

Nos. 17-418 and 17-446

In The
Supreme Court of the United States

STATES OF NEW YORK, CONNECTICUT, DELAWARE,
ILLINOIS, MAINE, MICHIGAN, WASHINGTON,
and THE PROVINCE OF MANITOBA, CANADA,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,
Respondents.

RIVERKEEPER, INC., THEODORE GORDON
FLYFISHERS, INC., and WATERKEEPER ALLIANCE, INC.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,
Respondents.

**On Petitions For Writ Of Certiorari To The United
States Court Of Appeals For The Second Circuit**

**JOINT BRIEF OF INTERVENOR-RESPONDENTS
WESTERN STATES AND WESTERN WATER
PROVIDERS IN OPPOSITION TO
PETITIONS FOR WRIT OF CERTIORARI**

CYNTHIA H. COFFMAN,
Attorney General
FREDERICK R. YARGER*,
Solicitor General
GLENN E. ROPER,
Deputy Solicitor General
LAURA CHARTRAND,
Deputy Attorney General
ANNETTE M. QUILL,
Sr. Asst. Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
720-508-6000
Fred.Yarger@coag.gov
*Counsel for Intervenor-Respondent
the State of Colorado*

**Counsel of Record*

PETER D. NICHOLS
BERG HILL GREENLEAF
RUSCITTI LLP
1712 Pearl Street
Boulder, Colorado 80302
303-402-1600
pdn@bhgrlaw.com
*Lead Counsel for Intervenor-
Respondents Western
Water Providers
Counsel for National Water
Resources Association,
Lower Arkansas Valley
Water Conservancy District*

[Additional Counsel Listed On Signature Page]

QUESTION PRESENTED

Throughout the western United States, water transfers are integral to the delivery of essential water supplies for municipal, industrial, and agricultural use. These projects have always fallen under state regulatory authority—indeed, for nearly the entire 45-year history of the Clean Water Act, the Environmental Protection Agency has consistently interpreted the Act to defer to state administration of water transfers. In 2008, seeking to codify that longstanding interpretation, EPA promulgated the Water Transfers Rule.

Below, the Second Circuit Court of Appeals—like the Eleventh Circuit in an earlier case—upheld the Rule, citing the Act’s policy of deference to state authority over water allocation and management; the reasonableness of the Rule’s interpretation of the Act in light of decisions by this Court and lower federal courts; and the drastic negative consequences that would flow from requiring, for the first time, that all water transfers across the country be subject to the Act.

The question presented is as follows:

Is EPA’s Water Transfers Rule—which balances the Clean Water Act’s deference to state authority over water resources with the goal of protecting water quality—a reasonable interpretation of the Act?

PARTIES TO THE PROCEEDINGS

Respondents accept the Petitioners' lists of Parties to the Proceeding with the following addition:

The City of Colorado Springs, acting by and through its water utility enterprise Colorado Springs Utilities, intervened as a defendant in the district court, was an appellant in the court of appeals, and is not a respondent here, although is a member of the Western Urban Water Coalition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Intervenor-Respondents the Western Urban Water Coalition, the National Water Resources Association, the Idaho Water Users Association, and the (California) State Water Contractors, hereby disclose that they have no parent corporations nor have they issued stock. The other western water providers¹ are all governmental entities

¹ Central Arizona Water Conservation District, Central Utah Water Conservancy District, City and County Of Denver, by and through its Board of Water Commissioners, City and County of San Francisco Public Utilities Commission, City of Boulder (Colorado), City of Aurora (Colorado), El Dorado Irrigation District, Idaho Water Users Association, Imperial Irrigation District, Kane County (Utah) Water Conservancy District, Las Vegas Valley Water District, Lower Arkansas Valley Water Conservancy District, Metropolitan Water District of Southern California, National Water Resources Association, Salt Lake and Sandy (Utah) Metropolitan Water District, Salt River Project, San Diego County Water Authority, Southeastern Colorado Water Conservancy District, Washington County (Utah) Water District, and Western Urban Water Coalition.

CORPORATE DISCLOSURE STATEMENT –
Continued

exempt from Rule 29.6. The State Intervenor-Respondents are sovereign entities and are likewise exempt from Rule 29.6.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE.....	1
I. The Clean Water Act’s NPDES requirements impose strict conditions on regulated activities even when they do not actually cause exceedances of water quality standards	2
II. Water transfers are essential to the West....	3
III. For over a century, the federal government has consistently deferred to state water management—including through the Clean Water Act.....	8
IV. EPA promulgated the Rule to codify its longstanding interpretation of the Act, which the Second Circuit upheld as reasonable	10
REASONS FOR DENYING THE PETITIONS.....	14
I. The decision below is consistent with this Court’s jurisprudence and with lower court cases decided after the Water Transfers Rule formally implemented EPA’s longstanding interpretation of the Act.....	15

TABLE OF CONTENTS – Continued

	Page
II. The Second Circuit correctly held that the Rule is reasonable given the severe practical consequences of overturning EPA’s interpretation of the Act and the range of regulatory alternatives to the NPDES program	21
A. Subjecting all water transfer projects nationwide to NPDES permits would be cost prohibitive and would ignore the practical realities facing western water providers	22
B. State and federal regulatory mechanisms apart from the NPDES program protect water quality in the context of water transfers.....	25
CONCLUSION	32

TABLE OF AUTHORITIES

	Page
CASES	
<i>California v. Campbell</i> , 138 F.3d 772 (9th Cir. 1997)	28
<i>California v. United States</i> , 438 U.S. 645 (1978).....	8
<i>Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York</i> , 451 F.3d 77 (2d Cir. 2006)	18, 19
<i>Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York</i> , 273 F.3d 481 (2d Cir. 2001)	18, 19
<i>Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.</i> , 467 U.S. 837 (1984)	<i>passim</i>
<i>Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.</i> , 13 F.3d 305 (9th Cir. 1993).....	3
<i>Del-Aware Unlimited, Inc. v. Pennsylvania</i> , 508 A.2d 348 (Pa. Commw. Ct. 1986).....	18
<i>Dubois v. U.S. Dep't of Agric.</i> , 102 F.3d 1272 (1st Cir. 1996)	18
<i>Friends of the Everglades v. S. Fla. Water Mgmt. Dist.</i> , 570 F.3d 1210 (11th Cir. 2009)	19, 20
<i>Friends of the Everglades v. EPA</i> , 699 F.3d 1280 (11th Cir. 2012).....	20
<i>In re Application for Plan for Augmentation of City and Cty. of Denver</i> , 44 P.3d 1019 (Colo. 2002)	28

TABLE OF AUTHORITIES – Continued

	Page
<i>Los Angeles County Flood Control District v. Natural Resources Defense Council</i> , 568 U.S. 78 (2013).....	17
<i>Miccosukee Tribe of Indians v. So. Fla. Water Mgmt. Dist.</i> , 280 F.3d 1364 (11th Cir. 2002)	15, 22
<i>Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005).....	21
<i>Phillips v. Davis Timber Co., Inc.</i> , 468 So. 2d 72 (Miss. 1985)	28
<i>PUD No. 1 of Jefferson County v. Washington Department of Ecology</i> , 511 U.S. 700 (1994).....	17, 18
<i>S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe</i> , 541 U.S. 95 (2004)	<i>passim</i>
<i>Stokes v. Morgan</i> , 680 P.2d 335 (N.M. 1984)	27
<i>Tarrant Reg’l Water Dist. v. Herrman</i> , 569 U.S. 614 (2013)	8
<i>United States v. New Mexico</i> , 438 U.S. 696 (1978)	8
 STATUTES	
CAL. WATER CODE § 13050	28
COLO. REV. STAT.	
§ 25-8-103(19).....	28
§ 25-8-205(1)(c)	27
§ 25-8-503(5).....	27

TABLE OF AUTHORITIES – Continued

	Page
CONN. GEN. STAT.	
§ 22a-423	28
DEL. CODE ANN. tit. 7, § 6003(a)(2).....	28
Federal Water Pollution Control Amendments of 1972, 86 Stat. 816	
33 U.S.C. §§ 1251-1388 <i>et seq.</i>	2
33 U.S.C. § 1251(b)	9, 29
33 U.S.C. § 1251(g)	9, 16, 18, 25
33 U.S.C. § 1253(b)	30
33 U.S.C. § 1288(a)(2).....	26
33 U.S.C. § 1311(a)	2
33 U.S.C. § 1313(a)	3
33 U.S.C. § 1313(c)(2)(A)	3
33 U.S.C. § 1342.....	2
33 U.S.C. § 1342(a)	3
33 U.S.C. § 1370.....	29
33 U.S.C. § 1370(2)	9
ME. REV. STAT. tit. 38, § 361-A(7)	28
MICH. COMP. LAWS § 324.3101(z)	28
N.D. CENT. CODE	
§ 61-28-09(1).....	28
§ 61-32-03	28

TABLE OF AUTHORITIES – Continued

	Page
N.M. STAT.	
§ 72-5-23	27
§ 72-5-26	27
§ 72-12-7	27
N.M. STAT. ANN. § 74-6-4	28
N.Y. ENVTL. CONSERV. LAW § 17-0105(2)	28
RULES AND REGULATIONS	
Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008)	<i>passim</i>
40 C.F.R. § 122.3	1
40 C.F.R. § 122.28	3
40 C.F.R. § 122.44(d)(1)(i)	3, 25
40 C.F.R. § 131.12	3
5 COLO. CODE REGS. 1002, § 31.16	25
71 Fed. Reg. 32,887 (June 7, 2006)	11
OTHER AUTHORITIES	
Ann R. Klee & Benjamin H. Grumbles, U.S. EPA, <i>Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers</i> (Aug. 5, 2005)	10

TABLE OF AUTHORITIES – Continued

	Page
Bureau of Reclamation et al., Memorandum of Understanding 16-LM-60-257B, <i>Grand Lake Clarity Stakeholders’ Memorandum of Understanding</i> 1 (2016), http://co.grand.co.us/DocumentCenter/View/7935	29
Colo. Dep’t of Public Health & Env’t, <i>Total Maximum Daily Loads</i> , https://www.colorado.gov/pacific/cdphe/total-maximum-daily-loads-tmdls	27
Colo. River Basin Salinity Control Forum, <i>Water Quality Standards for Salinity, Colorado River System</i> (Oct. 2017), http://www.coloradoriver.salinity.org/docs/2017%20Review%20-%20FINAL.pdf	30, 31
Delaware River Basin Interstate Compact between the State of Delaware, the State of New Jersey, the State of New York, and the Commonwealth of Pennsylvania, Pub. L. No. 87-328, 75 Stat. 688, art. 5, sec. 5.1 (Sept. 27, 1961)	30
Environmental Protection Agency, Regions VII and IX, <i>The Mineral Quality Problem in the Colorado River: Summary Report</i> (1971)	30
North Front Range Water Quality Planning Assoc., <i>2016 Plan Update—Area-Wide Water Quality Management Plan (208 Plan)</i> , http://www.nfrwqpa.org/awqmp.shtml	26
Red River of the North Compact between the State of South Dakota, the State of North Dakota, and the State of Minnesota, Pub. L. No. 456, 52 Stat. 150, art. II (Apr. 2, 1938)	30

TABLE OF AUTHORITIES – Continued

	Page
U.S. Dep’t of the Interior, Bureau of Reclamation, <i>Colo. River Basin Water Supply & Demand Study, Executive Summary</i> (Dec. 2012)	6
U.S. Dep’t of the Interior, Bureau of Reclamation, <i>Colo. River Basin Water Supply & Demand Study, Technical Report B—Water Supply Assessment</i> (Dec. 2012)	23

STATEMENT OF THE CASE

“Water transfers” are precisely what they sound like—activities that convey water from one place to another, ensuring that it is available where it is needed most. These projects, which are typically government-operated, do not introduce pollutants into sources of water. They simply move water from one natural source and transport it for use elsewhere.

The Water Transfers Rule (the “Rule”), promulgated by the Environmental Protection Agency in 2008, interprets the Clean Water Act to exclude water transfers from one particular federal regulatory program, the National Pollution Discharge Elimination System (“NPDES”). Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3). The NPDES is the same program that applies to municipal wastewater treatment plants and to industrial sources of pollutants like oil refineries, which—unlike water transfers—invariably discharge waste that can degrade receiving waters.

The Rule does not represent a new regulatory approach; to the contrary, it embodies decades of agency practice. That longstanding practice is particularly important to the western United States, where water transfers have always been both common and critically important. And the practice is consistent with a large body of federal law—including the Clean Water Act—that requires deference to state water administration. Thus, understanding the Rule and this litigation requires an explanation of the NPDES program, as well

as historical background concerning water transfers and an explanation of the federal government’s traditional deference to state water administration.

I. The Clean Water Act’s NPDES requirements impose strict conditions on regulated activities even when they do not actually cause exceedances of water quality standards.

The Federal Water Pollution Control Amendments of 1972, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1388 *et seq.*), are commonly known as the Clean Water Act (the “Act”). The Act creates a wide variety of pollution control programs and regulatory measures aimed at improving and maintaining the quality of surface waters across the country. One of its central provisions prohibits “the discharge of any pollutant by any person” into covered waters, unless the discharge complies with one of the Act’s provisions. 33 U.S.C. § 1311(a).

The principal provision of the Act under which a discharge may be allowed is Section 402, which establishes a permitting program known as the “National Pollutant Discharge Elimination System.” 33 U.S.C. § 1342. NPDES permits grant permission to discharge a specified amount of specified pollutants into waters covered by the Act. *See id.*; *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe* (“*Miccosukee*”), 541 U.S. 95, 102 (2004). NPDES permits must include limitations designed to meet the water quality standards of waters receiving the discharge. States are primarily

responsible for adopting and periodically revising water quality standards. 33 U.S.C. § 1313(a), (c)(2)(A).

Even 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 “pollutants or pollutant parameters.” 40 C.F.R. § 122.44(d)(1)(i); *see also Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (“The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit.”). In short, every NPDES permit must contain conditions that limit the amount of pollutants delivered to the receiving waters regardless of whether water quality standards would actually be exceeded as a result of the delivery. These limitations apply to both individual permits, which regulate the discharge of a single permittee, and general permits, which may be used to cover one or more “categories” of discharges. *See* 33 U.S.C. § 1342(a); 40 C.F.R. §§ 122.28, 122.44(d)(1)(i), 131.12.

At issue here is whether all water transfers across the United States, which add no pollutants to transferred water, constitute “discharges” for which an NPDES permit is required.

II. Water transfers are essential to the West.

Unlike the eastern half of the country, the western United States is predominantly arid. To say that

“water is the lifeblood of the West” is neither an exaggeration nor a cliché. Without the thousands of water transfers that support western agriculture and urban areas from Denver to Los Angeles, settlement of the “Great American Desert” would have been impossible.

The Colorado River provides a stark example of the importance of water transfers to the American West. Snow falls and collects in the sparsely populated Rocky Mountains, hundreds or thousands of miles from major urban and agricultural centers. Yet this snowfall accounts for 85 to 90 percent of the entire precipitation in the Colorado River Basin, an area encompassing one-eighth of the continental United States. For obvious reasons, water transfers within this vast portion of the country are ubiquitous, and they have been for over a century.

The State of Colorado alone provides numerous examples. “[O]ver forty interbasin diversions . . . serve the State’s water needs,” Pet. App. 22a,² and those transfers have existed since the early days of Colorado’s statehood. In the 1880s, irrigators began diverting the headwaters of the Colorado River from west of the Continental Divide to the eastern part of the State in order to increase supply in the Cache la Poudre River, one of the first rivers to be tapped for irrigation within Colorado. Decades later, the Colorado-Big Thompson Project was completed to

² This brief relies on the Petition Appendix in case number 17-418 and does not cite the separate Petition Appendix in case number 17-446.

deliver water from the Colorado River through a 13.1-mile-long tunnel under Rocky Mountain National Park. Water from that project supplies 8 counties and 33 municipalities and irrigates 720,000 acres in northeastern Colorado. Other trans-mountain and inter-basin transfers from the Colorado River system supply more than 4 million residents of Colorado's major urban areas, including the Denver-Boulder metropolitan area as well as Colorado Springs and Pueblo.

Outside of Colorado, water transfers perform a key role in meeting obligations under interstate water compacts, water apportionment decrees, federal legislation, and international treaties. For example, New Mexico obtains much of its share of the Colorado River via the interstate San Juan-Chama Project. That project transfers water hundreds of miles from south-central Colorado, through the Continental Divide, and across the state line to New Mexico, supplying more than a million people living in Santa Fe, Albuquerque, and the Rio Grande Basin. The cities of Cheyenne, Wyoming, and Salt Lake City, Utah, are also located outside the Colorado River Basin and also rely on water transfers to utilize their States' share of the River.

Further west, the Central Arizona Project diverts water from the Colorado River to residents of the Phoenix and Tucson metro areas—which, with more than 5 million people, account for 80 percent of the State's population. The Las Vegas Valley Water District transfers Nevada's share of the Colorado River from Lake Mead, on the Arizona border, to serve the over 2 million residents of, and 40 million annual visitors to, one

of the country's premier tourist destinations. The Colorado River Aqueduct transfers water from the River some 242 miles to the southern California coast, supplying 19 million people from Los Angeles to San Diego. The All-American Canal transfers the last of the United States' Colorado River entitlement to irrigate 560,000 acres in the Imperial and Coachella Valleys, which grow many of the nation's wintertime vegetables. The Colorado River is also vital to Mexico under the 1944 Mexican Treaty, supporting a thriving agricultural industry and providing municipal water supplies for millions of people.

The following map, created by the United States Department of the Interior, Bureau of Reclamation,³ illustrates the scale of the Colorado River Basin and provides perspective on the critical importance of water transfers to the massive portion of the western United States that the River serves:

³ The map is included in U.S. Dep't of the Interior, Bureau of Reclamation, *Colo. River Basin Water Supply & Demand Study, Executive Summary*, at 2 (Dec. 2012).



For the sake of comparison, the Potomac and Hudson Rivers serve about 6 million and 4 million people respectively. The “hard working” Colorado River, meanwhile, supplies about 30 million residents of its basin plus another 25 million residents of other basins, for a total of 55 million people. Yet the Potomac and Hudson

are blessed with *three to four times* the amount of natural precipitation and *two to three times* the average flow of the Colorado River. The scarce resources of the Colorado River are needed to serve a vast area both within and outside the basin. Water transfers are, and long have been, the primary means of doing so.

III. For over a century, the federal government has consistently deferred to state water management—including through the Clean Water Act.

Given the tremendous importance of water resources to the settlement and continued prosperity of the West, the western States have long valued their ability to manage those resources both within their borders and in cooperation with neighboring States. The ability to manage water is “an essential attribute of sovereignty,” one that States do not cede lightly. *Tarrant Reg’l Water Dist. v. Herrman*, 569 U.S. 614, 631 (2013).

Congress, for its part, has consistently reaffirmed the importance of—and its deference to—state authority over water resources. “Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.” *United States v. New Mexico*, 438 U.S. 696, 702 & n.5 (1978) (noting the existence of 37 statutes in which Congress expressly recognized the importance of deferring to state water law); *see also California v. United States*, 438 U.S. 645,

650, 653 (1978) (discussing deference to state water programs as codified in laws dating from the mid-1800s).

The Act itself reflects this federal policy of preserving state authority to manage and administer water use. Section 101(b) of the Act makes this policy explicit: “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources. . . .” 33 U.S.C. § 1251(b). Other provisions of the Act reiterate and implement that policy. *See, e.g.*, 33 U.S.C. § 1251(g) (“It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Clean Water Act]. It is further the policy of Congress that nothing in [the Act] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.”). Indeed, nothing in the Act may “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” 33 U.S.C. § 1370(2).

This long thread of deference to state water administration, reflected in dozens of federal statutes spanning over a century of federal policymaking, is particularly important here. The federal government has, for the entire history of the Clean Water Act, deferred to state administration of water transfer projects. Pet. App. 14a–15a.

IV. EPA promulgated the Rule to codify its longstanding interpretation of the Act, which the Second Circuit upheld as reasonable.

Origins of the Water Transfers Rule. The Water Transfers Rule has its roots in this Court’s 2004 decision in *Miccosukee*. There, the Court, in the course of vacating a district court ruling that required a water transfer to obtain an NPDES permit, acknowledged the “longstanding EPA view that the process of transporting, impounding, and releasing navigable waters cannot constitute an addition of pollutants to the waters of the United States.” 541 U.S. at 107 (internal quotation marks omitted). But the Court noted that this longstanding EPA policy had not been formalized. *Id.* at 107, 109.

In the wake of *Miccosukee*, EPA moved to formalize its decades-old position. In 2005, it issued an official memorandum supporting its interpretation that Congress did not intend to include water transfers within the regulatory scheme of the NPDES program. Ann R. Klee & Benjamin H. Grumbles, U.S. EPA, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005). The memorandum analyzed the text, structure, and legislative history of the Clean Water Act, ultimately concluding that EPA’s longstanding position was based on the best reading of the Act, particularly in light of the Act’s policy of deference to state management of water resources:

Water transfers are an integral part of water resource management; they embody how States

and resource agencies manage the nation's water resources and balance competing needs for water. Water transfers also physically implement state regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out.

Id. at 9.

A year later, EPA published notice of its proposed nationwide “Water Transfers Rule.” 71 Fed. Reg. 32,887 (June 7, 2006). After providing an extended comment period and reviewing thousands of comments, EPA issued its final Rule in 2008. 73 Fed. Reg. 33,697.

The Rule clarified that a water transfer, “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use,” is excluded from regulation under the Clean Water Act’s NPDES program. *Id.* at 33,697. This is so because transfers do not result in the “addition” of a pollutant to the waters of the United States. *Id.* at 33,700–03. The same is not true if “pollutants are introduced from outside the waters being transferred,” and the Rule acknowledges that States continue to have authority both to administer the use of transferred water and to monitor and address water quality as part of water transfers. *Id.* at 33,701–02. “[T]he heart of this matter,”

the Rule explains, “is the balance Congress created between federal and State oversight of activities affecting the nation’s waters.” *Id.* at 33,701.

Challenges to the Rule. Soon after the Rule was promulgated, a coalition of States led by New York, as well as the Province of Manitoba, Canada, and several environmental, sporting, and conservation organizations, challenged the Rule in the Southern District of New York. After related litigation in other courts resolved threshold jurisdictional issues, Pet. App. 27a–28a, the district court granted the applications of all parties who sought to intervene in the case. A large coalition of western States and water providers joined the case in defense of the rule: Colorado and 10 other States—Alaska, Arizona (Department of Water Resources), Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming—along with 26 municipal water providers, water districts, and water associations supplying approximately 116 million people, one-third of the nation’s population.

The district court concluded that the Clean Water Act neither forecloses nor requires the policy reflected in the Water Transfers Rule. Pet. App. 160a, 176a. Even so, the court held that the Rule represented an unreasonable interpretation of the Act and was therefore invalid under the second step of the *Chevron* framework. *See id.* at 177a–78a (applying *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)). In doing so, the district court discounted the provisions in the Act that expressly preserve the historic deference to States in the realm of

water allocation and management. *See id.* at 166a–72a. The district court granted summary judgment for the plaintiffs, vacated the Rule, and remanded it to EPA. *Id.* at 250a.

The Second Circuit’s decision. EPA and the intervenor-defendants appealed to the Second Circuit. In a 2-1 decision, the court reversed the judgment of the district court and reinstated the Rule. Pet. App. 83a–84a.

The majority analyzed the Rule under the two-step *Chevron* framework, concluding under the first step (as did the district court) that the Clean Water Act is silent or ambiguous on the specific issue of whether Congress intended for water transfers to be regulated under the NPDES permitting scheme. Pet. App. 55a–56a.

Under the second step of *Chevron*, the majority concluded that EPA’s construction of the Act was reasonable. Pet. App. 83a–84a. The majority observed that “in the nearly forty years since the passage of the Clean Water Act, water transfers have never been subject to a general NPDES permitting requirement.” *Id.* at 67a. And, importantly, both this Court’s decision in *Miccossukee* and later circuit court decisions “support . . . the reasonableness of the Rule’s interpretation” because those cases either implicitly or explicitly concluded that the Rule is within the Act’s permissible interpretive scope. *Id.* at 71a–74a.

The dissent would have upheld the district court’s decision under both step one and step two of *Chevron*.

Pet. App. 85a–86a. In coming to this conclusion, the dissent did not mention or analyze any of the provisions of the Act that require a policy of deference to state authority over water resources.



REASONS FOR DENYING THE PETITIONS

The United States, in its Brief in Opposition, comprehensively explains why this case is inappropriate for certiorari. This brief does not attempt to repeat those arguments. Instead, it focuses on two discrete points. First, the decision below—rather than reflecting a conflict among jurisdictions on the issue presented here, Pet. 19–22 (No. 17-418)—is consistent with this Court’s decision in *Miccosukee* and other cases, as well as with circuit court interpretations of the Clean Water Act that post-date the promulgation of the Rule. Second, the Rule is reasonable under *Chevron*, given the practical realities facing water transfer projects—particularly in the West—and the alternative regulatory mechanisms that can and do address water quality concerns in the context of water transfers.

I. The decision below is consistent with this Court’s jurisprudence and with lower court cases decided after the Water Transfers Rule formally implemented EPA’s longstanding interpretation of the Act.

The Petition by the State of New York asserts that the decision below is “in substantial tension” with the rulings of this Court. Pet. 21 (No. 17-418). It argues further that lower courts have “conflicting views of the Act’s meaning” and that those views are “irreconcilable.” *Id.* at 21. Neither assertion is correct.

This Court’s cases. In *Miccosukee*—decided before EPA promulgated the Rule—this Court considered whether a water transfer project in southern Florida required an NPDES permit. *Miccosukee* came to the Court from the Eleventh Circuit, which had held that NPDES permits are required for water transfers. *Miccosukee Tribe of Indians v. So. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002). This Court vacated that decision. In doing so, it noted but did not reach EPA’s argument that the Act excludes water transfers from the NPDES program, an argument EPA made upon the Court’s invitation to participate as amicus curiae. EPA urged the Court to defer to the agency’s 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.” *Miccosukee*, 541 U.S. at 107.

Because this argument had not been adequately raised in prior stages of the litigation, the Court

declined to reach it, instead remanding to resolve outstanding factual disputes. *Id.* at 109, 111–12. But the Court made clear that the argument would be “open to the parties on remand.” *Id.* And it explicitly acknowledged the reasonableness of EPA’s construction of the Act. A contrary approach—*i.e.*, “construing the NPDES program to cover [water] transfers”—could “violate Congress’ specific instruction that ‘the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired.’” *Id.* at 108 (quoting 33 U.S.C. § 1251(g)). And, the Court noted, “[i]f we read the 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.” *Id.* (citing an amicus brief filed by a coalition of States led by the State of Colorado).

Implicit in these observations was the assumption that EPA had latitude under *Chevron* to formalize its longstanding interpretation of the Act as a matter of administrative policy. Indeed, the Court called out the fact that EPA had not cited “any administrative documents” officially announcing its interpretation—a clear invitation for EPA to engage in rulemaking. *Id.* at 107. Of course, in response to *Miccosukee*, EPA did just that.

In arguing that *Miccosukee* is “in substantial tension” with the Rule, the Petition by the State of New York ignores *Miccosukee*’s recognition of the

reasonableness of the agency interpretation of the Act on which the Rule is based. Pet. 21 (No. 17-418). If *Miccosukee* had in fact foreclosed that interpretation, there would have been no need for the Court to explicitly hold that EPA’s arguments would “be open to the parties on remand.” 541 U.S. at 109, 112. As the Second Circuit acknowledged below, *Miccosukee* supports the Rule rather than undermines it. Pet. App. 67a–70a.⁴

Apart from *Miccosukee*, New York relies on two other decisions by this Court to demonstrate “tension” between the decision below and this Court’s jurisprudence. Its reliance on those two cases is likewise misplaced; neither one is in conflict with the decision below.

The first, *Los Angeles County Flood Control District v. Natural Resources Defense Council*, addressed only a “narrow question,” holding that no discharge of a pollutant occurs when water flows between upper and lower portions of the same river. 568 U.S. 78, 82, 84 (2013). This holding is “consistent with both [EPA’s] reading of the CWA . . . and with [a contrary] reading.” Pet. App. 74a n.33. It “does not provide support for either side of the debate over . . . the Water Transfers Rule.” *Id.* at 75a n.33.

The second, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, was decided a decade

⁴ Indeed, for this reason *Miccosukee* forecloses the first question presented in the Petition by the State of New York, which asserts that the Rule violates the plain meaning of the Clean Water Act. Pet. i (No. 17-418).

before *Miccosukee*. 511 U.S. 700 (1994). The State of New York asserts that *PUD No. 1* forecloses the argument that the Rule is reasonably supported by the Clean Water Act’s explicit policy of deference to state water administration. Pet. 21–22 (No. 17-418). But that assertion is directly contrary to the later-decided *Miccosukee*, which suggested that EPA’s interpretation of the Act to exclude water transfers from the NPDES program is not only supported by, but may in fact be *mandated* by, the Act’s deference to state authority over water resources. *Miccosukee*, 541 U.S. at 108 (quoting 33 U.S.C. § 1251(g)).

Lower court decisions. The Petition by the State of New York cites four cases in arguing that the decision below “conflicts with decisions of other federal and state courts.” Pet. 19 (No. 17-418). All of those cases arose before EPA’s promulgation of the Rule and therefore did not provide occasion for the deciding courts to engage in the *Chevron* analysis on which the decision below is based. *Id.* (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (“*Catskill II*”), 451 F.3d 77 (2d Cir. 2006); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (“*Catskill I*”), 273 F.3d 481 (2d Cir. 2001); *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1272 (1st Cir. 1996); and *Delaware Unlimited, Inc. v. Pennsylvania*, 508 A.2d 348 (Pa. Commw. Ct. 1986)).⁵ Indeed, two of those cases, *Catskill I & II*, came from the Second Circuit itself.

⁵ The Notice of Final Rule itself recognizes that none of these earlier decisions “viewed the question of statutory interpretation through the lens of *Chevron* deference.” 73 Fed. Reg. at 33,700.

And, in any event, *Catskill I & II* are not inconsistent with the decision below, which upheld the rule under *Chevron* deference—an issue *Catskill I & II* neither reached nor foreclosed. As the Second Circuit observed below, “[n]owhere in *Catskill I* did we state that [the Act] could bear only one meaning. . . . Such a statement would have been inconsistent with our acknowledgement that *Chevron* deference might be owed to a more formal agency interpretation. Nor did we make any such statement in *Catskill II*.” Pet. App. 38a.

Indeed, the only post-Rule case cited in New York’s Petition *upheld* the Rule, based on the same rationale contained in the decision below. Pet. 20 (No. 17-418) (citing *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.* (“*Friends I*”), 570 F.3d 1210 (11th Cir. 2009)). *Friends I* comes from the Eleventh Circuit, the same jurisdiction in which *Miccosukee* arose. In *Friends I*, the Eleventh Circuit explained that it was compelled to depart from its earlier decision in *Miccosukee* (*i.e.*, that water transfers are governed by the NPDES program) because EPA’s promulgation of the Rule was “a change” in the legal landscape, and “[a]n important one.” *Friends I*, 570 F.3d at 1218. The Rule “was not available at the time of . . . earlier decisions” like *Miccosukee*, and those decisions therefore “are not precedent against” the Rule. *Id.* The Eleventh Circuit analyzed EPA’s Rule using the *Chevron* framework, ultimately concluding that the Rule is “a reasonable, and

therefore permissible, construction of the language” of the Clean Water Act. *Id.* at 1228.⁶

In the present case, the Second Circuit—like the Eleventh Circuit—also heeded the “important” fact that the Rule now triggers *Chevron* and makes earlier decisions inapposite. *See* Pet. App. 23a (“None of these [earlier] decisions classified the EPA’s views on the regulation of water transfers as sufficiently formal to warrant *Chevron* deference.”). New York is thus incorrect in asserting that there is a present conflict among jurisdictions that requires resolution by this Court. The opposite is true: the two courts of appeal that reviewed the Rule have both upheld it under the same rationale. None have rejected EPA’s Rule.

⁶ After upholding EPA’s Water Transfers Rule in *Friends I*, the Eleventh Circuit later dismissed several petitions for direct appellate review of the Water Transfers Rule on the ground that the circuit courts of appeal lack original jurisdiction to hear challenges to the Rule. *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) (“*Friends II*”). Although it declined to address the merits of EPA’s Rule, the Eleventh Circuit reiterated its earlier holding that “the water-transfer rule was a reasonable interpretation of an ambiguous provision of the Clean Water Act” and therefore passed muster under *Chevron*’s deferential standard of review. *Id.* at 1285.

II. The Second Circuit correctly held that the Rule is reasonable given the severe practical consequences of overturning EPA’s interpretation of the Act and the range of regulatory alternatives to the NPDES program.

The point of *Chevron* is to grant regulatory agencies the discretion they need to balance competing policy concerns. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The Water Transfers Rule is a paradigm example, as the court below recognized after carefully analyzing the policy considerations that the Rule embodies. Pet. App. 83a. Given the arguments in the Petition by the State of New York, two relevant policy considerations bear discussion here: first, the crippling burdens that would be imposed on water providers if EPA were forced to depart from its longstanding policy of deferring to state administration of water transfers and, second, the availability of other regulatory mechanisms (beyond the NPDES program) to address potential water quality issues in the context of water transfer projects. *See* Pet. 27 (No. 17-418) (incorrectly claiming that the burdens of subjecting water transfers to the NPDES system are based on “unsupported speculation”); *id.* at 15–17 (wrongly asserting that without regulation under the NPDES system, water transfers would be given “free reign to pollute”).

A. Subjecting all water transfer projects nationwide to NPDES permits would be cost prohibitive and would ignore the practical realities facing western water providers.

The court below recognized the “potentially serious and disruptive practical consequences of requiring NPDES permits for water transfers,” as did EPA when it promulgated the Rule. Pet. App. 83a; *see, e.g.*, 73 Fed. Reg. at 33,700. “[C]ompliance with an NPDES permitting scheme for water transfers,” the Second Circuit explained, “is likely to be burdensome and costly for permittees, and may disrupt existing water transfer systems.” Pet. App. 75a. This Court made similar observations in *Miccosukee*: “It may be that construing the NPDES program to cover [water] transfers would raise the costs of water distribution prohibitively. . . .” *Miccosukee*, 541 U.S. at 108. Some have argued that water transferors could reduce regulatory burdens by operating under general rather than individual NPDES permits. *See id.* at 108–09. But while in some cases general permits provide an opportunity for shorter review and approval periods, they impose the same requirements and discharge limitations as individual permits. *See supra*, Statement § I. General permits therefore would not ameliorate the exorbitant costs to water providers.

Some estimates, the Second Circuit recognized, put these costs at “\$4.2 billion to treat just the most significant water transfers in the Western United States.” Pet. App. 75a. Individual water providers, the

court said, could bear “hundreds of millions of dollars” in compliance costs. *Id.* Costs of this scale are neither feasible for water providers to bear, nor are they justified given the realities facing western water supply systems. *E.g.*, C.A. App. 346 (explaining that the costs of compliance for one project “could exceed \$315 million, double the initial cost of the entire . . . project”).

In the West, water characteristics vary naturally between watersheds and water bodies. This is because runoff from precipitation in mountainous regions accounts for the vast majority of the water supply. A.R. 1433 at 4, *see also, e.g.*, U.S. Dep’t of the Interior, Bureau of Reclamation, *Colo. River Basin Water Supply & Demand Study, Technical Report B—Water Supply Assessment* at B-12 (Dec. 2012). And, due to natural processes like erosion, this runoff—which can travel long distances over varied terrain—naturally contains elevated levels of “total suspended solids” (*i.e.*, suspended particles of soil and sediment), “total dissolved solids” (*i.e.*, dissolved particles of soil and sediment), and “turbidity” (muddiness). *See* A.R. 1433 at 15–16. Indeed, these natural erosive processes are responsible for much of the West’s dramatic topography, from gullies carved into 14,000-foot mountains to water-filled depressions that sit below sea level, like the Salton Sea. *Id.*

Subjecting the thousands of western water transfers to the massive costs of a mandatory NPDES system, and requiring them to remove naturally occurring constituents from transferred water, would yield far fewer environmental benefits than one might assume.

Colorado, for example, has more than 1,700 diversions that transfer water within river basins, as well as over 40 major trans-mountain projects that, based on conservative estimates, move 500,000 acre-feet of water per year. C.A. App. 320. Yet although Colorado, like every other State, is required under Section 303(d) of the Clean Water Act to develop a list of waters that fail to meet water quality standards, the State “has never encountered a water body whose quality is impaired as a result of pollutants transferred from one water body to another.” *Id.* at 320–21. The administrative record includes few reports of 303(d)-impairment caused by water transfers, despite the massive numbers of water transfers in the United States. *See, e.g., id.* at 292 (“Michigan’s experience over the past thirty years has found that water transfers that cause water quality problems are relatively rare.”); *see also* 73 Fed. Reg. at 33,698 (noting the prevalence of water transfers, particularly in the West). In many projects, transferred waters are of equal or better quality than are receiving waters. C.A. App. 320 (“Colorado has not experienced water quality problems caused by water transfers. Indeed, most major transfers in Colorado occur relatively high in river basins and transfer high quality water from one river basin to another.”).

Complying with NPDES program requirements for the naturally occurring constituents present in western transferred water would be a daunting task. Water transferors have no ability to control the natural processes that determine the quality of source waters. C.A. App. 346–47. Yet they could be required to treat

the water they transfer for up to three dozen naturally occurring parameters and constituents if the transfer caused *any* change in the quality of the receiving waters, as discussed above in the Statement. *See, e.g.*, 40 C.F.R. § 122.44(d)(1)(i); 5 Colo. Code Regs. 1002, § 31.16. This is why the costs of subjecting water transfers to the NPDES program would be prohibitive. And for some projects, compliance would not only be costly but also technically infeasible. C.A. App. 346. Some water providers would thus have no realistic alternative but to curtail the use of their water rights to meet NPDES requirements, *e.g., id.* at 346–47—a result that “violate[s] Congress’ specific instruction that ‘the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired [by the Act],’” *Miccossukee*, 541 U.S. at 108 (quoting 33 U.S.C. § 1251(g)).

B. State and federal regulatory mechanisms apart from the NPDES program protect water quality in the context of water transfers.

The Rule does not establish a regulation-free zone. To the contrary, the Rule was enacted in part because state and federal regulatory mechanisms are available to mitigate the potential environmental effects of water transfers. *E.g.*, 73 Fed. Reg. at 33,699 (noting that the Act “reserves the ability of States to regulate water transfers under State law”); *id.* at 33,702 (explaining that the Act “establishes a variety of programs and regulatory initiatives in addition to the NPDES

permitting program”). These alternatives, the Second Circuit recognized, illustrate why the Rule is an example of *Chevron* working as it should, allowing an agency to take account of the full range of policy considerations in determining how best to interpret a federal statute. “The existence of these available regulatory alternatives suggests that exempting water transfers from the NPDES permitting program would not necessarily defeat the fundamental water-quality aims of the Clean Water Act, which further counsels in favor of the reasonableness of the Water Transfers Rule.” Pet. App. 79.

State mechanisms. Under the Rule, States are not required to subject water transfers to the NPDES program. But this does not mean that other state-level regulatory tools under the Clean Water Act are unavailable. One example is regulation under mandatory state water quality management plans—or “Section 208 Plans”—which must set forth methods for controlling water pollution in defined geographic areas. See 33 U.S.C. § 1288(a)(2). Colorado’s Section 208 plans cover the many basins across the State that include water transfer projects. *E.g.*, North Front Range Water Quality Planning Assoc., *2016 Plan Update—Area-Wide Water Quality Management Plan (208 Plan)*, <http://www.nfrwqpa.org/awqmp.shtml> (describing plans for the Cache la Poudre River Basin and Big Thompson River Basin). Another example is regulation for “total daily maximum loads” under Section 303(d) of the Act, through which States must quantify the amount of specific pollutants water bodies can assimilate without

exceeding water quality standards. Again, these requirements apply in basins affected by water transfers, imposing measures to protect the water quality of those basins. Colo. Dep't of Public Health & Env't, *Total Maximum Daily Loads*, <https://www.colorado.gov/pacific/cdphe/total-maximum-daily-loads-tmdls> (setting forth information on total maximum daily loads for various river basins in the State).

In addition to these mechanisms under the Clean Water Act, States have additional regulatory authority—independent of the Act—to address potential water quality issues associated with water transfers. In fact, multiple, overlapping authorities exist in many States. *See* Pet. App. 77a & n.37. Colorado, for example, has “control regulations,” under which the State Water Quality Control Commission can prescribe mandatory or prohibitory measures for any activity that causes the quality of state waters to violate any water quality standard. COLO. REV. STAT. §§ 25-8-503(5); 25-8-205(1)(c). These tools would be available “[i]f, in the future, concerns regarding water quality impacts due to contaminants contained in water transfers should arise in Colorado.” C.A. App. 321. The New Mexico State Engineer has authority to deny a transfer of surface or ground water if the transfer will be detrimental to the public welfare of the State, which includes considerations of water quality. N.M. STAT. §§ 72-5-23, 72-5-26, 72-12-7; *see also Stokes v. Morgan*, 680 P.2d 335, 341 (N.M. 1984) (explaining that the state engineer could withhold a permit due to “intrusion of poor quality water”). In North Dakota, water transfers may be subject

to non-NPDES permits that contain protective conditions, and transfers must in any event comply with the “state’s water quality standards established to protect aquatic life.” N.D. CENT. CODE §§ 61-32-03, 61-28-09(1).

Indeed, beyond these examples, *every* State has authority under its own laws to protect water quality in the context of water transfers. *See, e.g.*, A.R. 1460 at 2.⁷ And regulation under those laws is often substantially broader than regulation under the Clean Water Act itself would be. Many States, including several of the Petitioners here, regulate not just the “navigable waters” that are subject to the Act, but also ground water and other waters that fall outside the Act’s mandatory scope. *See, e.g.*, CAL. WATER CODE § 13050; COLO. REV. STAT. § 25-8-103(19); CONN. GEN. STAT. § 22a-423; DEL. CODE ANN. tit. 7, § 6003(a)(2); ME. REV. STAT. tit. 38, § 361-A(7); MICH. COMP. LAWS § 324.3101(z); N.M. STAT. ANN. § 74-6-4; N.Y. ENVTL. CONSERV. LAW § 17-0105(2). This reflects the fact that—as the Act itself recognizes—States have “primary responsibilit[y] . . .

⁷ Additionally, state common law categorizes water pollution as a trespass against a downstream user’s water rights. In Colorado, for example, “a common law theory . . . prohibits the discharge of contaminants into streams where doing so makes the water unsuitable for an[other] appropriator’s normal use of water.” *In re Application for Plan for Augmentation of City and Cty. of Denver*, 44 P.3d 1019, 1028 (Colo. 2002). The same is true in other States. *See, e.g., California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1997) (noting that under California law water pollution is a public nuisance); *Phillips v. Davis Timber Co., Inc.*, 468 So. 2d 72, 79 (Miss. 1985) (holding that the plaintiff was “entitled to an injunction enjoining and prohibiting further [pentachlorophenol] pollution into his lake”).

to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b); *see also id.* § 1370 (recognizing that States may impose more stringent water quality regulations than those required by the Act).

Federal alternatives. The federal government likewise has regulatory tools available outside the NPDES program to address any potential negative effects of water transfers. The Second Circuit listed a few such tools, including provisions under the Clean Water Act itself, as well as “other federal statutes and regulations . . . like the Safe Drinking Water Act” and “the Federal Energy Regulatory Commission’s regulatory scheme for non-federal hydropower dams.” Pet. App. 76a–77a. Given that the federal government is often involved in major water transfer projects, statutes like the National Environmental Policy Act (“NEPA”) and the Endangered Species Act can also play a significant role.⁸

The Petition by the State of New York claims that these tools are insufficient to “resolv[e] interstate disputes over water pollution.” Pet. 17 (No. 17-418). But water transfers “do not often have interstate or international effects.” Pet. App. 79a. And when they do,

⁸ These statutes can prompt state-federal cooperation in the context of water transfers. For example, the Colorado-Big Thompson Project affects the clarity of receiving waters, and federal, state, and local parties with interests in the project are working together under a memorandum of understanding to address the issue while Reclamation completes its NEPA process. *See* Bureau of Reclamation et al., Memorandum of Understanding 16-LM-60-257B, *Grand Lake Clarity Stakeholders’ Memorandum of Understanding* 1 (2016), <http://co.grand.co.us/DocumentCenter/View/7935>.

other mechanisms are available to address cross-boundary issues. For example, more than a dozen interstate compacts involving more than twenty-five States facilitate interstate pollution control.⁹ Indeed, the Act specifically authorizes States to negotiate interstate compacts “for the prevention and control of pollution.” 33 U.S.C. § 1253(b).

Other provisions of the Act requiring interstate coordination have been successful in the past. In the Colorado River Basin—which includes a huge number of water transfer projects—salinity has been a particular concern to downstream States since the 1970s. *See* Environmental Protection Agency, Regions VII and IX, *The Mineral Quality Problem in the Colorado River: Summary Report* (1971). In response to this concern, EPA promulgated a basin-wide salinity control plan, and Congress legislated on the issue, in the early 1970s. *See* Colo. River Basin Salinity Control Forum, *Water Quality Standards for Salinity, Colorado River System 5* (Oct. 2017), <http://www.coloradoriversalinity.org/docs/2017%20Review%20-%20FINAL.pdf>. Around the same time, the seven Colorado River Basin States

⁹ *See, e.g.*, Delaware River Basin Interstate Compact between the State of Delaware, the State of New Jersey, the State of New York, and the Commonwealth of Pennsylvania, Pub. L. No. 87-328, 75 Stat. 688, art. 5, sec. 5.1 (Sept. 27, 1961) (“The commission may . . . acquire, construct, operate and maintain projects and facilities to control potential pollution and abate or dilute existing pollution of the water resources of the basin.”); Red River of the North Compact between the State of South Dakota, the State of North Dakota, and the State of Minnesota, Pub. L. No. 456, 52 Stat. 150, art. II (Apr. 2, 1938) (“Each of the States . . . undertake to cooperate . . . for . . . the prevention of the pollution of such waters.”).

established an interstate cooperative effort, the Salinity Control Forum, to satisfy the States' obligation under the Act to work together in addressing water quality concerns. *Id.* (“The Forum was created for interstate cooperation and to provide the states with the information necessary to comply with Section 303(a) and (b) of the Clean Water Act.”). As a result of these efforts, salinity levels in the basin have declined significantly. *Id.* at 13 (“To date, it is estimated that the Program has reduced the annual salt loading in the Colorado River by approximately 1,330,000 tons, resulting in over 100 mg/L reduction in salinity concentrations in the Lower Basin.”).¹⁰

In short, the States and the federal government have tools available to address water quality concerns in the context of water transfers, and they in fact employ those tools. The State of New York suggests that the NPDES program is the only option. Pet. 14–16 (No. 17-418). This is incorrect. Water transfers have never been subject to the NPDES program nationwide. The Rule therefore does not create new “dangers,” cause new “harms,” or “undermine” the alternative protective mechanisms within the Act or other regulatory regimes. *Id.* at 15–17.



¹⁰ Salinity on the Colorado River has also prompted international cooperation. In the 1970s, the United States and Mexico engaged in discussions on the subject, which led to an agreement of measures be taken to address salinity issues. Permanent and Definitive Solution to the Int'l Problem of the Salinity of the Colorado River, Minute No. 242 (Aug. 30, 1973), Int'l Boundary and Water Comm'n United States and Mexico.

CONCLUSION

For these reasons, as well as those set forth in the Brief in Opposition by the United States, the Court should deny the petitions for writ of certiorari.

Respectfully submitted,

CYNTHIA H. COFFMAN,

Attorney General

FREDERICK R. YARGER*,

Solicitor General

GLENN E. ROPER,

Deputy Solicitor General

LAURA CHARTRAND,

Deputy Attorney General,

ANNETTE M. QUILL,

Sr. Asst. Attorney General

PETER D. NICHOLS,

Special Assistant Attorney General

Counsel for Intervenor-Respondent the

State of Colorado

**Counsel of Record*

PETER D. NICHOLS

BERG HILL GREENLEAF RUSCITTI LLP

Lead Counsel for Intervenor-Respondents

Western Water Providers

Counsel for National Water

Resources Association, Lower

Arkansas Valley Water

Conservancy District

Additional Counsel for the Western States

HECTOR BALDERAS, Attorney General	JAHNA LINDEMUTH Attorney General
TANIA MAESTAS, Deputy of Civil Affairs	STATE OF ALASKA P.O. Box 110300
CHOLLA KHOURY, Director, CONSUMER AND ENVIRONMENTAL PROTECTION DIVISION	Juneau, Alaska 99811-0300 (907) 465-2133
PETER D. NICHOLS, Special Assistant Attorney General	
STATE OF NEW MEXICO P.O. Box Drawer 1508 Santa Fe, New Mexico 87504 (505) 827-6010	
DOUG PETERSON Attorney General of the State of Nebraska 2115 State Capitol Lincoln, Nebraska 68509 (402) 471-2682	LAWRENCE G. WASDEN Idaho Attorney General P.O. Box 83720 Boise, Idaho 83720-0010 (208) 334-2400
WAYNE STENEHJEM Attorney General of North Dakota 600 E. Boulevard Avenue Bismarck, North Dakota 58505-0040 (701) 328-2210	ADAM LAXALT Attorney General for the State of Nevada OFFICE OF THE ATTORNEY GENERAL 100 North Carson Street Carson City, Nevada 89701 (775) 684-1100

TYLER GREEN
Utah Solicitor General
OFFICE OF THE UTAH
ATTORNEY GENERAL
160 East 300 South,
5th Floor
P.O. Box 140858
Salt Lake City, Utah
84114-0858
(801) 366-0533

KENNETH C. SLOWINSKI,
Chief Counsel
STATE OF ARIZONA
DEPARTMENT OF
WATER RESOURCES
3550 North Central Avenue
Phoenix, Arizona 85012
(602) 771-8474

KEN PAXTON
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2100

PETER K. MICHAEL
Attorney General
of Wyoming
OFFICE OF THE
ATTORNEY GENERAL
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7844

Additional Counsel for the Western Water Providers

DON BAUR, ESQ.	MARCIA SCULLY,
PAUL B. SMYTH, ESQ.	General Counsel
PERKINS COIE LLP	JILL C. TERAOKA, Senior
700 13th Street NW,	Deputy General Counsel
Suite 600	KAREN L. DONOVAN, Senior
Washington, DC 20005-2000	Deputy General Counsel
<i>Counsel for Western Urban</i>	PATRICK B. ROHEN,
<i>Water Coalition</i>	Deputy General Counsel
	METROPOLITAN WATER
	DISTRICT OF
	SOUTHERN CALIFORNIA
	P.O. Box 54153
	Los Angeles, California
	90054
PATRICIA L. WELLS,	JOANNA SMITH HOFF, ESQ.
General Counsel	Assistant Counsel
CITY AND COUNTY	IMPERIAL IRRIGATION DISTRICT
OF DENVER, BOARD OF	P.O. Box 937
WATER COMMISSIONERS	Imperial, California 92251
1600 West 12th Avenue	
Denver, Colorado 80204	
JAY JOHNSON, ESQ.	
General Counsel	
CENTRAL ARIZONA WATER	
CONSERVATION DISTRICT	
P.O. Box 43020	
Phoenix, Arizona 85080	

SHAWN E. DRANEY, ESQ.
 SNOW, CHRISTENSEN AND
 MARTINEAU, PC
 P.O. Box 45000
 Salt Lake City, Utah 84145
*Counsel for Metropolitan
 Water District of Salt
 Lake City & Sandy*

STEVEN E. CLYDE, ESQ.
 CLYDE SNOW & SESSIONS
 201 South Main Street,
 13th Floor
 Salt Lake City, Utah
 84111-2216
*Counsel for Central
 Utah Water
 Conservancy District*

PATRICK B. SIGL, ESQ.
 Supervising Attorney,
 LAND & WATER RIGHTS
 LAW SERVICES
 Salt River Project
 1500 N. Mill Avenue
 Tempe, Arizona 85281-1298

LEE MILLER, ESQ.
 General Counsel
 SOUTHEASTERN COLORADO
 WATER CONSERVANCY
 DISTRICT
 31717 United Avenue
 Pueblo, Colorado 81001

THOMAS A. CARR, ESQ.
 City Attorney
 CITY OF BOULDER
 1777 Broadway
 Boulder, Colorado 80302

DALLIN W. JENSEN, ESQ.
 PARSONS BEHLE & LATIMER
 201 South Main Street,
 Suite 1800
 Salt Lake City, Utah 84111
*Counsel for Washington
 County Water Conservancy
 District, Kane County
 Water Conservancy District*

STEFANIE MORRIS, ESQ.
 General Counsel,
 STATE WATER CONTRACTORS
 1121 L Street, Ste. 1050
 Sacramento, California
 95814
*Counsel for [California]
 State Water Contractors*

CHRISTINE MCKENNEY
 Assistant City Attorney
 CITY OF AURORA
 15151 E. Alameda Parkway,
 Fifth Floor
 Aurora, Colorado 80012

JONATHAN KNAPP
Deputy City Attorney
OFFICE OF THE
CITY ATTORNEY
CITY AND COUNTY OF
SAN FRANCISCO
1390 Market Street,
Suite 418
San Francisco, California
94102

GREGORY J. WALCH, ESQ.
General Counsel
SOUTHERN NEVADA
WATER AUTHORITY
1001 South Valley
View Boulevard
Las Vegas, Nevada 89153
*Counsel for Las Vegas
Valley Water District*

BRIAN POULSEN, ESQ.
General Counsel
EL DORADO
IRRIGATION DISTRICT
2890 Mosquito Road
Placerville, California 95667