No. 10-196

In The
Supreme Court of the United States

FRIENDS OF THE EVERGLADES;
FLORIDA WILDLIFE FEDERATION; and
FISHERMEN AGAINST DESTRUCTION
OF THE ENVIRONMENT,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT
DISTRICT; CAROL WEHLE, Executive Director;
UNITED STATES OF AMERICA; and UNITED
STATES SUGAR CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* TOWN OF GRAND LAKE, COLORADO; GREATER GRAND LAKE SHORELINE ASSOCIATION; AND THREE LAKES WATERSHED ASSOCIATION IN SUPPORT OF PETITIONERS

ELIZABETH H. TEMKIN
Counsel of Record
TEMKIN WIELGA & HARDT LLP
1900 Wazee Street, Suite 303
Denver, CO 80202
(303) 292-4922
temkin@twhlaw.com

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTION PRESENTED

Whether transferring pollutants from one distinct body of water to another constitutes the addition of pollutants to navigable waters, and therefore requires a point source discharge permit under the Clean Water Act, 33 U.S.C. §§ 1311(a); 1362(12) or whether all waters of the United States may be treated as a "unitary" whole, so that such transfers of pollutants do not constitute an addition of pollutants requiring a permit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Blank Page

INTERESTS OF *AMICI CURIAE*

Amici Curiae submit this brief in support of the petition for a writ of certiorari submitted by Friends of the Everglades, Florida Wildlife Federation and Fishermen Against Destruction of the Environment, seeking reversal of the lower court's decision in *Friends of the Everglades v. South Florida Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2010).[1]

Amici Curiae are entities in Grand County, Colorado that are impacted by impaired water quality in Colorado's largest and deepest natural water body, Grand Lake. Grand Lake is located high in the Colorado Rockies, on the western slope of the Continental Divide, at the west entrance to Rocky Mountain National Park. The lake sits at an elevation of 8,367 feet, and is fed by clear, pristine snowmelt and other runoff from the snow-capped 12,000 to 14,000-foot peaks of the Continental Divide, at the headwaters of the Colorado River. The setting is beautiful and picturesque. The lake was carved out of the surrounding mountain landscape by glaciers and supports

---

[1] Pursuant to Rule 37.6 of this Court, *Amici* state that this brief was authored in its entirety by counsel for *Amici*, and that no person or entity other than *Amici* and their representatives made any monetary contribution to the preparation or submission of this brief. All parties were timely notified of *Amici Curiae*'s intention to file this brief. All parties have consented, and a copy of each consent letter has been submitted with this brief.

rainbow and brown trout, kokanee salmon, and Mackinaw (lake trout) which can grow to over 30 pounds. The area is populated by elk, big horn sheep, moose and a staggering array of other wildlife. In addition to Rocky Mountain National Park, Grand County includes, and is surrounded by, thousands of acres of wilderness in the Indian Peaks and Never Summer Wilderness areas, which contain some of the nation's highest peaks and most scenic wild lands. Well into the 20th century, Grand Lake's waters remained pristine. However, since the early 1950s, the water quality of the lake has been seriously impacted by seasonal water transfers into the lake from a man-made reservoir via a narrow channel that connects the two. The lake is now polluted to the point where its clarity is one-third of what it once was. Both Grand Lake and the reservoir are waters of the United States.

Amicus Curiae, the Town of Grand Lake, Colorado (the "Town"), is a municipality located on the north shore of Grand Lake. Since its establishment in 1879, the Town has depended on the natural scenery and recreational wealth of the lake and surrounding area. Today, the Town is a major local center of commerce and a significant Colorado tourist destination. In the summer months, the Town is the primary access point for recreational users of Grand Lake, as well as nearby Shadow Mountain Reservoir and Lake Granby, and is one of two main gateways for the more than three million visitors to Rocky Mountain National

Park each year. The lake is the lifeline of the Town's economy.

Amicus Curiae, the Greater Grand Lake Shoreline Association ("GGLSA"), is a non-profit corporation whose members are primarily Grand Lake property owners and other concerned Grand County residents. GGLSA's purpose is to preserve and protect Grand Lake and its surroundings and to enhance the water quality, fishery, boating safety, and the aesthetic values of Grand Lake. Since its formation in 2003, GGLSA has made significant efforts to address Grand Lake's water quality problems. These activities have included partnerships with other citizens' groups and Grand County to spearhead efforts to establish water quality standards for the lake that will protect its designated uses.

Amicus Curiae, the Three Lakes Watershed Association, is an organization composed of homeowners and businesses on Grand Lake, Lake Granby and Shadow Mountain Reservoir. The association, which was formed in 1975, has worked for many years to address water quality issues in Grand County's water bodies, including effects on water quality from water transfers. It has partnered with GGLSA, Grand County, the United States Bureau of Reclamation and other entities to study water quality in the Northern Colorado River Watershed to develop solutions to water quality impairments resulting from water transfers in the area.

BACKGROUND

Water quality in Grand Lake has deteriorated due to water transfers from Shadow Mountain Reservoir, an 18,400 acre foot water storage reservoir constructed in the 1940s as a part of the largest transbasin water diversion in the United States, the Colorado-Big Thompson Project (the "C-BT").[2] The C-BT project was spearheaded by the United States Bureau of Reclamation and the State of Colorado as a means to augment agricultural water supplies for Colorado farmers on the eastern slope of the Continental Divide. S. Doc. No. 75-80 (1937). Congress specifically intended that the C-BT project be operated in a manner which would preserve the unique character of the community, and not impair Grand Lake's waters. *Id.* Its development and construction were driven by a nationwide federal initiative during the early decades of the twentieth century, to develop and control the United State's water resources. The same initiative accounts for the Florida project at issue in the case below.

On average, the C-BT diverts approximately 260,000 acre feet of water annually from the Colorado River headwaters to the eastern slope of the

---

[2] For a general description and history of the Colorado-Big Thompson Project, *see* Daniel Tyler, *The Last Water Hole in the West: the Colorado-Big Thompson Project and the Northern Colorado Water Conservancy District* (1992); *see also*, S. Doc. No. 75-80 (1937).

Continental Divide.[3] Water to supply these diversions is captured from the Northern Colorado River Watershed and stored in three principal locations – Lake Granby, Windy Gap Reservoir and Willow Creek Reservoir. Lake Granby, the largest of these reservoirs, has a capacity of 539,000 acre feet and regularly receives inflow from both the Willow Creek and Windy Gap reservoirs. The C-BT project uses Shadow Mountain Reservoir and Grand Lake to facilitate the movement of these waters to the eastern slope. A pumping plant on Lake Granby, the Farr Pumping Station, lifts the water approximately 100 feet up to a canal which feeds Shadow Mountain Reservoir. When the Farr Pumping Station is activated, the normal flow of the Colorado River headwaters is reversed. Contrary to the natural flow from Grand Lake into Shadow Mountain Reservoir, pumping forces water from Shadow Mountain Reservoir into Grand Lake via a narrow channel. Thus, both Shadow Mountain Reservoir and Grand Lake serve as conduits for the reverse flow of water from downstream elements of the C-BT project.

At Grand Lake, water transferred from Shadow Mountain Reservoir is drawn through an inlet below the surface of the lake into the Alva B. Adams Tunnel, where it is conveyed 13.1 miles beneath the Continental Divide. The water emerges on the eastern

---

[3] This is a volume of water totaling approximately 84.7 billion gallons.

slope of the Rocky Mountains, southwest of Estes Park, to be distributed through a series of tunnels, reservoirs and natural streams to approximately 800,000 end users in northeastern and central Colorado.[4] Today, this water irrigates almost 700,000 acres of land on Colorado's eastern slope, and provides water to 30 eastern slope communities for municipal and industrial use. When the project first came on-line in the late 1940s, approximately three-fourths of the water transferred to the eastern slope was used for irrigation, and the remainder went to municipal and industrial uses. Today, this proportion is reversed.

C-BT water is also used to generate electric power at six hydroelectric power plants. Some of this power is used to operate the Farr Pumping Station, and the remainder is sold at market. The first delivery of water through the Adams Tunnel occurred in 1947, and construction of the entire project was completed in 1956. When Congress authorized construction of the project in 1937, it determined that the project "must be operated in such a manner as to . . . preserve the fishing and recreation facilities and the scenic attractions of Grand Lake, the Colorado River and the Rocky Mountain National Park." S.

---

[4] As discussed more fully below, C-BT facilities are operated by the Northern Colorado Water Conservancy District ("NCWCD"). The NCWCD maintains current data regarding the project which are available at http://www.ncwcd.org/project_features/cbt_main.asp.

Doc. No. 75-80 at 3 (1937); *see also, United States v. Martin*, 267 F.2d 764, 766 (10th Cir. 1959) (addressing the requirements to preserve Grand Lake set forth in S. Doc. No. 75-80).

The C-BT water distribution facilities are operated by the Northern Colorado Water Conservancy District ("NCWCD"). The NCWCD is a quasi-municipal corporation created in 1937 pursuant to the Colorado Water Conservancy Act, Colo. Rev. Stat. § 37-45-101 *et seq.*, in order to partner with the Bureau of Reclamation to construct and operate the C-BT project. The NCWCD is authorized to levy taxes for the construction and maintenance of water diversion and storage projects and the purchase of water rights, and may contract with the United States, hold property and exercise the power of eminent domain. Colo. Rev. Stat. §§ 37-45-118; 121. C-BT distribution facilities are owned by the NCWCD in some instances, and jointly by the NCWCD and the United States in others. C-BT power facilities are owned by the United States and administered by the Western Area Power Administration, a sub-agency of the United States Department of Energy.

The early part of Colorado's irrigation season, between late April and early July, corresponds with periods of high runoff from snow melt in the Northern Colorado River Watershed. During this period, flows in the major streams which feed directly into Grand Lake from the Park rise from 100-200 cubic feet per

second ("cfs") in early May, to a peak flow of 400-500 cfs in early July.[5] By late July, these flows typically decline to less than 50 cfs. McCutchan at 4. Smaller streams contributing directly to Grand Lake exhibit similar flow patterns. The abundance of water between late April and early July allows for the majority of eastern slope demands for C-BT water to be met with native Grand Lake water. By late July, additional water must be pumped from Lake Granby up to Shadow Mountain Reservoir, where it is transferred upstream into Grand Lake via the narrow connecting channel in order to meet demand for Adams Tunnel diversions without lowering the level of Grand Lake.[6] It is this forced water transfer, from Shadow

---

[5] Specific hydrologic and water quality data are primarily from two sources: (1) James H. McCutchan, Jr., *Factors Controlling Transparency in Grand Lake, Colorado* (July, 2010) (hereinafter, "McCutchan"), an unpublished assessment prepared by Grand County, Colorado in cooperation with the Colorado River Water Conservation District, the Northern Colorado Water Conservancy District, the United States Bureau of Reclamation, and *Amici*, the Greater Grand Lake Shoreline Association and Three Lakes Watershed Association; and (2) Davine M. Lieberman, *Physical, Chemical and Biological Attributes of Western and Eastern Slope Reservoir, Lake and Flowing Water Sites on the C-BT Project, 2005-2007: Lake Granby, Grand Lake, Shadow Mountain Reservoir, Horsetooth Reservoir, and Carter Lake* (United States Bureau of Reclamation, 2008) (hereinafter, "Lieberman"). Other data are from the United States Geological Survey, and are available online at http://waterdata.usgs.gov/co/nwis/.

[6] As set forth in S. Doc. No. 75-80, the C-BT system must be operated in a manner which does not allow the elevation of Grand Lake to fluctuate more than one foot. *Id.* at 1.

Mountain Reservoir to Grand Lake, which makes this Court's resolution of the Question Presented vital to *Amici Curiae*.

Grand Lake and Shadow Mountain Reservoir are very different water bodies. Shadow Mountain Reservoir has a maximum depth of 24 feet, compared with Grand Lake's depth of 265 feet. Shadow Mountain Reservoir's water is much warmer than Grand Lake's water. The variation in temperatures was illustrated dramatically in June 2010. On June 28, seasonal transfers from Shadow Mountain Reservoir to Grand Lake ramped up, replacing the cooler Grand Lake waters that flowed downstream from the lake through the channel to Shadow Mountain Reservoir, with the warmer waters now being pumped back upstream from Shadow Mountain Reservoir. The water temperature in the connecting channel, which was measured at 52.3 degrees Fahrenheit that morning, rose to 62.6 degrees Fahrenheit over the course of a single day.[7] This movement of warmer waters into Grand Lake begins each year when the Farr Pumping Station is activated, and continues until pumping stops in the fall.

With its warmer temperatures, Shadow Mountain Reservoir experiences seasonal algal blooms and excessive growth of aquatic vegetation. Shadow

---

[7] The data discussed above for June 28, 2010 are available from the United States Geological Survey at http://waterdata.usgs.gov/co/nwis/.

Mountain Reservoir also experiences increased sedimentation, increased concentrations of nitrogen and phosphorous, and low concentrations of dissolved oxygen, which have consistently remained below State-established standards since 2002. Colorado has classified Shadow Mountain Reservoir as an impaired water body pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), due to its low concentrations of dissolved oxygen. 5 Colo. Code Regs. § 1002-93.

The seasonal pumped transfer of water from Shadow Mountain Reservoir into Grand Lake seriously impacts the lake. These impacts started soon after completion of the reservoir and the first water transfers. In a jointly-prepared report in 1954, the Colorado Game and Fish Commission and the United States Bureau of Reclamation recognized that "[t]he natural biological conditions existing in Grand Lake prior to the construction of the Colorado-Big Thompson Project have changed. The construction and operation of the western slope features of the Project have drastically altered the biological population of the Lake." *Report on Algae Control in the Grand Lake Area, Technical Sub-Committee* at 1 (June 28, 1954). The changes in Grand Lake water quality are documented to correlate with summer water transfers from Shadow Mountain Reservoir. The pumped introduction of Shadow Mountain Reservoir water into Grand Lake results in increased algae, chlorophyll and dissolved solids concentrations, as reflected

by, for example, the specific conductance of the waters.[8] Lieberman at 165-66. Specific conductance in Grand Lake increases toward the end of the summer, reflecting the introduction of higher conductance waters from Shadow Mountain Reservoir. McCutchan at 10-11.

In late 1941, prior to any transfer from Shadow Mountain Reservoir to Grand Lake, water clarity in the lake was measured at 9.2 meters,[9] Lieberman at 168; McCutchan at 18, placing Grand Lake in the top 2% of all lakes in the United States for clarity.[10] More recent measurements document drastically reduced clarity, corresponding most directly with late summer water transfers. Clarity measurements by the United States Geological Survey between 2000 and 2010 exhibited a mean Secchi depth of 3.2 meters during the spring and summer seasons. McCutchan at 19. Data which excludes measurements from early spring and summer, prior to the initiation of pumping,

---

[8] Specific conductance is a measure of electrical conductivity. Water with higher conductance values generally has higher concentrations of total dissolved solids and other particulates. Other pollutants are introduced into Grand Lake which are not directly reflected in the data for specific conductance.

[9] Water clarity is typically measured through the use of a "Secchi disk," a circular disk bearing a high-contrast pattern that is attached to a line or pole and then lowered into the water body. The depth at which the disc can no longer be seen is termed the "Secchi depth."

[10] Data is from the North American Lake Management Society (NALMS), and is available at http://dipin.kent.edu/view.htm.

reflect even lower Secchi depths. *Id.* In order to evaluate potential clarity improvements which might be achieved by reduced pumping, the Farr Pumping Station was shut down between August 13 and 26, 2009. Water quality data collected by the Grand County Water Information Network ("GCWIN"), a volunteer, non-profit corporation that collects and maintains water quality data for water bodies throughout Grand County, show Secchi depths during this period reflecting an improvement in water clarity of approximately 30%.[11] *See also*, McCutchan at 19.

The water transfers also cause nutrient loading. Lieberman at 170. Nutrients primarily consist of nitrogen and phosphorous. *Id.* The continuous supply of nutrient rich waters likely contributes to the large algal blooms in Grand Lake that now routinely occur during August and September, when pumping operations are underway. *See id.* at 170, 183. In 2007, the Grand County Public Health Nursing Service and Grand County Board of Health issued a Water Advisory warning that levels of microcyst toxin (a toxin produced by algal blooms) exceeded safe guidelines established by the World Health Organization in both Grand Lake and Shadow Mountain Reservoir. Residents and recreational users were advised not to swim in or bathe with the waters, or to consume water from either water body. Correspondingly,

---

[11] GCWIN data may be accessed at http://co.grand.co.us/GCWIN/database.html

clarity reached a low of 1.37 meters on August 12, 2007, during this same time period. In contrast, nearby Columbine Lake receives natural, high-quality inflows similar to the natural inflows to Grand Lake. Columbine Lake is not a part of the C-BT system, and receives no waters from Shadow Mountain Reservoir. GCWIN data collected in August of 2010 show Secchi depths in Columbine Lake which range between 6.0 and 7.0 meters.

The transfer of water from Shadow Mountain Reservoir into Grand Lake would not occur but for the operation of the Farr Pumping Station, which reverses the natural water flow. Prior to construction of the C-BT, the area now beneath Shadow Mountain Reservoir was a hay field and wetland meadow. The Colorado River exited Grand Lake in the area which now serves as the channel between Shadow Mountain Reservoir and the lake, and flowed downstream, through the meadow to its convergence with the river's North Fork, and ultimately westward.

SUMMARY OF ARGUMENT

The gaping regulatory hole left by the Eleventh Circuit presents an issue of national significance warranting review by this Court. The Eleventh Circuit's construction of the Clean Water Act immunized an entire, significant class of discharges from regulation under the NPDES program in the absence of any evidence that Congress intended this outcome.

Under the Clean Water Act, even where permitted discharges comply with the technology based standards established under the NPDES program, permitted discharges must meet more stringent requirements if the water quality objectives of the specific water body are not achieved. The Eleventh Circuit's decision would eliminate this critical regulatory tool, which is essential to Grand Lake's future.

ARGUMENT

Certiorari is warranted in this case because the Eleventh Circuit has opened a vast hole in this country's most significant scheme for controlling water pollution and maintaining the quality of individual water bodies. The Grand Lake/Shadow Mountain Reservoir example illustrates how and why the Eleventh Circuit's interpretation of the Act is untenable. The importance of the issue for Colorado and the rest of the United States is difficult to overstate. Currently, the EPA has delegated to 45 States the authority to administer the NPDES permitting program. Many of those States have objected to the "unitary waters" theory.[12] In Colorado, use classifications and numeric

[12] As *Amici* do here, several States argued, as *Amici* in *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Florida,* 541 U.S. 95 (2004), that the unitary waters theory cannot be reconciled with the Act's NPDES permitting requirements. *See* Brief of the States of New York, Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri,

(Continued on following page)

water quality standards designed to ensure that designated uses are achieved have been developed for specific water bodies or stream segments in seven separate basins across the State. 5 Colo. Code Regs. §§ 1002-31 *et seq.* Specific basins and rivers include the Colorado River and its tributaries, the San Juan and Dolores, as well the Arkansas, the Platte and the Rio Grande, among others. Many of these rivers flow across State boundaries.

Water transfers across basins to meet agricultural and municipal demand are common in Colorado. Forty-nine major transbasin diversions in Colorado provide at least a portion of the municipal water supply for sixty percent of Coloradans. Including the C-BT project (which accounts for nearly half of Colorado transbasin diversions by annual volume), these diversions transfer an average of 550,000 acre feet of water per year. More than fifty percent of Colorado's irrigated farmland relies on transbasin water. Significant transbasin diversions occur in other western States, including Utah and New Mexico. Other Circuits which have addressed point-source transfers from relatively low-quality waters of the United States to more pristine waters of the United States have required NPDES permits, recognizing that to do otherwise is contrary to the text and intent of the Act.

New Jersey, North Carolina, Oklahoma, Vermont and Washington as *Amici Curiae* in Support of Respondents, 2003 WL 22766718.

See Northern Plains Resource Council v. Fidelity Exploration & Devel. Co., 325 F.3d 1155, 1162 (9th Cir.), *cert. denied*, 540 U.S. 967 (2003); *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996). There is, however, no controlling precedent in the Tenth Circuit, which has yet to address the question.

In the case below, the Eleventh Circuit recognized that "[S]tate water quality standards, which are specific to individual water bodies, are intertwined with the NPDES permitting process." *Friends of the Everglades*, 570 F.3d at 1226. The court acknowledged the possibility that, under the unitary waters theory, no permit would be required to pump "the most loathsome navigable water in the country into the most pristine one," but ultimately dismissed these concerns as "horrible hypotheticals," stating that its task was to apply the statute, not to effectuate whatever purpose Congress may have had in enacting the legislation. *Id.* While this prospect is indeed horrible, it is not hypothetical.

Colorado's NPDES permitting authority, the Colorado Water Quality Control Commission ("WQCC"), has established water quality standards for the Upper Colorado River Basin which recognize the unique significance of Grand Lake. In 2008, for example, the WQCC established narrative and numerical clarity standards for the lake, explaining "it is appropriate to adopt water quality standards for the protection of Grand Lake's clarity because of Grand Lake's uniqueness as Colorado's largest

natural lake. Grand Lake adjoins and compliments Rocky Mountain National Park in the headwaters of the Colorado River and its social and economic importance is worthy of protection." 5 Colo. Code Regs. § 1002-23-33.44(Q). This is the first time that a clarity standard has been adopted in Colorado. *Id.*

There are two point-source discharges to the lake. The first is from the Town's municipal stormwater system, which passes stormwater through a high-efficiency filtration system prior to its discharge. Because the Town's population is so small, no discharge permit is required for the stormwater system. Nevertheless, the Town has voluntarily chosen to filter its water discharges, at great financial cost, because the water quality of Grand Lake is so important to the community. The second point-source discharge to the lake is the water transfer from Shadow Mountain Reservoir. This transfer is, by far, the most significant factor affecting the water quality of the lake. Yet under the Eleventh Circuit's construction of the Act, the WQCC cannot regulate this transfer because it merely transports effluent from one water of the United States to another. The WQCC (and citizens who may wish to enforce the Act under its citizen suit provisions) thus has no practical way to insure that the water quality standards for Grand Lake are met. As a result there is no mechanism to achieve the clarity standards for the lake. Moreover, if the effluent funneled from Shadow Mountain Reservoir to Grand Lake is excluded from the NPDES program, there is no practical way to control the

discharge of phosphates, nitrogen, toxic algae, chlorophyll, dissolved solids, sediment and heat, all of which are flushed from Shadow Mountain Reservoir into Grand Lake when pumping begins each summer.

An interpretation of the Act which leaves such a breach in the regulatory scheme cannot be reasonable. The NPDES' program is Congress' chosen mechanism to ensure that location-specific water quality standards are achieved. The Act established, as a touchstone, the preservation of the water quality in individual water bodies, including specific portions of the same water body. 33 U.S.C. § 1312(a); *see also*, 40 C.F.R. § 131.2 ("A water quality standard defines the water quality goals of a water body, *or portion thereof*, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.") (emphasis added). Thus, location-specific water quality standards are more than simply "intertwined with the NPDES' permitting process," *Friends of the Everglades,* 570 F.3d at 1226; their achievement and maintenance are one of its central objectives. 33 U.S.C. § 1311(b)(1)(C); *see also*, *Arkansas v. Oklahoma*, 503 U.S. 91, 105-06 (1992).

NPDES permit limits are the key mechanism to ensure that the standards for individual water bodies are achieved and maintained. As this Court has previously noted, NPDES permits serve "to transform generally applicable effluent limitations and other standards *including those based on water quality* into the obligations (including a timetable for compliance) of the individual discharger . . . " *United States Envt'l*

Prot'n Agency v. California, 426 U.S. 200, 206 (1976) (emphasis added). As the Ninth Circuit has explained, "Congress recognized that even if all the firms discharging pollutants into a certain stream segment were using the best available technology, the stream still might not be clean enough to meet the water quality standards set by the States. To deal with this problem, Congress supplemented the 'technology-based' limitations with 'water-quality-based' limitations." *Natural Resources Defense Council v. United States Envt'l Prot'n Agency*, 915 F.2d 1314, 1316-17 (9th Cir. 1990).

There is no evidence that Congress intended the NPDES permitting program to be anything but location-specific. As the Senate Committee on Public Works explained in its 1971 discussion of section 301 of the new legislation, "the [EPA] Administrator is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards." S. Rep. No. 92-414 at 42 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3710. Describing Section 302, the Committee emphasized that "limitations necessary to achieve a given level of water quality in one reach of a waterway may require more control of effluents than that attainable through application of the best available technology . . . Section 302 provides the authority to impose controls

based on water quality." *Id.* at 45; 1972 U.S.C.C.A.N. 3712-13.[13]

CONCLUSION

The Court should grant certiorari. The Eleventh Circuit has opened a gap of national proportions in the primary enforcement mechanism of the Nation's most important water pollution prevention statute. In the case of water transfers between two waters of the United States, where the transfer of that water results in dramatically reduced water quality which is below applicable standards, the Eleventh Circuit would foreclose recourse to the Act's primary regulatory and enforcement mechanism.

[13] EPA has also recognized these obligations and authorities. *See, e.g.*, United States Environmental Protection Agency, Water Quality Standards Regulation, 48 F.R. 51400 (Final Rule, Nov. 8, 1983) ("EPA accepted the recommendations for including regulatory language explicitly affirming EPA's commitments to have [water quality] standards move toward Section 101(a)(2) goals of the Act and to use [water quality] standards as a basis of restoring and maintaining the integrity of the Nation's waters" . . . [water quality standards are] "the *regulatory basis for the establishment of water quality based treatment controls.*") (emphasis added).

This result squarely contradicts the provisions of the Act and Congressional intent, and presents a devastating prospect for water bodies like Grand Lake.

Respectfully submitted,

ELIZABETH H. TEMKIN
Counsel of Record
TEMKIN WIELGA & HARDT LLP
1900 Wazee Street, Suite 303
Denver, CO 80202
(303) 292-4922
temkin@twhlaw.com

Counsel for Amici Curiae

Blank Page