clean Water Act Requires Permits for Water Transfers" (Jan. 26, 2006) (App. 105K at p. 000741) p. 4.
[48] *See*, App. 109, Exhibit A, p. 12 (Motion to Intervene).
[49] Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, October 14, 2005 (App. 105K at p. 000608) p. 23.
[50] *See* ,App. 114 (*amicus* motions); The group also includes the City of Aurora, where Mark Pifher now works.
[51] *See* ,App. 115, pp. 80-92 (Presentation by Montano).
[52] *See* ,Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act*, ACWA/CLE International, (App. 105K at p. 000509) p. 6-8 (May 11-12, 2006).
[53] *See* ,Letter from February 18, 2003 from Eric Wilkinson to Tom Donnelly (NWRA) (App. 105K at p. 000752) (NCWCD letterhead lists Trout firm as legal counsel); *http://www.ncwcd.org/ncwcd_about/about_main.asp* (NCWCD established as local agency to contract with Federal government on Colorado-Big Thompson Project).
[54] Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act*, ACWA/CLE International, (App. 105K at p. 000509) p. 8 (May 11-12, 2006).
[55] Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act*, ACWA/CLE International, (App. 105K at p. 000509) p. 9 (May 11-12, 2006).
[56] *See*, App. 110, pp. 80-81, 91-93 (Ploss Depo.); App. 111, p. 129 (Dickey Depo.).
[57] Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act*, ACWA/CLE International, (App. 105K at p. 000509) p. 7 (May 11-12, 2006).
[58] *See*, App. 110, p. 57 (Ploss Depo.); App. 116, pp. 10, 37, 100-1, 107-8, 110-11, 128-31, 138, 156, 167-170 (Yanke Depo.); App. 117, p. 36, 45-48, 54-56 (Eisel Depo.).
[59] App. 118, pp. 9-22 (U.S. Stipulation).
[60] *See*, App. 119,pp. 52-53, 35-50 (Yahnke Testimony) (describing the western projects); App. 120, pp. 22-34 (Albertsen Testimony) (January 20, 2006).
[61] *See*, App. 113, p. 69 (Closing Remarks of David Guest).
[62] App. 121 (Notice of Proposed Rule).
[63] *See*, Letter of April 6, 2006 from Peter Nichols to Michael Cantanzaro, EPA (App. 105K at p. 000745); Memo of April 10, 2005 Re: State Water Quality Authority over Water Transfers (App. 105KK at p. 001412) (document identified by EPA as prepared by Perkins Coie in App. 105KK at p. 001370); Martin, Guy, "Water Diversions and Conveyances Under the Clean Water Act"

(January 7, 2005) (App. 105KK at p. 001373) (note that Mr. Martin is an attorney with Perkins Coie).
[64] Letter of April 6, 2006 from Peter Nichols to Michael Cantanzaro, EPA (App. 105K at p. 000745).
[65] Martin, Guy, "Water Diversions and Conveyances Under the Clean Water Act" (January 7, 2005) pp. 25-26 (App. 105KK at p. 001373).
[66] Martin, Guy, "Water Diversions and Conveyances Under the Clean Water Act" (January 7, 2005) p. 26 (App. 105KK at p. 001373).
[67] Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act,* ACWA/CLE International, (App. 105K at p. 000509) p. 16 (May 11-12, 2006); Email of June 2, 2006 from Peter Nichols to Russell George, (App. 105J at 000491) ("EPA is about to propose a rulemaking. . . .This is the position they took at our urging in their Agency Interpretation last summer in the Lake Okeechobee case. . . . I am thinking that Colorado will once again have to take the lead in the west since the other states with the most at risk – Az and Cal – are not internally unified (so far) enough to speak out."); *see also,* Email of June 1, 2006 from Peter Nichols to Steve Gunderson, et al. (App. 105J at p. 000493) (Trout, Raley, Montano, Witwer & Freeman, P.C. to organize comments from western States and water users).
[68] Peter Nichols e-mail to Barbara Biggs, MWRD (Exhibit 105K at p. 000746) (June 21, 2006).
[69] Nichols, Peter, *Miccosukee and Related Cases on Water Transfers Under the Clean Water Act,* ACWA/CLE International, (App. 105K at p. 000509) p. 15 (May 11-12, 2006).
[70] *See,* App. 122 (Meltzer Letter).
[71] *See,* App. 123 (*Amici* briefs); Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, June 10, 2005 (App. 105K at p. 000675) pp. 6-7..
[72] Central Arizona Project, Regular Meeting of the Board of Directors, August 7, 2003 (App. 105D at p. 000337) p 5; Transcript of Board of Directors of the Central Arizona Water Conservation District, June 17, 2004 (App. 105D at p. 000360) p. 24.
[73] Transcript of Board of Directors of the Central Arizona Water Conservation District, June 17, 2004, (App. 105D at p. 000360) p. 19-25 (Arizona reluctant to sign onto western *amici* briefs due to resistance of the Department of Environmental Quality to the position that permits should not be required); *See also,* Transcript of Board of Directors of the Central Arizona Water Conservation District, August 5, 2004, (App. 105D at p. 000368) p. 37-41 ("I think [the Arizona Department Environmental Quality] continue to believe that it may be appropriate in some circumstances to require [NPDES] permits . . . ."); Email of August 13, 2003 from Chris Varga to Jane De-Rose Bamman (App. 105B at p. 000213) (stating the belief that transport of one water to another would require an Arizona NPDES permit unless pollutants were absent); Western States Water, Issue No. 1546, January 2, 2004 (App. 105S at p. 001017) (California divided); Email of June 7, 2006 from Sara Russell to Peter Nichols (App. 105K at p. 000508) (California reaction to proposed rule likely to be mixed).
[74] *See,* Letter of June 21, 2004 from Robert Lynch to the Second Circuit (App. 105C at p. 000281); Transcript of Board of Directors of the Central Arizona Water Conservation District, August 5, 2004, (App. 105D at p. 000368) p. 40.
[75] *See* ,Municipal Subdistrict, Northern Colorado Water Conservancy District, Minutes of Board Meeting Held At District Headquarters Board Room, December 9, 2005 (App. 105K at p.

000586) (explaining that EPA filed an interpretation "adopting arguments counsel made on behalf of western water users and western attorneys general in Miccosukee and Catskill . . . .").
[76] *See*, App. 124, p. 5 (SFWMD Reply).
[77] *See*, App. 124, pp.7-8 (SFWMD Reply).
[78] *See*, App. 105KK (Second Response of EPA); App. 125 (rejection of extension letters).