No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONWIDE PUBLIC PROJECTS COALITION, WEST VALLEY WATER DISTRICT OF CALIFORNIA, METROPOLITAN DENVER WATER AUTHORITY OF COLORADO, SEMITROPIC WATER STORAGE DISTRICT OF CALIFORNIA AND WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici are cities, water and wastewater districts, and private entities providing essential services to the public. If upheld, the Ninth Circuit's decision would require virtually all entities that transfer water through a concrete channel or other engineered improvement to obtain Clean Water Act National Pollution Discharge Elimination System (NPDES) permits for every stage of the transfer. This requirement would have profound implications for the ability of *Amici's* members to provide public services in a timely and cost-efficient manner.

The Nationwide Public Projects Coalition (NPPC), headquartered in Colorado, is a not-for-profit association of regional and local government agencies involved in water supply, flood control, irrigation, and wastewater and stormwater management. These agencies represent some 15 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC's mission is to represent the public interest in

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[1] The parties have consented to the filing of this brief. *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

ensuring that vital public infrastructure services are provided in a safe, timely, affordable, and environmentally-responsible fashion. Consisting predominantly of public agencies and firms that provide services to the public sector, NPPC's members must ensure that a fair balance is achieved between environmental values and essential public needs.

The West Valley Water District of California (WVWD) is an independent special water district located 60 miles east of Los Angeles that serves approximately 65,000 citizens. WVWD routinely engages in interbasin transfers of water through various diversion structures to address fluctuations of available water from WVWD's sources.

The Metropolitan Denver Water Authority (MDWA) is a political subdivision and public corporation of the State of Colorado. MDWA is made up of 20 cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver, Colorado area and serves more than 1.5 million persons. MDWA's member agencies are dependent on interbasin water transfers to meet the water needs of their constituents.

The Wheeler Ridge-Maricopa Water Storage District of California (WRMWSD) is a political subdivision of the state of California that encompasses 228 square miles of mostly

agricultural land. WRMWSD relies on interbasin transfers to supply the growing demand for water of landowners within its jurisdiction.

The Semitropic Water Storage Agency, located in the San Joaquin Valley, part of Kern County, California, supplies water to over 220,000 acres of which 140,000 acres are irrigated. The farmers within Semitropic have a total annual demand of approximately 450,000 acre-feet which is met by surface water import and local groundwater. Semitropic also has a fully permitted and partially completed 1,650,000 acre-foot groundwater storage facility serving urban and public agencies that benefit more than 20 million people from San Diego to the San Francisco Bay area.

The outcome of this case will have a profound impact on the collective interests of *Amici* and the public they serve. Interbasin water transfers through various engineered diversion structures are a necessity for countless water districts, especially in areas where the demand for water outpaces historic, localized supply. By requiring water districts to obtain NPDES permits for these routine and critical water transfers from one segment of the same body of water to another, the Ninth Circuit's decision would exponentially increase the costs of regulatory compliance and —

at the same time — reduce the flexibility water districts currently enjoy to obtain needed water from a variety of sources. The ultimate losers will be consumers, who will face dramatically higher water costs in return for marginal to non-existent environmental benefits. Indeed, requiring permits for such routine transfers runs counter to this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004) (*Miccosukee*) that such transfers of water "cannot constitute an addition of pollutants" requiring an NPDES permit. This Court should reject the reasoning of the Ninth Circuit to prevent further intrusion into activities that traditionally have been, and should remain, outside the NPDES permit process of the Clean Water Act (CWA).[2]

SUMMARY OF ARGUMENT

1. The Ninth Circuit's interpretation of "addition of pollutants" misconstrues the statutory language of the Clean Water Act and conflicts with this Court's ruling in *Miccosukee*. The transfer of water through an engineered structure within a water management system does not result in a "discharge" from a regulated "point source." Extending CWA regulation to such conveyances

[2] Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (2002).

would require a permit for virtually every interbasin transfer of water. This would have a significant impact on a wide spectrum of *Amici's* water management activities that in no way "add" pollutants to the waters they transfer.

2. The Ninth Circuit incorrectly merged regulation of "point source" and "non-point source" pollution by requiring water management agencies to obtain NPDES permits in the circumstances presented here. In effect, the Ninth Circuit's ruling — that in-stream engineered structures become point sources simply by redirecting water through the in-stream structure — enlarges the regulatory scope of the NPDES permit program to cover non-"point source" pollution traditionally regulated by the States.

3. The Ninth Circuit's interpretation of the CWA is inconsistent with fundamental principles of federalism. Nothing in the CWA evinces a "clear statement" that Congress intended to encroach upon state and local regulation of land use and water management activities, a "quintessential" state and local power.

ARGUMENT

I. THE NINTH CIRCUIT MISINTERPRETED THE STATUTORY TERM "ADDITION OF POLLUTANTS" IN WAYS THAT COULD HAVE A SIGNIFICANT ADVERSE EFFECT ON A WIDE SPECTRUM OF VITAL WATER MANAGEMENT SERVICES.

A. The transfer of water through an engineered improvement within a managed water system does not result in a "discharge" because pollutants are not added to a navigable water from the outside world by a "point source."

The Ninth Circuit's ruling misconstrues the language of the CWA and would expand the regulatory scope of the permit process in ways that are flatly contrary to the statute. Although this particular case involves a municipal separate storm sewer system (MS4) permit (water flowing through concrete channels into the "naturally occurring" portions of the Los Angeles and San Gabriel Rivers), it has ramifications far beyond the MS4 permit at issue. At its essence, the Ninth Circuit decision represents a fundamental alteration of the CWA's regulatory scheme. In the Ninth Circuit's

incorrect view, a man-made structure within a stream transforms that part of the stream into a point source so that water flowing through the structure results in an "addition of pollutants" from a "point source."[3] That view is incompatible with the statute because, under the Ninth Circuit's interpretation, water management districts would need to obtain NPDES permits for transfers of water through engineered diversion structures even when the conveyance merely redirects water without adding any pollutants from the outside world. In so ruling, the Ninth Circuit ignored the central core of this Court's holding in *Miccosukee* that movement of water within a single water body "cannot constitute an addition of pollutants."[4] In *S.*

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[3] The term "discharge of a pollutant means (A) any addition of any pollutant to navigable waters from any 'point source." 33 U.S.C. §1362(12). The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C §1362(14)

[4] *Miccosukee* cited the "unitary waters" argument advanced by the Government (that "all the water bodies that fall within the Act's definition of navigable waters should be viewed unitarily for the purposes of the NPDES permitting requirements"), 541 US 95, 105-106. Although the Court declined to resolve that issue, it still cited the Second Circuit's *Trout Unlimited* decision on "additions" ("[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into

D. Warren v. Maine Board of Environmental Protection, 547 U.S. 370, 380 (2006), the Court again recognized that "discharge" under §402 of the CWA has a very specific meaning requiring an "addition of a pollutant."[5] Indeed, EPA's regulations make clear that a "point source outfall" does not include "open conveyances connecting two municipal separate storm sewer or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United

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the pot, one has not 'added' soup or anything else to the pot." 541 U.S. at 110 (citing *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of N.Y.*, 273 F.3d. 481, 492 (2d Cir. 2001).

[5] In *S. D. Warren* the Court distinguished §402 from §401 of the CWA, the latter of which requires a State to furnish a water quality certification for "discharges." The Court noted that "Section 402 has a historical parallel with §401, for the legislative record suggests that it, too, was enacted to consolidate and ease the administration of some predecessor regulatory schemes ...." *See* H.R. Rep. No. 92-911, at 124-25 (1972), *as reprinted in* 1 Leg. Hist. 805-806. But it contrasts with §401 in its more specific focus. It establishes what Congress called the National Pollutant Discharge Elimination System, requiring a permit for the "discharge of any pollutant" into the navigable waters of the United States, 33 U.S.C. §1342(a). The triggering statutory term here is not the word "discharge" alone, but "discharge of a pollutant," a phrase made narrower by its specific definition requiring an "addition" of a pollutant to the water. §1362(12).

States." 40 C.F.R. §122.2 (2002). EPA's "water transfer" rule further clarified that water transfers are not regulated under the NPDES program unless there is an "intervening industrial, municipal or commercial use."[6] Thus, under the CWA there is no addition of a pollutant from a "point source" unless the "point source" actually introduces a pollutant from the outside world. Under the Ninth Circuit's reasoning, however, the mere transfer of water though a man-made structure without any such intervening use would require an NPDES permit. Contrary to the express statutory focus, the Ninth Circuit's incorrect interpretation essentially guarantees that public entities would be forced into the time-consuming and costly NPDES permit process for water transfers that do not "add" any pollutants.

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[6] EPA's water transfer rule, 73 Fed. Reg. 33661, 33701 (June 13, 2008), excluded water transfers from the permit requirements and noted that requiring NPDES permits for such transfers would upset the "balance Congress created between federal and state oversight of activities affecting the nation's waters" (citing various provisions of the Act such as §101(g): the CWA is not to be construed in a manner to "unduly interfere with the ability of States to allocate water within their boundaries . . ."). *Id.* at 33702. EPA's rule was upheld by the Eleventh Circuit in *Friends of the Everglades Inc. v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009), *cert. denied,* 131 S. Ct. 643 (2010).

The broad reach of the Ninth's Circuit's flawed interpretation of the CWA becomes apparent when one considers the composition of typical water segments. Because no two water segments are identical — even within a unitary hydrologic system — the Ninth Circuit's rationale will inevitably (and incorrectly) result in finding the "addition of pollutants" in totally inappropriate circumstances given the CWA's broad definition of "pollutants." Brian J. Skinner & Stephen C. Porter, *Physical Geology* 283-85, 299-300 (1987). That is because each segment of a naturally occurring water contains a hodgepodge of materials in varying proportions. *Id.* Even within a unitary water storage basin, different water segments possess varying chemical compositions, consisting of different types and ratios of organic and inorganic nutrients deposited by sources such as runoff, erosion, non-point source pollution, adjacent land use and exempted or previously-permitted discharges. *See id.* at 291-98; Raymond A. Young & Ronald L. Giese, *Introduction to Forest Science,* 397-401 (2d ed. 1990). Each segment is influenced by its own diverse topography, distinct tributaries, and heterogeneous substrate. Skinner & Porter, *supra,* at 292. These factors produce varying flow rates that cause different segments to exhibit disparate temperatures, to produce distinct dissolved oxygen levels, and to possess a different capacity for carrying suspended solids. *Id.* at 272-

79, 283-86; Young & Giese, *supra,* at 396-401. Finally, the different location of each segment yields different types and amounts of biological material such as vegetative matter and animal remains.

Under the Ninth Circuit's reasoning, the simple act of moving water by an engineered diversion would be enough to require an NPDES permit. Indeed, an "addition of pollutants" subject to regulation would occur whenever any intra-system diversion structure transfers water within a water basin (a routine practice for water supply systems) even though no pollutants from the outside world are added. Naturally occurring water constituents would be transmogrified into regulable pollutants simply by flowing from one component of the same water management system to another. Such far-reaching implications should weigh heavily in favor of reversing the decision below.

B. The Ninth Circuit's incorrect holding makes it very difficult for water supply facilities to meet the public's critical water supply needs efficiently and effectively.

The impact of the Ninth Circuit decision is especially significant in light of the wide spectrum

of water management and supply systems nationwide. These systems contain literally millions of water diversion structures that fit within the Ninth Circuit's incorrect definition of "point sources" and, under the decision below, would be subject to the NPDES permitting process for the first time. Among the water management and supply projects that would be regulated under the Ninth Circuit's rationale are: facilities that ensure public safety, such as dams and flood control systems; facilities that serve agriculture, such as irrigation supply systems; water supply facilities that provide an adequate amount of safe drinking water; and ecosystem and species preservation programs, such as those that regulate water flow from lakes and reservoirs into rivers and streams. *See* Skinner & Porter, *supra,* at 283 (discussing the wide variety of indispensable uses for water management and supply infrastructure). *Amici* are aware of countless examples of diversion structures that, while technically qualifying as "point sources" under the CWA, operate without adding to the water any pollutants from the outside world. Yet, under the Ninth Circuit's ruling all such structures will be forced into the NPDES permitting process.

Water management and supply facilities along the Colorado River provide but one example of the countless projects that the Ninth Circuit's

interpretation will subject to the time-consuming and expensive NPDES permitting process. The Colorado River contains water management and supply infrastructure constructed between 1938 and 1964. *Id.* at 282. This infrastructure includes a system of dams, reservoirs, canals and 400 kilometers of aqueducts that perform a variety of critical functions throughout the Southwest. *Id.* at 282-83. The Parker Dam provides most of the municipal water supply for Los Angeles and San Diego. *Id.* at 283. The Imperial Dam furnishes irrigation water to farms throughout the Southwest. *Id.* Three other dams along the river generate hydroelectric power that is the primary source of electricity for customers throughout the region. *See id.* Within this water management system, numerous diversions and conveyance structures move water from the dams/reservoirs into other waters of the United States.

The particular plight of other NPPC members further illustrates the scope of projects that the Ninth Circuit opinion would pull into the NPDES permit process.

The California State Water Project (SWP), an intricate water transfer and delivery system, supplies water to two-thirds of California's citizens. SWP's supply of more than four million acre-feet of water per year is largely drawn from the Feather

River watershed in Northern California and transported south via the Sacramento-San Joaquin River Delta, where the SWP water is commingled with water from the watersheds of the Sacramento, American, Stanislaus, Mokelumne, San Joaquin, and many other rivers. These diverse bodies of water each have different chemical compositions, including vastly different levels of phosphates, suspended solids, and other federally-recognized pollutants. As it moves south, SWP water is diverted to water districts throughout California, where it is often mixed again with local water supplies, each with its own unique chemical composition.

Under the Ninth Circuit's decision, the transport and distribution of SWP water would become bogged down in a costly and time-consuming regulatory morass that Congress did not intend. Merely counting the number of times SWP water combines with water from another distinct source through a structure such as a concrete spillway would be a challenge. The prospect of obtaining a separate NPDES permit for each combination is a regulatory nightmare that would dramatically increase compliance costs and could force the State to rethink its entire water distribution system.

For example, the Wheeler Ridge-Maricopa Water Storage District of Kern County, California, which obtains most of its water supply via the California Aqueduct directly from the SWP, provides water to 72,074 acres of farm lands within the District's Surface Water Service Area. While most of the District's water supply comes from SWP interbasin transfers, the District has also been forced to secure additional dry year water supplies from the Kern Water Bank, Pioneer Project and Berrenda Mesa Project. These projects utilize flood flows and excess water supplies from the Kern River, the Central Valley Project (which is an interbasin from the San Joaquin River watershed into Kern County) and the SWP. The District is very concerned over the delays, cost increases and restrictions that could arise from NPDES permitting in both wet and dry years — all without any environmental benefit.

Other California water agencies would face similar burdens. NPPC member the West Valley Water District in Rialto obtains its surface water from a small water body known as Lytle Creek, which is designated a cold water stream by the Regional Water Quality Control Board. The creek water is normally diverted and used for the operations of electricity before it is distributed to water agencies through diversion. The District blends creek water with SWP water provided by a

State Water Contractor who wholesales water to local agencies. At times, the District must divert water back into the creek. If NPDES permits were required for these diversions, the District estimates that it would have to add other types of treatment prior to discharge back into the creek or for groundwater storage and recovery at substantial additional expense — again, without any environmental benefit. Similarly, NPPC member Semitropic Water Storage District moved over one million acre-feet in and out of storage since the inception of its program in the mid 90s. If NPDES permits were required, it would hamper the District's ability to move water to and from storage through transfers and exchanges critical to ensure this important program works efficiently to supply water in drought years to more than twenty million people.

The impact of the Ninth Circuit's decision would also be significant to the Metropolitan Denver Water Authority (MDWA), one of the fastest growing areas in the nation. MDWA, which serves suburbs within the Metropolitan Denver area, is supported by annual membership assessments based on the number of water and/or sewer taps provided. Most member communities obtain their raw or treated water from the City of Denver. The City shares with its suburban neighbors water that it gets from watersheds

including the South Platte, east of the Continental Divide, and the Colorado River, west of the Continental Divide. The additional costs of NPDES permits that Denver would have to obtain for inter-basin transfers would be passed on to MDWA's members who would receive no environmental benefit.

C. The Ninth Circuit's massive expansion of the NPDES permit process would be costly and time-consuming without producing any environmental benefits.

The economic and temporal burdens of acquiring a permit[7] and complying with its terms would impose severe burdens on NPPC members currently grappling with serious financial constraints. In turn, since 46 states have assumed responsibility for the NPDES permit program, the new requirements created by the Ninth Circuit will

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[7] NPDES permit applications require parties to develop a complex database to address issues such as water quality-based effluent limitations, monitoring and reporting of existing water quality conditions, best management practices, compliance schedules and various other procedures. *See* 40 C.F.R. §122.21 (2002). This process also involves notice to the public with an opportunity for the public to challenge proposed permits at the administrative level — an undertaking that can render the NPDES permitting process interminable. *See* 40 C.F.R. §§124.10-14 (2002).

also fall heavily on financially-strapped state agencies. *See* Dep't of Interior, Office of the Inspector General, *EPA State Enforcement of Clean Water Act Discharges Can Be More Effective,* 8 (2001).

An EPA study on the burdens of simply acquiring a NPDES permit sheds some light on the costs applicants and states will incur.[8] EPA estimates that the total annual temporal NPDES MS4 burden is 223,040 hours.[9] The EPA study also estimates that the total MS4 permitting cost is $26,987,958.[10] Should this Court uphold the Ninth Circuit, these costs will increase dramatically. Thus, EPA estimates of the prior costs and commitment of resources represent only a fraction of the new burdens that the decision below could, for the first time, thrust upon countless water management and supply facilities.

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[8] *See* EPA Information Collection Request For Applications For National Pollutant Discharge Elimination System Discharge Permits and the Sewer Sludge Management Permits (Final Draft), OMB No. 2040-0004 EPA ICR No. 0229.1 (2005), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2004-0031-0004.

[9] *Id.* Table B-1, pg. B-2.

[10] *Id.*

Much of the inevitable financial burden of the many new NPDES permits that the Ninth Circuit requires will ultimately fall on the shoulders of American taxpayers. Parties that cannot bear the costs or meet the standards under NPDES *(e.g.,* effluent limitations, monitoring requirements) would be forced to alter or abandon their operations — possibly jeopardizing the supply of adequate drinking water in large cities, interrupting the flow of water to irrigation-dependent farms, disrupting the operation of flood control facilities that pump out encroaching water from populated areas, and encumbering efforts to protect threatened and endangered species and to preserve critical habitat. Unless the decision below is reversed, the American public could be forced to accept the major public safety risks associated with the possible disruption of flood control operations, the potential risk of an inadequate drinking water supply, and the seasonal impacts of the hydrologic cycle on irrigation-dependent agriculture.

II. THE DECISION BELOW INCORRECTLY MERGES TWO COMPLEMENTARY, BUT DISTINCT, MANDATES OF THE CWA.

By requiring water management agencies such as SFWMD to address the pre-existing "pollutants" found in the waters they seek to divert, the Ninth Circuit improperly merges two

complementary, but distinct, mandates under the CWA. In effect, the Ninth Circuit ruling — that an in-stream engineered structure becomes a "point source" when transferring water — enlarges the regulatory scope of the NPDES permit program to require water management agencies to address "non-point sources" of pollution, which are traditionally regulated by states and localities under different CWA standards and requirements.

The NPDES permit program is not intended to address all potential sources of pollution in our nation's waters. Indeed, NPDES applies only to facilities that discharge pollutants from "point sources." *See* 33 U.S.C. §1342. Other provisions of the CWA address non-point sources of pollutants. "Non-point source" pollution comes from a wide variety of human activities in the watershed as water runs off or moves through the ground, such as "runoff from farmlands, mining activity, housing construction projects, roads, and so on." *Sierra Club v. Meiburg,* 296 F.3d 1021, 1025 (11th Cir. 2002). "Non-point sources" generally "cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point." *Id.* at 1025. In fact, the CWA established financial incentives for states to implement management

programs to address "non-point source" pollution outside the NPDES permitting program.[11]

Addressing non-point source pollution is considerably more complex than "end of the pipe" NPDES permitting. Pursuant to CWA §303(c), states must establish water quality standards and submit those standards to the EPA for review. *See* 33 U.S.C. §1313(a)-(c). To determine water quality standards, the state designates a use for a particular body of water and then determines the level of water quality required to achieve that use. *See id.* §1313(c)(2)(A). Where effluent limits are not stringent enough to implement water quality standards, States and EPA have authority to develop Total Daily Maximum Limits (TMDLs) for such waters needed to meet standards that consist of Waste Load Allocations (WLAs) from "point sources" and Load Allocations (LAs) for "non-point sources."

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[11] Section 208 of the CWA creates an area-wide planning program for state and local planning agencies to control non-point sources through water quality management programs with federal grants available to assist, 33 U.S.C. §1288(a). Congress added §319 to the Act in 1987 requiring states to develop phased nonpoint-source management programs with federal funding, 33 U.S.C. §1239 (a). *See generally* Mark A. Ryan, *The Clean Water Act Handbook,*193-97 (Am. Bar Ass'n 3d ed. 2011).

In contrast to the regulatory regime Congress enacted, the Ninth Circuit's decision would force water districts to control diffuse "non-point source" constituents through the NPDES program. In effect, water districts could become liable for violations of an NPDES permit for exceedences of water quality standards in the stream caused by "non-point source" runoff intended to be covered under state and local programs. Thus, by requiring an NPDES permit for engineered water movements within an MS4 system that contains many constituents from storm water runoff, the Ninth Circuit ignores the division between "point" and "non-point sources" of pollution and fails to consider the ramifications this merger will have by forcing parties such as *Amici's* members to address "non-point source" pollutants as a matter of federal regulatory law. Under the Ninth Circuit's ruling, a party that transfers water within the same unitary body of water becomes responsible for its physical characteristics by doing nothing more than redirecting such water internally from one segment to another.[12] Water

[12] Parties that obtain individual NPDES permits must meet certain effluent limitations, which are limits on the amount of pollutants that may be discharged. *See* 33 U.S.C. §1311. Hence, the NPDES permit could be used to require the water management authority to remediate existing pollutants which are ever-changing, depending on up-stream conditions. Indeed, such districts could face civil penalties of up to

management facilities will be forced to obtain NPDES permits and to retrofit their facilities to address pre-existing (and changing) water quality conditions despite having added nothing to the water.

III. THE DECISION BELOW VIOLATES A FUNDAMENTAL PRINCIPLE OF FEDERALISM. ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT INTRUDE INTO STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES.

In holding that the concrete channel in the LA River is a "point source," the Ninth Circuit adopted an unprecedented broad interpretation of the statutory term "addition of a pollutant" that disrupts the existing delicate balance between federal and state regulation of land and water resources. There is no "clear statement from Congress" that it intended such a result. Rather, Congress expressly preserved the States'

$37,000 per day for each day of violation, 33 U.S.C. §1319(d), and up to an additional $37,500 for violating an EPA CWA administrative enforcement order under §309(a) of the Act. 33 U.S.C. §1319(a). *See Sackett v. EPA*, 132 S. Ct. 1367 (2012). They also become targets for citizen suits under §505 of the Act, including liability for attorneys fees. 33 U.S.C. §1365(d).

traditional and primary power over land and water use when setting out the scope of activities regulated under the CWA.

A. Nothing In the CWA evinces a clear statement that Congress intended to encroach upon local regulation of water management and supply activities that do not add pollutants

A principal tenet of federalism is that courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended to alter the traditional balance between federal and state powers. In cases where a court seeks to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. *See Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001); *Rapanos v. United States,* 547 U.S. 715, 724 (2006).[13] This Court has recognized that there is an underlying assumption

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[13] As Justice Scalia noted in *Rapanos,* "Regulation of land use, as through the issuance of the development permits sought by petitioners . . . is a quintessential state and local power . . . . We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)." 547 U.S. at 738 (citation omitted) (Scalia, J., plurality op.).

that the power to legislate in areas traditionally regulated by the States "is an extraordinary power . . . [that] Congress does not exercise lightly." *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991). Rather, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass,* 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to intrude into state interests. *See Gregory,* 501 U.S. at 464.

The Ninth Circuit's decision clearly upsets the CWA's "cooperative federalism." Section 101 of the CWA specifically limits federal authority over state and local matters:

> 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 (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. §1251(b). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or

jurisdiction of the States with respect to the waters . . . of such States." *Id.* §1370(2).[14]

The division between the regulation of point and non-point source pollutants reflects this dual approach. "In so doing, the CWA uses distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources." *Pronsolino v. Nastri,* 291 F.3d 1123, 1126 (9th Cir. 2002) (citation omitted). While NPDES is based on "technological controls to limit the pollution point sources may discharge," the CWA "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task," consistent with CWA §101. *Id.* at 1126-27 (citations omitted).

The plain language of the CWA provides no "clear statement" that Congress intended to regulate all intra-system water movements that somehow affect water quality. Accordingly, there is no basis for concluding that it is "unmistakably clear" Congress intended the statutory term "addition of pollutants" to encompass everyday activities such as water management or other routine water supply projects. Congress set forth the very specific limit that regulated activities

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[14] *See also* 33 U.S.C. §1288 (encouraging states to develop area-wide management plans).

must result in an "addition" of pollutants in order to fall within the ambit of NPDES control. This careful balance between state and federal power should not be upset.

B. States have enacted water quality programs that are far broader and more comprehensive than the NPDES program.

Amici recognize the salutary objective of the CWA to protect the Nation's waters. But §402 does not cover all water movement activities that could potentially impact water quality. Consistent with the statutory language and with fundamental principles of federalism, activities such as water management, irrigation and drinking water supply, flood control and other routine water transfer uses are properly within the purview of state and local governments. Consistent with the statutory language, this Court has recognized that the CWA "establishes a distinctive variety of cooperative federalism which authorizes a State to 'administer' its own permit system that complies with federal statutory and regulatory requirements." *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607, 633 (1992); *see also Pronsolino,* 291 F.3d at 1140. As discussed above, the CWA bestows "primary" responsibility on the states to protect water resources. Pursuant to that

statutory authority, states and literally thousands of local governments regulate navigable waters.[15]

State-based clean water laws are typically far broader than their federal counterpart — regulating a wider spectrum of water management and supply projects. For example, California's Porter-Cologne Act requires any discharger or potential discharger that "could affect the quality of the waters of the state . . ." to report the activity to a regional clean water control board. *See* Cal. Water Code §13260(a)(1). The board then issues permit-like waste discharge requirements that account for water quality objectives, other waste discharges, the necessity of preventing discharge-related nuisances, and the beneficial uses the board seeks to protect. *See id.* §13263. As its primary operative mechanisms, the California statute prohibits any discharge of waste before a potential discharger files a report with the regional board; the statute also provides abatement authority to remedy unapproved discharges. *See id.* §§13264, 13304(a).

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[15] *See* Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcommittee On Clean Water, Fisheries and Wildlife of the Senate Committee on Environment and Public Works, 103d Cong. (1993) (statement of Nat'l Ass'n of State Dep'ts of Agric.), available in LEXIS, Legis Library, Cngtst File.

In Colorado, the Water Quality Control Act establishes a state water quality control commission. Colo. Rev. Stat. §25-8-101 *et seq.* The commission has the duty to set state water quality standards and may promulgate "precautionary measures, both mandatory and prohibitory, that must be taken by any facility, process, activity or waste pile that does cause or could reasonably be expected to cause pollution of any state waters in violation of control regulations or . . . any applicable water quality standard . . . ." *See id.* §§25-8-204, 25-8-205(l)(c). Similarly, Georgia's water pollution control law assigns to the state's Environmental Protection Division the responsibility "to regulate the withdrawal, diversion, or impoundment of the surface waters of the state . . . ." Ga. Code Ann. §12-5-21(b). The law also establishes a state board with the authority to promulgate water quality standards and associated rules to address any water quality need on a state, regional, or local level. *See id.* §12-5-23(a)(l).

Additional examples of state-based water pollution control laws that exceed CWA requirements are plentiful. Florida's water pollution control law broadly defines "waste" to include "substances which may pollute or tend to pollute any waters of the state" and forbids any unauthorized discharge into state waters of "any waste which, by itself or in combination with the

wastes or other sources, reduces the quality of the receiving waters below the classification established for them." *See* Fla. Stat. ch. 403.031(12), 403.088(1). Pennsylvania's Clear Streams Act takes an equally broad approach, prohibiting any person or municipality from discharging "any substance of any kind or character resulting in pollution . . . ." *See* 3 Pa. Cons. Stat. §691.401. Notably, the Pennsylvania statute defines "pollution" to encompass "contamination of any waters . . . including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid, or other substances into such waters." *Id.*

In a similar vein, all fifty states, the District of Columbia, and the Commonwealth of Puerto Rico, have enacted laws that apply to non-point source discharges. *See* Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution,* 1 (1998). The states fill a critical role in the overall scheme of the CWA (*id.*):

> Nonpoint source discharges, which consist generally of polluted runoff from farms, forests, land development and other activities, are not regulated under

> the federal Clean Water Act's National Pollutant Discharge Elimination System permitting program. Instead they are addressed primarily through nonregulatory means, such as planning, incentive and cost-share mechanisms . . . . Yet, increasingly, states are finding it necessary to deal with nonpoint source discharges that cannot be prevented, controlled, or abated adequately by these means.

Well aware of the comprehensive state-based initiatives discussed above, the EPA has explained the essential role of federalism in the protection of water resources even as to the permitting of point source discharges:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the [Clean Water Act permitting] program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources,

issues, and needs than are Federal regulators.[16]

Thus, there are many state and local protections in place to facilitate more creative and, therefore, less burdensome regulatory schemes than the CWA NPDES program[17] Such initiatives are directly threatened by the Ninth Circuit's expansive interpretation of the statutory term "addition of pollutants."

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[16] EPA, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the Section 404 Permit Program* (May 25, 1999), *available at* http://www.epa.gov/owow/wetlands/facts/fact23.html.

[17] For example, unlike the CWA, certain states protect both surface and groundwater. *See, e.g.,* Cal. Water Code §13050(e); 415 111. Comp. Stat. 5/3.550.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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