

2017

Water Transfers Litigation and EPA's Water Transfers Rule

Peter D. Nichols

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Peter D. Nichols, Water Transfers Litigation and EPA's Water Transfers Rule, 21 U. Denv. Water L. Rev. 67 (2017).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

WATER TRANSFERS LITIGATION AND EPA'S WATER TRANSFERS RULE

PETER D. NICHOLS, ESQ.¹

| | |
|--|----|
| Introduction | 67 |
| California | 68 |
| Fremont-Madison Irrigation District..... | 70 |
| Colorado..... | 71 |
| Natural water quality is not always pristine..... | 72 |
| Water transfers cause few water quality problems | 72 |
| The Clean Water Act: NPDES Requirements and Water Transfer | |
| Compliance | 73 |
| Water Quality Standards..... | 73 |
| Antidegradation | 73 |
| Water treatment to meet NPDES requirements would be cost prohibitive and technically impractical | 74 |
| Litigation History | 75 |
| The Legal Arguments | 77 |
| <i>Chevron</i> Doctrine..... | 77 |
| Plain Meaning..... | 78 |
| Clear Statement Rule..... | 78 |
| Interstate Issues | 79 |
| Enforcement Issues | 79 |
| Conclusion | 80 |

INTRODUCTION

Water transfers are essential to meet water supply needs across the West and, indeed, across the nation. Decades of litigation following the 1972 enactment of the federal Clean Water Act, however, challenged whether water transfers are subject to National Pollutant Discharge Elimination System (“NPDES”) permitting,² like municipal wastewater and industrial discharges.³ Responding to the Supreme Court’s implicit invitation in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004)

1. Mr. Nichols is a Partner at the law firm of Berg Hill Greenleaf Ruscitti LLP in Boulder, Colorado. He is Lead Counsel for Western Water Providers, and serves as a Special Assistant Attorney General for Colorado and New Mexico and co-counsel for the Western States.

2. See generally, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians (Miccosukee)*, 541 U.S. 95 (2004) (citing cases from 1975 forward that have litigated whether NPDES permits apply to water transfers).

3. 33 U.S.C. § 1342(p) (2012).

(“*Miccossukee*”)⁴, the U.S. Environmental Protection Agency (“EPA”) promulgated its Water Transfers Rule, which simply excludes water transfers from NPDES permitting.⁵ After nearly a decade of challenges to the EPA’s 2008 Rule,⁶ the Second Circuit Court of Appeals reversed the U.S. District Court for the Southern District of New York and reinstated the Rule.⁷ Now, several of the plaintiff/appellee states have filed a petition for *certiorari* to the Supreme Court, as well as some of the New England environmental plaintiff-intervenor/appellees.⁸ It seems unlikely the Court will grant *certiorari* because two circuits have concluded that EPA’s Rule is a reasonable construction of the Clean Water Act.

Since most western precipitation falls as snow, western water users and providers (“Providers”) “must capture water when and where the snow melts, far from the West’s urban and agricultural centers.”⁹ Providers divert and deliver water from other watersheds “through natural rivers and lakes, as well as through conveyance facilities such as reservoirs, aqueducts, ditches, canals and pipelines.”¹⁰ This water is used “for municipal, agricultural, industrial, commercial and other beneficial uses” across the West.¹¹ Without this extensive infrastructure for water transfers, many of the nation’s great cities could not exist, including Albuquerque, Colorado Springs, Denver, Las Vegas, Los Angeles, Phoenix, Reno, Salt Lake City, San Diego, San Francisco, Santa Fe, and Seattle.¹² Similarly, many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, the Snake River Valley of Idaho, and the Yakima Valley of Washington.¹³

All told, western transfers—delivering the “life blood” of the West—serve over 76 million people.¹⁴ Representative examples follow.

CALIFORNIA. Federal, state and local water transfers serve metropolitan and agricultural areas throughout California. For example, the State Water Project operated by the California Department of Water Resources provides water supplies for 25 million Californians and 750,000 acres of irrigated farmland in Northern California, the San Francisco Bay Area, the San Joaquin Val-

4. See *Miccossukee*, 541 U.S. at 106–07.

5. 40 C.F.R. § 122.3(i) (2017).

6. See, e.g., *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219, 1224 (11th Cir. 2009), *reh’g denied*, 605 F.3d 962 (2010), *cert. denied*, 562 U.S. 1082 (2010).

7. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill III)*, 846 F.3d 492, 533 (2d Cir. 2017).

8. Petition for Writ of Certiorari, *New York v. EPA*, No. 17-418, 2017 WL 4174955 (U.S. filed Sept. 15, 2017); Petition for Writ of Certiorari, *Riverkeeper, Inc. v. EPA*, No. 17-446, 2017 WL 4280573 (U.S. filed Sept. 14, 2017).

9. Brief of Intervenor Defendants-Appellants-Cross Appellees at 2, *Catskill III*, 846 F.3d 492 (No. 14-1823).

10. *Id.*

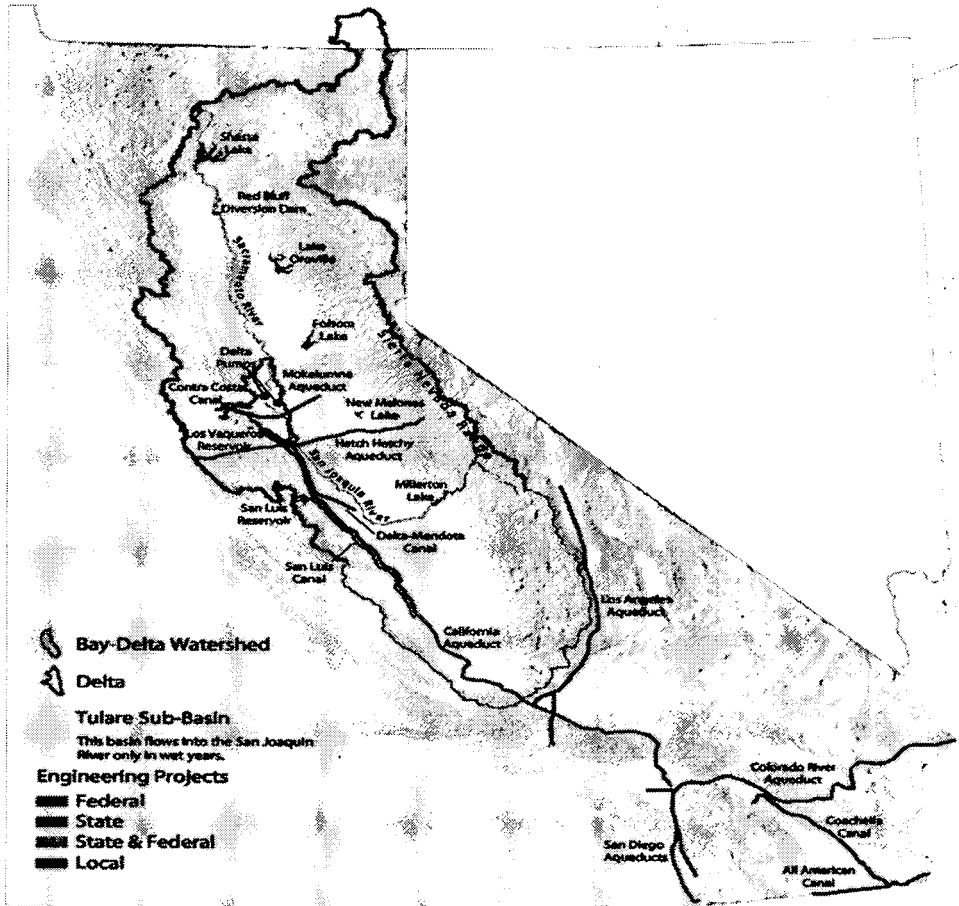
11. *Id.* at 2–3.

12. *Id.* at 3.

13. *Id.*

14. *Id.* at 1, 11; UNITED STATES POPULATION GROWTH BY REGION, https://www.census.gov/popclock/data_tables.php?component=growth (last visited June 23, 2017).

ley, the Central Coast, and Southern California as shown below.¹⁵ The Metropolitan Water District of Southern California transfers water from the Colorado River through the Colorado River Aqueduct and from Northern California via the California Aqueduct to serve nearly 19 million customers of its 26-member public agencies.¹⁶ San Francisco's Hetch Hetchy Aqueduct supplies 2.7 million residents of the City and twenty-seven suburban agencies in the Bay area.¹⁷ And the U.S Bureau of Reclamation projects store Sierra Nevada snowmelt for later urban and agricultural use throughout California, while its All American Canal and Coachella Canal deliver Colorado River water to irrigate the fertile Imperial Valley.¹⁸



The Bay-Delta Watershed [California] and Major Water Projects¹⁹

15. *California State Water Project Overview*, CA.GOV DEPT. OF WATER RESOURCES, <http://www.water.ca.gov/swp/> (last visited Nov. 27, 2017).

16. *Overview and Mission*, THE METRO. WATER DIST. OF S. CAL., <http://www.mwdh2o.com/WhoWeAre/Mission/Pages/default.aspx> (last visited June 23, 2017).

17. *Serving 2.7 million residential, commercial and industrial consumers*, SAN FRANCISCO WATER POWER SEWER, <https://sfwater.org/index.aspx?page=355> (last visited Nov. 27, 2017).

18. *See Projects and Facilities*, RECLAMATION, <https://www.usbr.gov/projects/facilities.php?state=California> (last visited Nov. 27, 2017).

19. Dennis Silverman, *California Water Projects Feeding Southern California*, ENERGY

FREMONT-MADISON IRRIGATION DISTRICT. The Fremont-Madison Irrigation District provides water for farm irrigation in the St. Anthony area of eastern Idaho.²⁰ “The Cross-Cut Canal, a critical component of the Fremont-Madison Irrigation District’s system,” enables irrigation of nearly 50,000 acres of farmland by transferring water from the Henry’s Fork of the Snake River to the Teton River.²¹

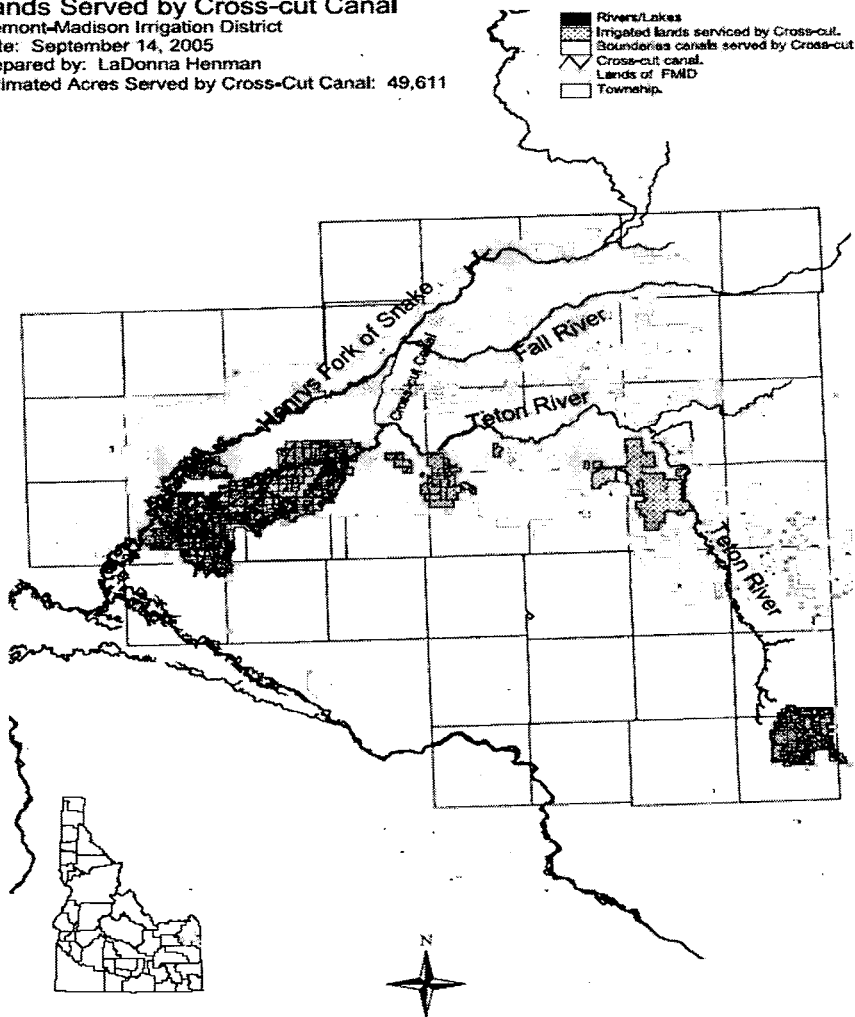
Lands Served by Cross-cut Canal

Fremont-Madison Irrigation District

Date: September 14, 2005

Prepared by: LaDonna Henman

Estimated Acres Served by Cross-Cut Canal: 49,611



Fremont-Madison [Idaho] Irrigation District: Water Supply System²²

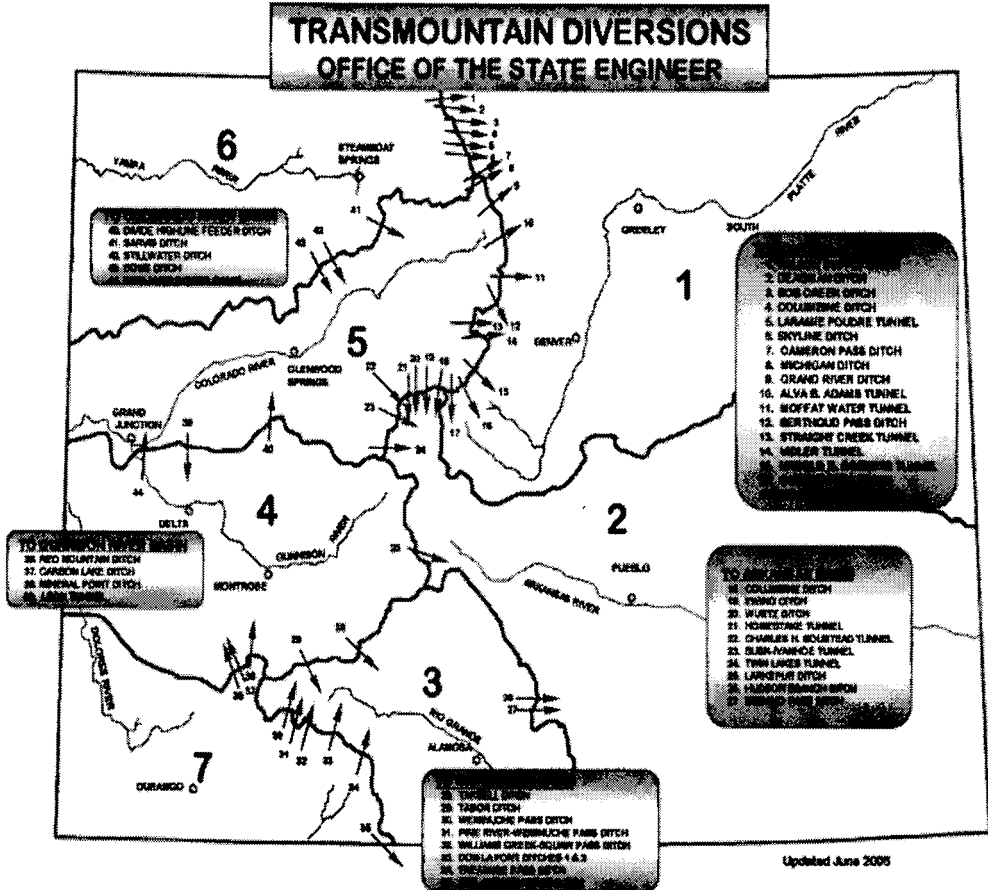
BLOG: SOUTHERN CALIFORNIA ENERGY (Apr. 28, 2015), <http://sites.uci.edu/energyobserver/2015/04/28/california-water-projects-feeding-southern-california/>.

20. See BUREAU OF RECLAMATION, U.S. DEPT. OF THE INTERIOR, PN-FONSI 04-10, FINAL ENVTL. ASSESSMENT FREMONT-MADISON IRRIGATION DIST. PROPOSED TITLE TRANSFER, 2-3 (2004), <https://www.usbr.gov/pn/programs/ca/idaho/FMID/ca-free2004.pdf>.

21. Motion for Leave to Appear as Amicus Curae in Support of Defendants’ Motion for Summary Judgment and Supporting Memorandum of Law at 13, Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist., No. 98-6056-CIV (June 5, 2006) [hereinafter “Motion for Leave”].

22. *Id.*

COLORADO. Forty-four major trans-mountain diversions²³ transfer 500,000 acre-feet per year to serve Colorado's eastern slope.²⁴ More than four million residents of Colorado's major cities, from Pueblo and Colorado Springs north to Denver, Boulder and Fort Collins, and about 700,000 acres on Colorado's eastern plains rely on water transfers for supplemental water supplies.²⁵



26

23. *Transmountain Diversions*, Office of the State Engineer, COLO. DIV. OF NAT. RES. (2005), <http://water.state.co.us/SurfaceWater/SWRights/WaterDiagrams/Pages/TransbasinDiversions.aspx>.

24. See *Where the water goes*, THE PUEBLO CHIEFTAIN (Dec. 20, 2010), http://www.chieftain.com/news/local/article_20ccdd82-0be8-11e0-8e62-001cc4c002e0.html.

25. Alan Best, *Tapped out: The future of water on the Front Range*, COLO. BIZ MAG., Oct. 1, 2009, at 28, 30, <http://www.cobizmag.com/Articles/Tapped-out-The-future-of-water-on-the-Front-Range/>; *Colorado Population Change 2000-2013*, COLO. DEPT. OF LOC. AFFS. (2014), <https://demography.dola.colorado.gov/demography/infographics/#infographics>; Motion for Leave, *supra* note 21, at 10.

26. *Transmountain Diversions*, *supra* note 23.

NATURAL WATER QUALITY IS NOT ALWAYS PRISTINE. Water quality naturally varies between watersheds, and therefore between the source waters and the receiving waters of water transfers.²⁷ Snow in the western states accounts for eighty percent of the surface water runoff.²⁸ Thunderstorms account for much of the rest.²⁹ Runoff from snowmelt and storm events naturally exhibit elevated levels of total suspended solids (TSS, suspended particles of soil and sediment), total dissolved solids (TDS, dissolved particles of soil and sediment) and turbidity (muddy water) from erosion, as well as nutrients.³⁰ The dramatic topography of the west, which extends from over 14,505 feet above sea level to 280 feet below sea level, is, of course, largely the result of such natural erosive processes.³¹ Water transfers typically employ unlined open canals, ditches, and tunnels that receive these constituents directly from natural erosion.³² Furthermore, the source water itself may be naturally high in total dissolved solids (TDS) and other constituents due to passing through saline geological formations and receiving inflows from brackish hot springs.³³

WATER TRANSFERS CAUSE FEW WATER QUALITY PROBLEMS. Several Providers examined their water transfers during the course of the litigation. Using publicly available data and their own monitoring information, Providers in several states were able to analyze more than twenty-five representative water transfers, including many multiple transfers.³⁴ Their analysis revealed:

1. Many small and large volume transfers move water that is always better than the quality of the receiving waters for all sampled parameters.
2. Parameters of the water transferred would exceed or contribute to the exceedance of one or more of the water quality standards of the receiving waters or downstream waters in many transfers. These situations include:
 - a. Transfers where the quality of the transferred water is usually better than the quality of the receiving waters for all sampled parameters, with the frequent exception of total suspended solids (“TSS”), a result of erosion during spring runoff. The same situation probably occurs following major precipitation events.
 - b. Transfers where the quality of the transferred water contains metals at higher concentrations than the receiving waters because of natural geological conditions present at the source.
 - c. Transfers that deliver nutrients into lakes and reservoirs from nonpoint source pollution introduced prior to and during transfer.³⁵

Not surprisingly, in view of the naturally high water quality of the western states, there are few reported water quality problems from water transfers. Colorado, for example, “has never identified a water body impaired by more than 1,700 transfers.”³⁶

27. Brief of Intervenor Defendants-Appellants-Cross Appellees, *supra* note 9, at 19.

28. *Id.*

29. *Id.* at 20.

30. *Id.*

31. *Id.*

32. *Id.*

33. Brief of Intervenor Defendants-Appellants-Cross Appellees, *supra* note 9, at 20.

34. Declaration of Mark T. Pifher ¶ 11, Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 8 F. Supp. 3d 500 (S.D.N.Y. 2014) (Case Nos. 08-CV-5606 (KMK), 08-CV-8430 (KMK)).

35. *Id.*

36. Brief of Intervenor Defendants-Appellants-Cross Appellees, *supra* note 9, at 33.

There are in fact surprisingly few examples of such impairment on record, a tiny fraction of the tens of thousands of water transfers in the United States.³⁷

THE CLEAN WATER ACT: NPDES REQUIREMENTS AND WATER TRANSFER COMPLIANCE

All NPDES permits must include discharge limitations designed to ensure that the water quality standards of the receiving waters are consistently met.³⁸ Further, all NPDES permits are also subject to requirements concerning antidegradation review under the Clean Water Act.³⁹

WATER QUALITY STANDARDS. States are primarily responsible for adopting and periodically revising standards to protect water quality and water uses.⁴⁰ Those standards must “be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and . . . also taking into consideration their use and value for navigation.”⁴¹ A discharger must not only ensure the attainment of the numeric and narrative water quality standards, but it must also protect all underlying beneficial uses as designated by the State.⁴²

Under the NPDES program, if a discharge merely has the “potential to cause, or contribute to an excursion above any State water quality standard,” its NPDES permit must contain conditions to control all such potential contributions.⁴³ In other words, an NPDES permit limits the amount of pollutants delivered to the receiving waters, regardless of whether the transfer would cause an exceedance of the water quality standards or be a significant potential cause of an exceedance.⁴⁴

Water quality standards are in place for more than three dozen naturally occurring constituents and physical properties across the United States, including temperature, total dissolved solids (TDS), nutrients and sediment.⁴⁵ Each of the water quality standards of the receiving waters would apply to a water transfer, as well as the antidegradation requirements discussed below.⁴⁶

ANTIDEGRADATION. Antidegradation is a component of the Act’s water quality standards program.⁴⁷ “Where the quality of waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water,” antidegradation provisions apply so as to maintain and protect existing quality.⁴⁸ Antidegradation requirements may apply to prevent any change to the quality of the receiving water for every one of a multitude of parameters, even if the overall quality is

37. *Id.* at 33-34.

38. *National Pollution Discharge Elimination System (NPDES): NPDES Permit Limits*, ENVTL. PROT. AGENCY, <https://www.epa.gov/npdes/npdes-permit-limits> (Nov. 29, 2016).

39. ENVTL. PROT. AGENCY, EPA-823-B-12-002, *WATER QUALITY STANDARDS HANDBOOK, CHAPTER 4: ANTI-DEGRADATION* 14 (2012).

40. See 33 U.S.C. § 1313(a), (c)(2)(A) (2012).

41. *Id.* § 1313(c)(2)(A).

42. *Id.* § 1313(c)(2)(B).

43. 40 C.F.R. § 122.44(d)(1)(i) (2017); see also *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993).

44. 40 C.F.R. § 122.44(d)(1)(i).

45. See 40 C.F.R. § 131.4 (2017) (establishing state water quality standards); see e.g., 5 COLO. CODE REGS. §§ 1002-31.1 to 31.16 (2017) (detailing state water quality standards).

46. See 40 C.F.R. § 131.4; 5 COLO. CODE REGS. §§ 1002-31.1 to 31.16.

47. 40 C.F.R. § 131.12(a)(2).

48. *Id.*

poor.⁴⁹ Antidegradation applies even in the absence of any threat to the ultimate beneficial use.⁵⁰

WATER TREATMENT TO MEET NPDES REQUIREMENTS WOULD BE COST PROHIBITIVE AND TECHNICALLY IMPRACTICAL. Transferred water is typically suitable for subsequent agricultural use without treatment, while the Safe Drinking Water Act requires treatment of water before domestic and municipal use.⁵¹ Regardless, it could cost an estimated \$7 billion per year to treat just the most significant western interbasin transfers to avoid the potential of causing or contributing to a violation of the water quality standards of the receiving waters.⁵² Costs of such magnitude are neither feasible nor justified to meet water quality standards and antidegradation provisions, and would pose additional unnecessary or redundant costs on Providers' water supplies.

If the NPDES program covered water transfers, a Provider might be compelled to expend hundreds of millions of dollars to construct one or more water treatment facilities, surge reservoirs, and pollutant disposal facilities, or reconfigure its water delivery infrastructure to eliminate water transfers.⁵³ A treatment facility would have to be capable of treating peak flows of source water (which might occur just one or two days a year during spring snowmelt) to avoid the risk of violating the water quality standards of receiving waters.⁵⁴ Further, because fifty percent of mountain stream flow occurs in May-June-July, expensive treatment plants might operate only a few weeks or months a year during snowmelt run-off when it is legal to divert water pursuant to the prior appropriation doctrine of the western states.⁵⁵ What is more, many water systems include multiple sequential transfers, i.e., into and out of waters of the United States multiple times before ultimate use.⁵⁶

While municipal and industrial wastewater dischargers employ conventional treatment techniques to affordably meet NPDES program requirements, it would be technically impractical for Providers to treat water transfers because of the variable quality of the source water, enormous volumes of water, and high transfer flow rates.⁵⁷ Moreover, pollutants removed by a treatment plant require expensive disposal in accord with applicable federal and state law.⁵⁸

Many water transfers, such as the U.S. Bureau of Reclamation's Colorado-Big Thompson and interstate ("Colo.-N.M.") San Juan-Chama Projects, traverse or abut federal land, including national forests, national parks, national recreation areas and wilderness areas.⁵⁹ To construct a treatment facility, surge reservoir, or pollutant dis-

49. See *id.* § 131.12(a)(2)(i).

50. See *id.*

51. See 42 U.S.C. §§ 300f(4)(B)(ii), 300g-1(b)(1)(A) (2012).

52. Declaration of Mark T. Pifher, *supra* note 33, at ¶ 11, 13.

53. See Chris Reagen, *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 U. COLO. L. REV. 307, 332 (2011).

54. See *id.*

55. See *id.*

56. See, e.g., *Colorado-Big Thompson Project*, N. COLO. WATER CONSERVANCY DIST., <http://www.northernwater.org/WaterProjects/C-BTPProject.aspx> (last visited June 23, 2017).

57. Declaration of Mark T. Pifher, *supra* note 33, at ¶ 13.

58. See, e.g., 40 C.F.R. § 261.4 (2017); 5 COLO. CODE REGS. § 1002-63 (2017) (federal and state regulations imposed upon treatment plants).

59. See, e.g., *Colorado-Big Thompson Project*, *supra* note 55; *San Juan - Chama Project*, BUREAU OF RECLAMATION, U.S. DEPT. OF THE INTERIOR, https://www.usbr.gov/uc/albuq/rm/mrg/fact/sjc_proj.pdf.

posal site would likely invoke the dredge-and-fill permit provisions of section 404 the Clean Water Act, the National Environmental Policy Act, the Federal Land Policy and Management Act, and potentially the Endangered Species Act. Obtaining necessary approvals would be costly, time-consuming, and potentially impossible given site requirements within or near federal lands in environmentally sensitive locations.

In short, infrastructure investments necessary to comply with NPDES requirements for naturally-occurring constituents would be cost prohibitive and technically impractical. Yet such controls would be necessary to avoid regulatory agency enforcement action and citizen suits.

LITIGATION HISTORY

In the so-called “dam cases,” of the 1980s, the D.C. and Sixth Circuit Courts of Appeal held that dams were not “point sources.”⁶⁰ Therefore, water transferred through or around the dams was not subject to NPDES permitting.⁶¹

The First Circuit Court of Appeals, however, subsequently held the discharge of snowmaking water was subject to NPDES permitting.⁶² And the Second Circuit Court of Appeals later required New York City to obtain an NPDES permit to transfer water from one watershed to another to provide drinking water to the City.⁶³

It wasn't long after the 2001 New York City decision that the Southern District of Florida and Eleventh Circuit Court of Appeals held that transfers of water into the Everglades required an NPDES permit.⁶⁴ When that case—known as *Miccosukee* after the plaintiff Tribe—reached the Supreme Court, the Colorado and New Mexico Attorneys General stepped up to defend federal deference to state water law as amicus and intervenors, while the National Water Resources Association and Western Urban Water Coalition rallied western municipal and industrial water providers and users.⁶⁵ The Supreme Court, however, remanded the issue to determine whether the transfer involved waterbodies that are not meaningfully distinct—in which case an NPDES permit would not be required—and invited EPA to weigh in.⁶⁶

In response to the Supreme Court's observation that EPA did not have any administrative documentation of its longstanding “view that the process of ‘transporting, impounding, and releasing navigable waters’ cannot constitute an ‘addition’ of pollutants to ‘the waters of the United States,’”⁶⁷ the agency adopted its Water Transfers Rule, which simply excludes water transfers from discharges subject to NPDES permitting.⁶⁸ Environmentalists from New England to Florida as well as New York State

60. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165, 176-77 (D.C. Cir. 1982).

61. *Nat'l Wildlife Fed'n v. Consumers*, 862 F.2d at 590; *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d at 161.

62. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296-97 (1st Cir. 1996).

63. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill I)*, 273 F.3d 481, 492 (2d Cir. 2001).

64. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 1999 U.S. Dist. LEXIS 23306, at *21-22 (S.D. Fla. Sept. 30, 1999); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002).

65. Brief for the States of Colo. and N.M. as Amici Curiae Supporting Petitioner at 9-13, Brief for Nat'l Wildlife Fed'n et al. as Amici Curiae Supporting Respondents at 23-25, *Miccosukee*, 541 U.S. 95 (2004) (No. 02-626).

66. *Miccosukee*, 541 U.S. at 108.

67. *Id.* at 107.

68. National Pollution Discharge Elimination System Rule, 73 Fed. Reg. 33,697, 33,703-04

(joined by eight states and Manitoba) challenged the Rule, and the Judicial Panel on Multidistrict Litigation consolidated these challenges in the Eleventh Circuit.⁶⁹ The Circuit, however, opted to stay the challenges until it decided an appeal involving Lake Okeechobee in the Everglades, a companion case to *Miccosukee*.⁷⁰ The Court reversed the Okeechobee trial court, holding that the Clean Water Act is ambiguous and that EPA's Rule is a reasonable interpretation of the Clean Water Act entitled to *Chevron* deference.⁷¹

The Eleventh Circuit, however, is full of surprises. After repeatedly denying—without explanation—the Western States and Western Water Providers' unopposed motions to intervene in support of the EPA's *nationwide* Rule, the Circuit dismissed the consolidated challenges for lack of jurisdiction.⁷²

The dismissal of the consolidated challenges by the Eleventh Circuit lifted the stays on “protective” challenges filed by Trout Unlimited, New York State *et al.*, Friends of the Everglades and the Miccosukee Tribe *inter alia* in district courts based on their reading of the Act's citizen suit provisions.⁷³ Friends and the Miccosukee Tribe, however, quickly dismissed their suit in the Southern District of Florida, which presumably would have been bound to uphold the Rule by the Eleventh Circuit's Lake Okeechobee precedent.⁷⁴ Forum shopping, Friends and the Tribe then sought intervention in Trout Unlimited and New York State's challenges in the Southern District of New York (“SDNY”), which most assumed would be bound by the Second Circuit Court of Appeals' decisions in *Catskills I and II*⁷⁵ and overturn the Rule.⁷⁶ The Western States, Western Water Providers, New York City, and South Florida Water Management District also sought to intervene.⁷⁷ After summoning all would be parties to White Plains, New York, the court granted everyone intervention “by consent.”⁷⁸ The parties filed cross motions for summary judgment, and the court heard oral arguments December 19, 2013.⁷⁹ On March 28, 2014, Judge Karas vacated the Water Transfers Rule to the extent it is inconsistent with the statute—and in particular the phrase “navigable waters” as interpreted in *Rapanos v. U.S.*⁸⁰—and remanded the Water Transfers Rule to the extent that the EPA did not provide a reasoned explanation for its interpretation.⁸¹ The EPA, Western States, Western Water Providers, New York City and South Florida Water Management District appealed.⁸² Briefing

(June 13, 2008) (to be codified at 40 C.F.R. pt. 122); 40 C.F.R. § 122.3 (2013).

69. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500, 514 (S.D.N.Y. 2014), *rev'd*, 846 F.3d 492 (2d Cir. 2017).

70. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309-Civ-Altonaga, 2006 U.S. Dist. LEXIS 89450, at *116 (S.D. Fla. Dec. 11, 2006).

71. *Friends of the Everglades*, 570 F.3d at 1227-28.

72. *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1283 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 421 (2013).

73. *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 8 F. Supp. 3d at 516.

74. *See* Brief of Intervenor Defendant-Appellants-Cross-Appellees States of Colo. *et al.* at 6, *Catskill III*, 846 F.3d 492 (No. 14-1823).

75. *Catskill I*, 273 F.3d 481; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill II)*, 451 F.3d 97 (2d Cir. 2006).

76. *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 8 F. Supp. 3d at 516.

77. *Id.*

78. *Id.*

79. *Id.* at 516-17.

80. *Rapanos v. United States*, 547 U.S. 715, 716 (2006).

81. *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 8 F. Supp. 3d at 567.

82. *Catskill III*, 846 F.3d at 506.

extended into early 2015,⁸³ followed by oral argument on December 1, 2015 in New York City.⁸⁴ A divided panel issued its opinions in early 2017, reversing the SDNY and reinstating the EPA's Rule.⁸⁵

At the same time challenges to the Rule unfolded, briefing was underway in an appeal of 1997-vintage litigation involving water transfers through the Klamath Straights in Oregon.⁸⁶ The Ninth Circuit's environmental bent is well known, and some initially thought the court might follow its decision in *Northern Plains Resources Council v. Fidelity Exploration and Development Company*, which involved the discharge of groundwater, clearly NPDES permissible—and therefore distinguishable—activity.⁸⁷ At oral argument, however, the panel probed whether the transfer involved waterbodies that are “meaningfully distinct.”⁸⁸ The Ninth Circuit thus surprised no one when it decided the case on its facts pursuant to *Miccosee* and sidestepped the EPA's Rule entirely.⁸⁹

THE LEGAL ARGUMENTS

CHEVRON DOCTRINE. *Chevron* concerns judicial deference to an agency's interpretation of an ambiguous statute when the agency administers the statute at issue.⁹⁰ The reviewing court must initially determine whether Congress has directly spoken to the precise question at issue.⁹¹ If Congress' intent is clear, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁹² If, however, “the statute is silent or ambiguous with respect to the specific issue,” the “question for the court is whether the agency's answer is based on a permissible construction of the statute.”⁹³

Challengers to the Rule argued that Congress unambiguously intended NPDES program requirements to apply to water transfers.⁹⁴ Defenders argued it never occurred to Congress that water transfers might be considered “discharges of pollutants” subject to the NPDES program, because Congress was focused on public outcry over notorious municipal and industrial discharges—like the Cuyahoga River fires—and was unaware of any water quality problems caused by water transfers. Moreover, Congress did not even discuss water transfers, which are noticeably absent

83. See Reply Brief of Intervenor Defendant-Appellant-Cross-Appellee City of New York, *Catskill III*, 846 F.3d at 506 No. 14-1823-cv(L).

84. Argument Calendar, U.S. Ct. App. 2d Cir., <http://ww2.ca2.uscourts.gov/calendar/index.php?eID=809> (last accessed October 9, 2017).

85. *Catskill III*, 846 F.3d at 493-94.

86. ONRC Action v. U.S. Bureau of Reclamation, CIV. 97-3090-CL, 2012 WL 3526833 (D. Or. Jan. 17, 2012) *report and recommendation adopted sub nom*, ONRC Action v. Bureau of Reclamation, 1:97-CV-03090-CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012).

87. 325 F.3d 1155, 1160 (9th Cir. 2003).

88. Oral Argument at 11:55, ONRC Action v. U.S. Bureau of Reclamation, 798 F.3d 933 (9th Cir. 2015) (No. 12-35831), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000013619.

89. ONRC Action v. United States Bureau of Reclamation, 798 F.3d 933, 938 (9th Cir. 2015).

90. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

91. *Id.*

92. *Id.*

93. *Id.* at 843.

94. See, e.g., Response Brief for Plaintiffs Trout Unlimited at 15-36, Response Brief for Plaintiffs States of N.Y. et al. at 23-62, *Catskill III*, 846 F.3d 492 (No. 14-1823).

from over 3000 pages of legislative history.⁹⁵ Furthermore, Western parties found it inconceivable that Congress would knowingly apply NPDES requirements that could frustrate the “life blood” of the west” provided by 170 federal Bureau of Reclamation projects it authorized and funded.⁹⁶

In reversing the SDNY and reinstating the EPA’s Rule, the Second Circuit distinguished its holdings in *Catskills I* and *II*, concluding those decisions did not hold the Clean Water Act to be unambiguous regarding water transfers.⁹⁷ The majority held:

At step one of the *Chevron* analysis, we conclude—as did the district court—that the Clean Water Act does not speak directly to the precise question of whether NPDES permits are required for water transfers, and that it is therefore necessary to proceed to *Chevron’s* second step. At step two of the *Chevron* analysis, we conclude—contrary to the district court—that the Water Transfers Rule’s interpretation of the Clean Water Act is reasonable. We view the EPA’s promulgation of the Water Transfers Rule here as precisely the sort of policymaking decision that the Supreme Court designed the *Chevron* framework to insulate from judicial second- (or third-) guessing. . . . The Act does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation [including water allocations], gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers.⁹⁸

PLAIN MEANING. Challengers point out that section 301(a) states that “[e]xcept as in compliance with this [Act], the discharge of any pollutant by any person shall be unlawful” and that Congress defined “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”⁹⁹ While there are explicitly prescribed exemptions in section 502(14) from the CWA’s broad prohibition of point source discharges, challengers point out there is no exemption for water transfers.¹⁰⁰

The dissenting judge in the Second Circuit, who would uphold the District Court’s decision to vacate and remand the Rule, similarly believed that the plain language of the Act is unambiguous and clearly expresses Congress’s intent to prohibit the transfer of polluted water from one water body to another distinct water body without a permit—logic that parallels the earlier decisions of the Second Circuit in *Catskills I* and *II*.¹⁰¹

CLEAR STATEMENT RULE. Land and water uses are traditionally and primarily state prerogatives, as long understood and applied by the federal and state governments alike.¹⁰² The Supreme Court thus “ordinarily expect[s] a ‘clear and

95. See S. COMM. ON PUBLIC WORKS, 92D CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1973); *Federal Water Pollution Control Act Amendments of 1977: Hearing Before the Subcomm. on Envtl. Pollution of Comm. on Envtl and Pub. Works*, 95th Cong. (1977).

96. Brief of Intervenor Defendants-Appellants-Cross Appellees Central Ariz. Water Conservation Dist. et al. at 11, *Catskill III*, 846 F.3d 492 (No. 14-1823).

97. *Catskill III*, 846 F.3d at 512.

98. *Id.* at 500-01.

99. 33 U.S.C. §§ 1311(a), 1362(12) (2012); see c.g., Joint Brief for Intervenor Plaintiffs - Appellees Miccosukee Tribe of Indians of Florida et al. at 2-3, *Catskill III*, 846 F.3d 492.

100. Response Brief for Plaintiffs Trout Unlimited et al. at 24, *Catskill III*, 846 F.3d 492.

101. *Catskill III*, 846 F.3d at 534 (Chin, J., dissenting).

102. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174

manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."¹⁰³

Western interests argued that rather than expressing a desire to alter the federal-state balance in the Act, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."¹⁰⁴ Consistent with this notion, Congress clearly expressed its intent "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act, and that nothing in the Act "shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."¹⁰⁵ Congress further mandated that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."¹⁰⁶ The Supreme Court in *Miccossukee* stated

If we read the [Clean Water] Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress's specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.¹⁰⁷

And, as explained above, water rights established by authority of the states would be abrogated or impaired, contrary to 33 U.S.C. section 1251(g). Vacating the EPA's Water Transfers Rule would therefore be contrary to the Court's "clear statement rule."

The Second Circuit nonetheless rejected western arguments urging the court to apply the "clear statement rule" of *SWANCC* and *Rapanos* to EPA's Rule, concluding "the case at bar presents no question regarding Congress's authority under the Commerce Clause, inasmuch as it is undisputed that Congress has the power to regulate navigable waters and to delegate its authority to do so."¹⁰⁸

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

The Second Circuit majority cited several provisions of the CWA, state statutory and common law, interstate compacts, and international treaties raised that are alternatives to regulate pollution in water transfers in the absence of NPDES permitting.¹⁰⁹

(2001).

103. *Rapanos*, 547 U.S. at 738.

104. 33 U.S.C. § 1251(b) (2012).

105. *Id.* § 1251(g).

106. *Id.* § 1370.

107. *Miccossukee*, 541 U.S. at 108.

108. *Catskill III*, 846 F.3d at 518.

109. *See, e.g., Catskill III*, 846 F.3d at 529-31.

ENFORCEMENT ISSUES. If water transfers become subject to the NPDES program, any water quality exceedances—even those resulting from natural processes—would expose Transferors to enforcement action and citizen suits.¹¹⁰ Of particular concern would be the possibility of an injunction prohibiting the operation of a water transfer without an NPDES permit, which would deprive westerners of essential water supplies.¹¹¹

In addition, transferors would be exposed to citizen suits over water transfers.¹¹² The Northern District of New York, for example, imposed civil penalties of \$5,749,000 on New York City for a water transfer without an NPDES permit, and calculated the maximum possible penalties at \$63,249,000.¹¹³

CONCLUSION

The EPA's Water Transfers Rule excludes water transfers from prohibitively expensive NPDES permitting requirements that would supersede, abrogate, or impair state water law and individual water rights essential to the West. The Eleventh Circuit Court of Appeals upheld the Rule in 2009,¹¹⁴ while the Ninth Circuit subsequently sidestepped the Rule when it opted to apply facts pursuant to *Miccosukee*,¹¹⁵ and the Southern District of New York (SDNY) vacated the Rule in part and remanded it to EPA in 2014.¹¹⁶ The Second Circuit, however, reversed the SDNY and reinstated the Rule in early 2017.¹¹⁷ Now, several of the plaintiff/appellee states have collectively filed a petition for *certiorari* to the Supreme Court, as well as some of the New England environmental plaintiff-intervenor/appellees.¹¹⁸ Supreme Court watchers and prognosticators will look to predict whether the Supreme Court will deny *certiorari* because two circuits have deferred to EPA's interpretation of the Clean Water Act and upheld the Rule, or agree with petitioners that there is a real split among the circuits and/or that the Second Circuit misapplied *Chevron* deference.

If the Supreme Court accepts an appeal, it could adopt one or more of several lines of reasoning, or surprise everyone, like when it remanded *Miccosukee* in 2004. First, the Court could conclude that the Act is ambiguous and defer to EPA pursuant to *Chevron*,¹¹⁹ although perhaps remanding the Rule for further consideration. Second, the Court could conclude that NPDES permitting would raise the costs of transfers prohibitively and violate Congress's specific instructions in the Act, consistent with its dicta in *Miccosukee*.¹²⁰ Third, the Court could take a states' rights approach, building on *SWANCC*¹²¹ and *Rapanos*,¹²² and potentially *PUD No. 1*,¹²³ and *S.D.*

110. See 33 U.S.C. §§ 1319, 1365 (2012).

111. See *id.* § 1319(b).

112. See *id.* §§ 1319, 1365.

113. See *Catskill II*, 451 F.3d at 89 (discussing calculation error and remanding to district court to reduce maximum penalty to \$62,725,000).

114. *Friends of the Everglades*, 570 F.3d at 1228.

115. See generally *ONRC Action*, 798 F.3d 933.

116. *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 8 F. Supp. 3d at 567.

117. *Catskill III*, 846 F.3d at 533.

118. Petition for Writ of Certiorari, *New York v. EPA*, No. 17-418, 2017 WL 4174955 (U.S. filed Sept. 15, 2017); Petition for Writ of Certiorari, *River Keeper, Inc. v. EPA*, No. 17-446, 2017 WL 4280573 (U.S. filed Sept. 14, 2017).

119. *Chevron*, 467 U.S. 837.

120. *Miccosukee*, 541 U.S. at 108.

121. See generally *Solid Waste Agency of N. Cook Cty.*, 531 U.S. 159.

Warren,¹²⁴ and defer to the states. Alternatively, the Court could conclude that NPDES permitting does not infringe on state authority, as lower courts read *PUD No. 1* and *S.D. Warren*, and narrowly decide that the Act is unambiguous through a technical statutory analysis and subject transfers to NPDES permitting. The Court could also equally narrowly and technically conclude the Act unambiguously does not apply the NPDES program to transfers.

The tide seems to have turned against blanket NPDES permitting of water transfers since the Eleventh Circuit's decision in *Lake Okeechobee*. However, with the Ninth Circuit's recent opinion that followed the Supreme Court's *Miccosukee* "test" and the Second Circuit's reversal of the decision below and reinstatement of EPA's Water Transfers Rule, there is at least an addendum to the story yet to be told.

122. See generally *Rapanos*, 547 U.S. 715.

123. See *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).

124. See *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006).

