

Western States Water Council
175th Council Meetings
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Water Transfers and the Federal Clean Water Act

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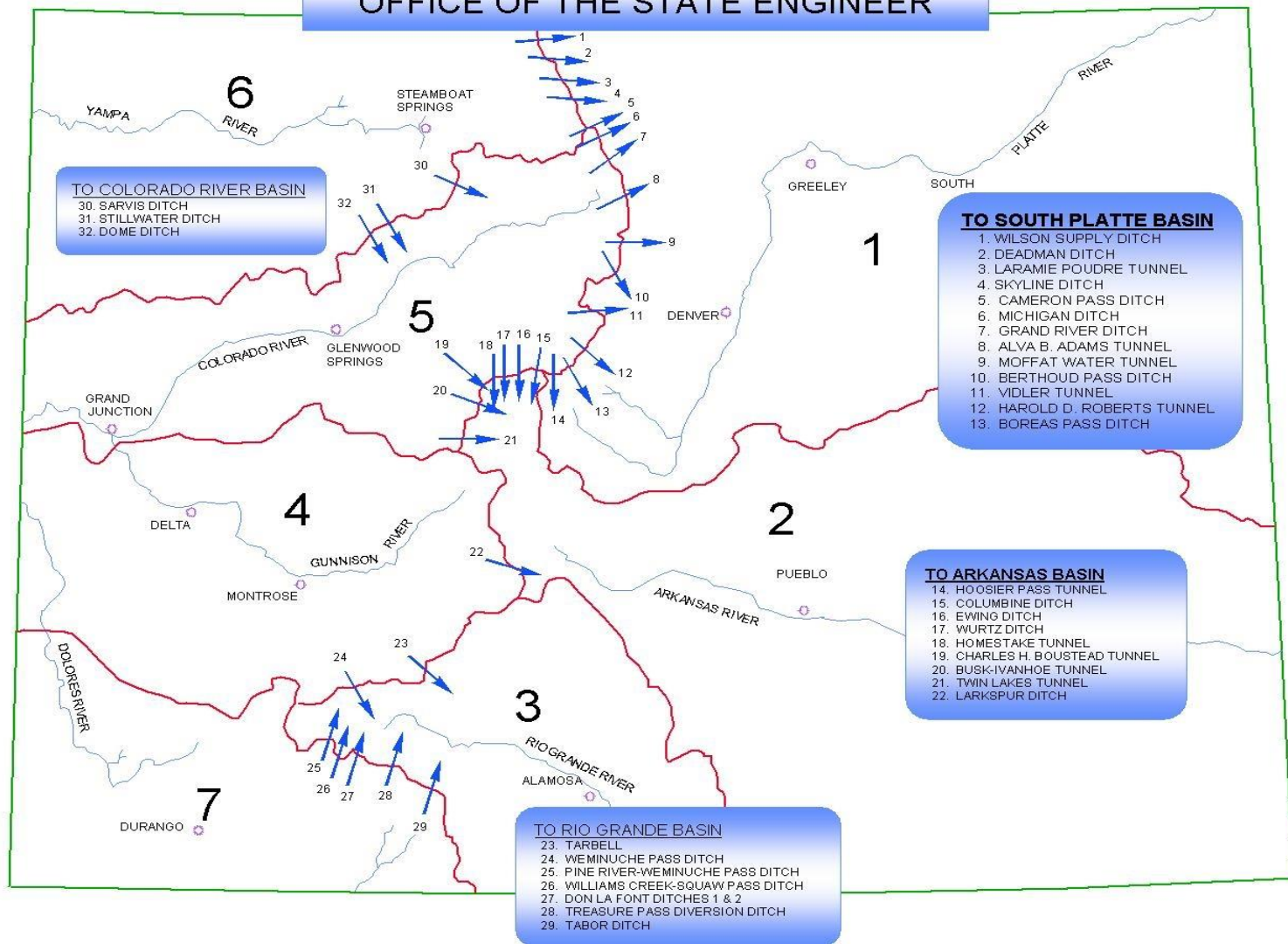
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Issue

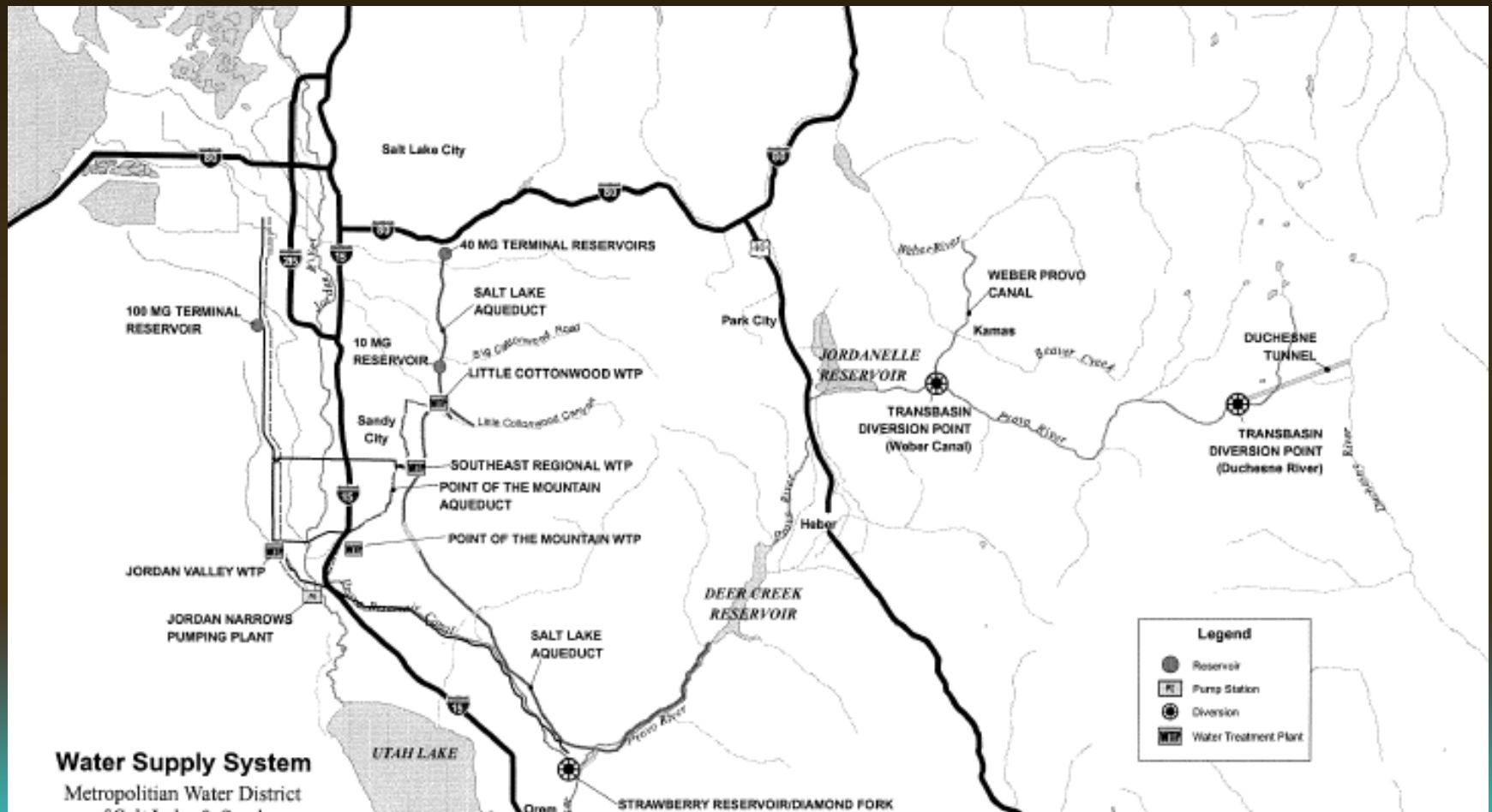
- Whether water transfers – that do not add anything to the water – are subject to National Pollutant Discharge Elimination System (“NPDES”) permitting under section 402 of the Clean Water Act. [33 USC § 1342]
 - The courts have employed a “but for” test for water transfers

TRANSMOUNTAIN DIVERSIONS

OFFICE OF THE STATE ENGINEER



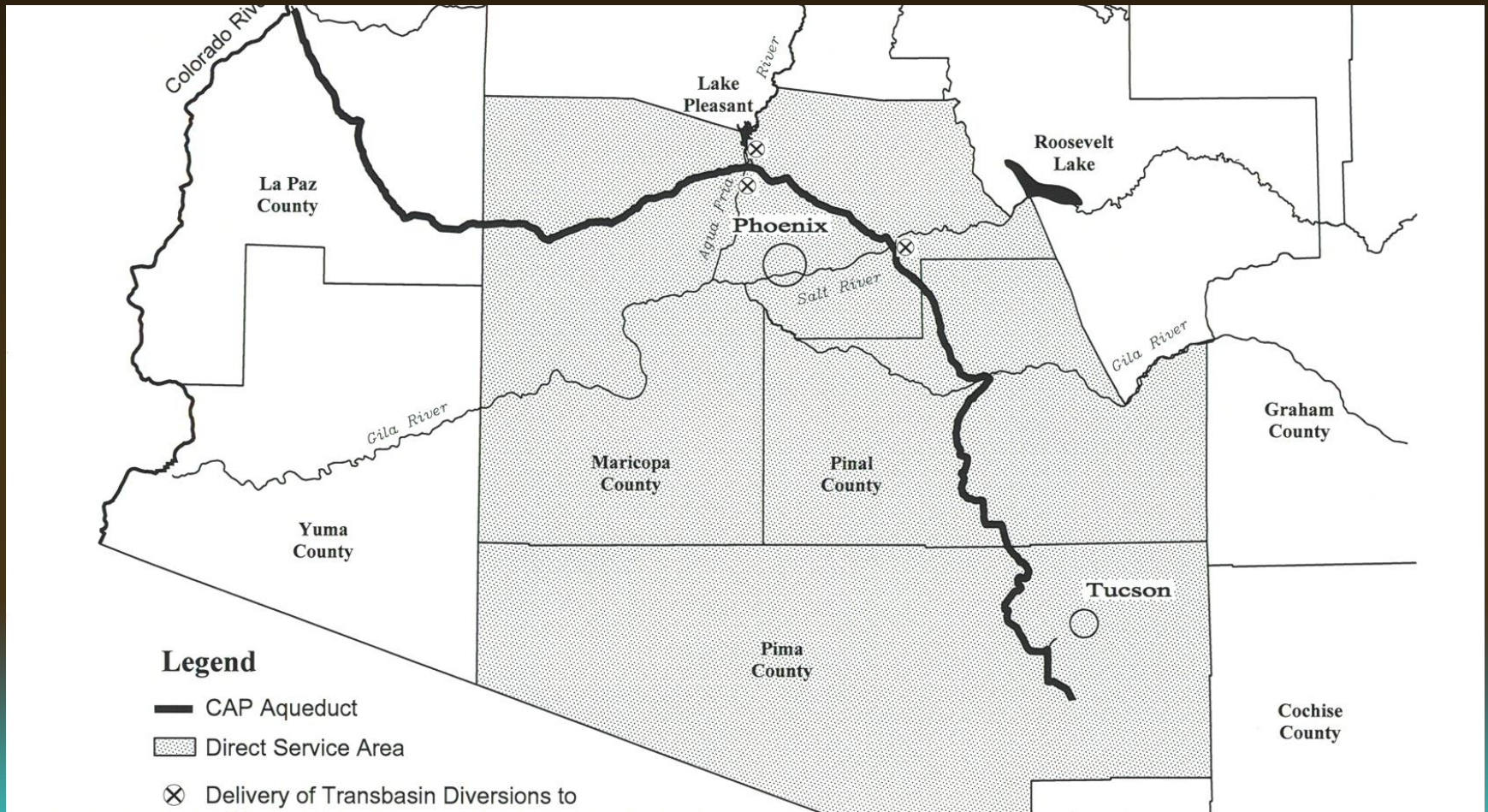
Expl: Salt Lake & Sandy



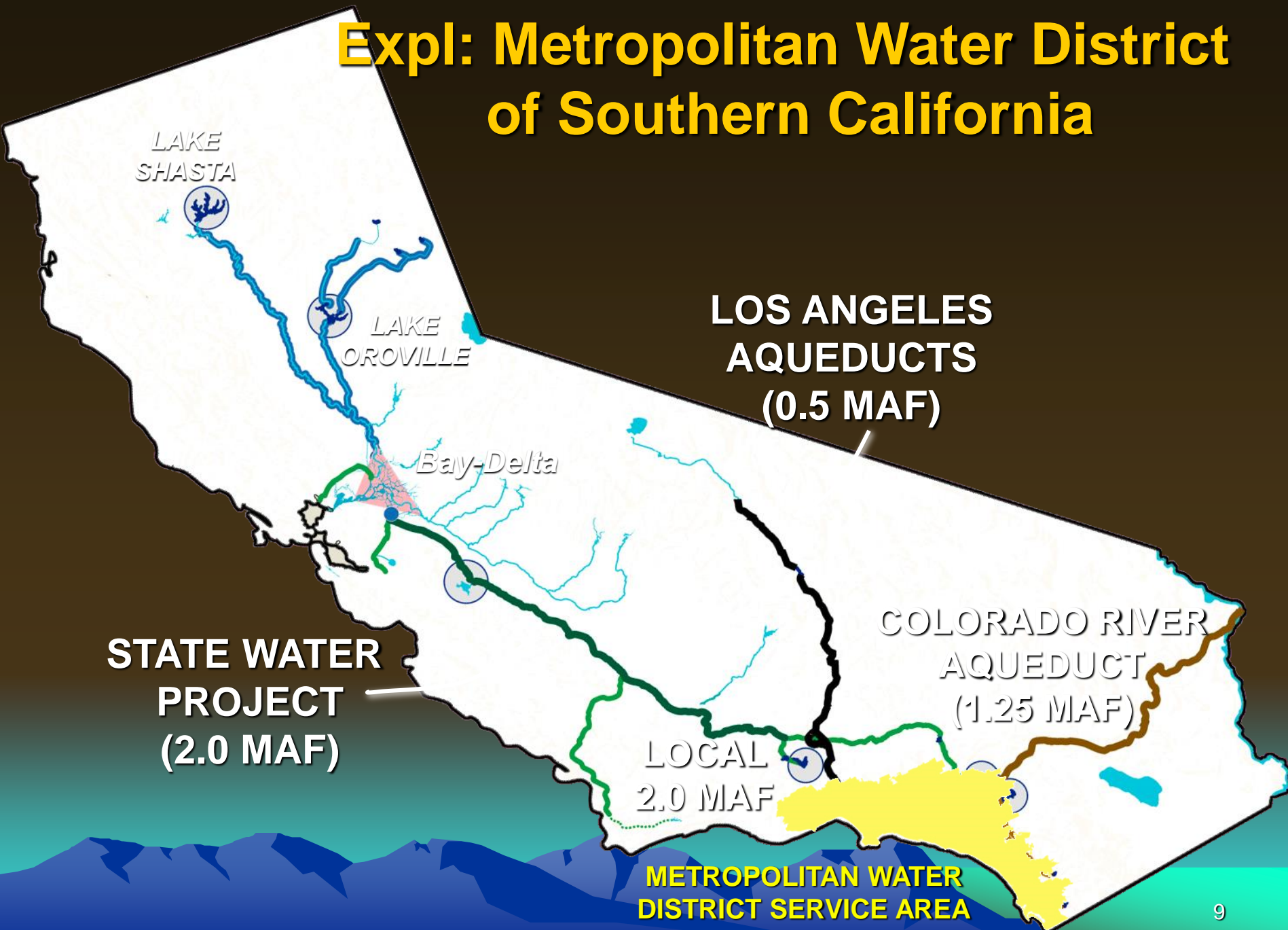
San Juan Chama Project – Colo-NM



Expl: Central Arizona Project



Expl: Metropolitan Water District of Southern California



Water Quality Impacts

- None for many transfers
- Many transfers exceed or contribute to the exceedance of water quality standards:
 - Total Suspended Solids (TSS) from non-point sources during spring run off, storm events
 - Groundwater transfers reflecting local geology
 - Elevated metals reflecting local geology
 - Nutrients from non-point sources introduced prior to or during transfer to lakes/reservoirs

NPDES Permit Requirements

Water quality limits on water transfers:

- If contribute mass loading to receiving waters that do not meet standards [33 USC § 1313(d); 40 CFR § 130.7].
- If receiving waters meet standards (anti-degradation) [40 C.F.R. § 131.12(a)(2)].
- If reasonable potential for receiving waters to exceed standards [40 CFR § 122.44(d)].

NPDES Compliance?

- Treatment plants at most water transfers
 - For major Colorado River Basin transfers
 - \$9 *billion* one-time capital
 - \$4.6 *billion* annual operation and maintenance
 - Economically infeasible
 - Technically challenging
 - Must be able to operate from min to max rates
 - Rapid and wide swings in volume and water quality
 - Environmentally difficult
 - Transfers in/adjacent to national parks, recreation areas, wilderness areas, federal lands
 - Site availability limited and permitting very difficult

NPDES COMPLIANCE?

- If cannot treat to meet water quality standards of receiving waters?
 - Have to cease transfers when cannot meet standards
 - Most transfers during spring runoff to capture snow melt
 - The times most unlikely to meet standards
- **Bottom line: Significant reduction in transfers and net loss of water supplies**

Chronology of Litigation

- 1970s “Dam Cases” (D.C. Cir.; 6th Cir.)
- 1996 *Dubois* (1st Cir.)
- 2001 *Catskills I* (2nd Cir.)
- 2004 *Miccosukee* (Supreme Court)
 - Western States amicus
 - Court invited EPA to weigh in
- 2008 – present EPA’s Water Transfers Rule

Chronology of EPA's Water Transfers Rule

- 2005 EPA OGC/OW Interpretation
- 2006 EPA Proposed Water Transfers Rule
- 2006 *Catskills II* (2nd Cir.)
 - Western States amicus
- 2007 “Lake Okeechobee” (SDFla)
 - Western States amicus
- 2008 EPA Water Transfers Rule
- 2008 Lake Okeechobee Appeal (11th Cir. Upheld 2009)
 - Western States amicus
- 2008 Challenges to Rule (11th Cir. Dismissed 2012)
 - Western States intervention denied; Western States Amicus
- **2008 Challenges to Rule (SDNY)**
 - Western States intervened
 - **2014 Order and Opinion; Western States et al appealed**

Circuit Courts of Appeals

1st, 2nd, 9th, 11th Cir. /1996 - 2006

– Clean Water Act is not ambiguous

- Act prohibits “the discharge of *any pollutant* by any person” unless in compliance with permit requirements
- The Act defines discharges as “*any addition* of any pollutant to navigable waters from any point source”
- NPDES permits are required for water transfers

– Western States amicus in 2nd and 11th circuits

U.S. Supreme Court *Miccosukee* (2004)

- A point source need not be the original source of the pollutant; it need only convey the pollutant to ‘the waters of the United States.’ ”
- Remanded to determine whether transfer was between meaningfully distinct water bodies. If not, permit not required
 - *Did not say reverse*, i.e., that if transfer is between meaningfully distinct water bodies a permit is required
 - *LA County Stormwater Dist. v. NRDC* (2013) interpreted *Miccosukee* to mean that
 - Invited EPA to weigh in; EPA promulgated Water Transfers Rule
- *Amici* Colo, NM, Haw, Id, Neb, Nev, ND, SD, Tx, Ut, Wyo

EPA's 2008 Water Transfers Rule

- 40 CFR § 122.3 Exclusions. (i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred (2008).
 - Lake Okeechobee (11th Cir. Upheld Rule 2009)
 - Consolidated challenges (11th Cir.) filed by EarthJustice; New York & 8 States; Penn; *et al.* (dismissed 26 Oct 2012)
 - Consolidated challenges (SDFla) filed by EarthJustice, Miccosukee Tribe (plaintiffs dismissed Nov 2012)
 - Consolidated challenges (SDNY) filed by NY & 8 States; environmental groups (decided Mar 2014)

Catskills Mtns v. NYC (Catskills II)

(2nd Cir. 2006)

- Clean Water Act is unambiguous
- NYC's water transfers require NPDES permits
 - Upheld penalties for violation of Act
 - Potential > \$50 million (\$25,000/day)
- COA dissed EPA's week-old proposed Rule
- **Western States amicus**

“Lake Okeechobee” Decision

(11th Cir. 2009)

- Clean Water Act is ambiguous
 - EPA’s regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the Act
 - Entitled to *Chevron* deference
 - No permit required for water transfers

– Western States amicus

ONRC v. Reclamation

(Ore. Dist. 2012)

- Upheld Rule based on “Lake Okeechobee”
 - Magistrate’s report based on misunderstanding of 11th Circuit decision
- Appeal pending 9th Circuit
 - Fully briefed (5 May 2014)
 - After SDNY 28 March 2014 opinion on Rule
 - Western States filed *amicus*
 - California filed separate *amicus*

Consolidated Rule Challenges

(11th Cir.)

- **Court of Appeal does not have jurisdiction over challenges to Rule**
 - **Western States intervention denied**
 - Western States amicus on merits not jurisdiction
- COA Dismissed challenges 26 October 2012
 - Supreme Court denied *certiorari* 15 Oct 2013

Consolidated Rule Challenges (SDNY)

- NY State *et al*, enviros filed “protective” challenges to Rule in SDNY in 2008
 - District courts, not COA have jurisdiction
 - Stayed pending ruling by 11th Cir.
 - Stay lifted after Supreme Court denied appeal
 - **Western States intervened**
 - Western Water Providers, NYC, Miccosukee Tribe, EarthJustice, So Fla Water Mgmt Dist intervened
- Cross motions for summary judgment

Consolidated Rule Challenges

SDNY Opinion & Order 28 March 2014

- **Vacated Rule to extent inconsistent with statute**
 - Definition of “navigable waters”
 - As interpreted by Supreme Court 4-1-4 in *Rapanos* and in the opinion
 - **Removes protections of Rule from most transfers**
- Remanded Rule “to the extent EPA did not provide a reasoned explanation for its interpretation”
- **Western States appealed**
 - EPA, Western Providers, NYC, SFWMD also

Western States' Issues on Appeal

1. Did the District Court err in failing to apply the "**clear statement rule**" because the Clean Water Act lacks a "clear and manifest statement" to authorize an unprecedented intrusion into traditional state authority over water allocation matters, and where the Act contains multiple directives, e.g., 33 U.S.C. § § 1251(g) and 1370(2), that explicitly preserve the states' traditional authority?
2. Did the District Court err in failing to apply the "**avoidance canon**," which dictates interpreting the Clean Water Act in a manner that avoids constitutional problems?
3. Did the District Court err in interpreting the Clean Water Act in a manner that will impermissibly **abrogate interstate compacts, Supreme Court interstate water apportionments, and congressional acts**?

Western Providers' Issues

1. Did the District Court err in interpreting the Clean Water Act contrary to Congress' specific instructions in 33 U.S.C. § § 1251 and 1370, and the Supreme Court's warning that **nothing in the Act shall be construed to supersede, abrogate or otherwise impair the authority of each state to allocate quantities of water**

EPA's Issues

1. Whether the district court erred in its application of *Chevron* in its holding that “EPA did not provide a reasoned explanation for its interpretation” and in its holding that the Water Transfers Rule was based in part on an interpretation that is inconsistent with the Clean Water Act and *Rapanos*.
 - Western States, Western Providers, NYC, & SFWMD also
2. Whether the district court erred in its **disposition of the case**: i.e., “**vacat[ing] the Water Transfers Rule** to the extent it is inconsistent with the statute . . . and **remand[ing] the Water Transfers Rule** to the extent EPA did not provide a reasoned explanation for its interpretation.”
3. Whether the district court lacked subject-matter jurisdiction to hear a challenge to the Water Transfers Rule under the APA.

SFWMD Issues

1. Whether the transfer of navigable waters by state and local water managers that add nothing to the waters being transferred constitutes an “addition” of a pollutant “to navigable waters from” a point source and, thus, triggers the need for an NPDES permit under the Act.
 - SFWMD’s application of the plain reading rule
2. Whether it is permissible to read the Clean Water Act, under *Chevron* and applicable, well established canons of statutory construction, to prohibit the transfer of navigable water for traditionally state and local purposes of land and water resource development unless the water manager first obtains a federal NPDES permit.
 - SFWMD’s own take on western issues

Appeal Schedule

- Opening Briefs Sept 9-15, 2014
- Response Briefs ~ Dec 15, 2014
- Reply Briefs ~ Dec 29, 2015

EPA Reconsideration?

- “The Court's decision allows EPA to retain, rescind, reconsider, or change the water transfers rule. EPA in fact intends to reconsider the rule.” (Okeechobee 2009, USA Response to EarthJustice Petition for Rehearing *en banc*)
- EPA convened Interagency Task Force
 - Action deferred during 1st Obama Administration
 - ***EPA may change position in future***

The Bottom Line

- Western residents rely on water transfers daily
 - More than 60 million residents of arid west
 - *Every major municipality relies on transfers for some water*
- Economically, technically, environmentally impossible to meet NPDES requirements
 - General permits have same legal rqmts as individual permits
- Critical legal issue concerning traditional federal deference to the states' water law/water rights

CONCLUSION

WSWC, WGA and Western States continue
to be critical advocates of state water law
– Only the West is arguing for deference

THANK YOU FOR YOUR SUPPORT!

QUESTIONS?