Clean Water Act NPDES Water Transfer Issue: The Implications for the Water Supply and Water User Communities

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The Clean Water Act (CWA)[1] prohibits "the discharge of any pollutant" into waters of the United States, except as otherwise authorized under the Act.[2] A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."[3] The national pollutant discharge elimination system (NPDES) permit program regulates point source discharges of pollutants into waters of the United States. The issue of whether water transfers are subject to NPDES permit requirements has been surrounded by considerable controversy. The question is of particular concern to the water supply and user communities because transbasin transfers of water from one water body to another for municipal, agricultural, and commercial purposes, among other activities, are essential for meeting those needs.

The U.S. Environmental Protection Agency (EPA) first addressed this issue in 1975 with an interpretation stating that an NPDES permit was required when irrigation ditches discharge into navigable water, even if the irrigation ditches also qualify as navigable waters.[4] The opinion was based on EPA's interpretation of the plain meaning and legislative intent of the CWA. However, that opinion dealt with a narrow issue and did not address transfers that merely convey navigable waters. The opinion also stated that to the extent the opinion could be interpreted to apply more broadly to water transfers, it was superseded by EPA's subsequent interpretations specifically addressing such transfers.

In 1977, the U.S. Congress amended the CWA, adding a provision confirming the states' primary authority over water allocations.[5] The amendments were followed by a 1978 EPA memorandum stating that the amendments did not prohibit EPA from taking actions required to protect water quality of the nation's waters even if such actions incidentally affected state water rights and state usages of water.[6]

Subsequently, courts began to grapple with the issue of what constitutes the "addition of a pollutant" in water transfers. In *National Wildlife Federation* v. *Gorsuch*,[7] the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held that an NPDES permit is required when the pollutant first enters the navigable water, but not when the polluted water later passes through the dam from one body of navigable water to another. Thus, the court reasoned that "addition" refers only to situations in which the point source introduces a pollutant into the water from the outside world.[8] In 1988, the U.S. Court of Appeals for the Sixth Circuit agreed with the *Gorsuch* court's conclusion regarding a hydropower facility operating on Lake Michigan, holding that the term addition may be limited to situations in which the point source introduces a pollutant into the water from the outside world.[9]

In contrast, decisions from the U.S. Courts of Appeals for the First and Second Circuits have held that NPDES permits were required for water transfers associated with the expansion of a ski resort and the supply of drinking water.[10] So far, Pennsylvania is the only state to require NPDES permits for water transfers after a state court decision mandated the issuance of such permits.[11]

The recent focus on this issue was largely precipitated by litigation over the operations of the South Florida Water Management District's management of water transfers related to the Everglades. In 2002, the U.S. Court of Appeals for the Eleventh Circuit interpreted "addition of pollutants" to include situations where water is pumped from one water stor-

1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
2. *Id.* §1311(a).
3. *Id.* §1362(12)(A).
4. In re Riverside Irrigation Dist., Op. No. 21, 1975 WL 23864 (EPA Off. Gen. Counsel June 27, 1975).
5. Pub. L. No. 95-217, 91 Stat. 1566 (1977).
6. Memorandum from Thomas Dorling, Assistant Administrator for Water and Waste Management to Regional Administrators re: State Authority to Allocate Water Quantities—Section 101(b) of the Clean Water Act (Nov. 7, 1978).
7. 693 F.2d 156, 175, 13 ELR 20015 (D.C. Cir. 1982).
8. *Id.*
9. National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 584, 19 ELR 20235 (6th Cir. 1988).
10. *See* Dubois v. Department of Agric., 102 F.3d 1273, 1298-1300, 27 ELR 20622 (1st Cir. 1996); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 494, 32 ELR 20229 (2d Cir. 2001).
11. Delaware Unlimited v. DER, 508 A.2d 348, 381 (Pa. Commw. Ct. 1986).

age area into another as part of a water management system in *Miccosukee Tribe of Indians v. South Florida Water Management District*.[12] Under that interpretation, an NPDES permit would be required for transferring water from one navigable water into another, even when no outside pollutants were added to the receiving water. In *Miccosukee*, the issue was whether a pumping station operated by South Florida Water Management District (SFWMD) needed an NPDES permit for pumping water containing phosphorus and other pollutants into the Everglades. The U.S. Department of Justice, as amicus, advanced the government's "unitary waters" theory, which argues that all navigable waters should be viewed as one for CWA purposes, and thus water transfers should be seen as nonpoint source activities that do not require NPDES permits.

The SFWMD argued before the Eleventh Circuit that it was not the source of the contamination but was simply transferring water from one side of a levee to another. The SFWMD further argued that Congress intended NPDES permits only to regulate those who add pollutants to water from the outside world. The SFWMD claimed that the court ruling would add barriers to environmental protection of the Everglades and would increase the regulatory burden and cost of public water management agencies across the United States. Environmental groups disagreed, stating that an alternate ruling would allow water operators nationwide to pump contaminants in water from one basin to another at will. However, the court rejected these arguments holding that an NPDES permit was required to continue operating the pumping station.

I. Supreme Court's Decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*

In 2004, the U.S. Supreme Court reversed the Eleventh Circuit's decision.[13] The Court remanded the case to determine whether the two waters in question were "meaningfully distinct."[14] The only issue clearly resolved by the Court in *Miccosukee* was the precise question that served as the basis of granting certiorari—whether the NPDES program applies when a pollutant *originates* from a point source, not when pollutants originating elsewhere simply pass through the point source. The Court listed examples of point sources to include "pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them."[15] The Court stressed "one of the [CWA's] primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants."[16] Therefore, the Court clearly held that the definition of discharge of a pollutant includes "point sources that do not themselves generate pollutants."[17]

The Court addressed, but did not resolve, the unitary waters argument that *all* of the waters that fall within the CWA's definition of navigable waters should be considered unitary for purposes of the NPDES permit requirements.[18] Rather, the Court, with Justice Antonin Scalia dissenting, noted that the unitary waters argument had not been raised below, but was available to the parties on remand.[19]

However, the Court did touch on the distinction between point and nonpoint pollution sources, noting that the latter sources are not specifically excluded from the NPDES program if they also fall within the point source definition.[20] The Court specifically referenced §1313(c)(2)(A) of the CWA, which allows states to "set individualized ambient water quality standards by taking into consideration the designated uses of the navigable waters involved."[21] Those standards directly affect local NPDES permits. The Court also recognized the total maximum daily load (TMDL) program, which covers pollutants originating from both point and nonpoint sources, noting that "if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body."[22]

The Court suggested that the CWA may be intended to protect individual bodies of water as well as navigable waters, and that the unitary waters approach may conflict with existing NPDES regulations. Noting how the CWA already credits the intake of polluted water, the Court concluded that the NPDES program "appears to address the movement of pollutants among water bodies, at least at times."[23] In dicta, the Court noted the tension between water quality, increased treatment costs, and federalism principles inherent in the CWA. If water transfers become prohibitively expensive, then perhaps NPDES requirements will illegally impinge on a state's authority to allocate its own water.[24] Conversely, a broad NPDES interpretation might be required to protect water quality, with general permits used to control the increased regulatory costs.[25]

While the Court essentially described the inherent conflicts in the overarching "unitary waters" issue, it fundamentally avoided the hard factual questions by finding that the record did not have enough facts to determine whether the drainage canal (C-11) and the water control area (WCA-3)—where the canal water is pumped—are distinct bodies of water, or are instead "indistinguishable parts of a single water body."[26]

12. 280 F.3d 1364, 1368-69, 32 ELR 20475 (11th Cir. 2002).
13. South Fla. Water Management Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 96, 34 ELR 20021 (2004).
14. *See* Lawrence R. Liebesman, *The Supreme Court's Decision in* South Florida Water Management District v. Miccosukee Tribe of Indians: *Leaving the Scope of Regulation Under the Clean Water Act in "Murky Waters,"* 34 ELR 10994 (Nov. 2004).
15. *Id.* at 105.
16. *Id.*
17. *Id.*
18. *Id.* at 106.
19. *Id.* at 109. Justice Antonin Scalia, in a short partial dissent, argued that the unitary waters argument was raised and decided below, citing the Eleventh Circuit's opinion and stating: "I see no point in directing the Court of Appeals to consider an argument it has already rejected." *Id.* at 113.
20. *Id.* at 106.
21. *Id.* at 107 (citing 33 U.S.C. § 1313(c)(2)(A)) (internal quotations omitted).
22. *Id., see also* Pronsolino v. Nastri, 291 F.3d 1123, 32 ELR 20689 (9th Cir. 2002).
23. *Miccosukee,* 541 U.S. at 108.
24. *Id.*
25. *Id.*
26. *Id.* at 109.

The Court held that there was not sufficient information in the record to determine whether C-11 and WCA-3 are distinct bodies of water, and therefore elected to not decide this issue.[27] The Court held that if, on remand, the lower court found that C-11 and WCA-3 are not "meaningfully distinct water bodies," then the pumping station will not need an NPDES permit.[28] Using the Second Circuit's language in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,[29] the Court compared water transfers to the stirring of a pot of soup, reasoning that "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."[30]

The Court did characterize the factual record in a way that may provide some guidance on remand by finding that the "record does contain information supporting the District's view of the facts."[31] The Court noted that the boundary between C-11 and WCA-3 was "indistinct," that there appeared to be some significant mingling of the two waters, and that "because Everglades' soil is extremely porous, water flows easily between ground and surface waters, so much so that ground and surface waters are essentially the same thing."[32] Yet after suggesting that the existing factual record may support the district, the Court refused to go further, noting that it was not necessary to decide whether the district court's test (that bodies of water are distinct where the transfer of water or pollutants would not occur naturally) was appropriate as it was applied prematurely regardless of whether the actual test was appropriate or not.[33]

II. August 2005 EPA Memorandum

In an effort to resolve this question left open by the Court, EPA issued an Agency Interpretation in August 2005 concluding that NPDES permits are not needed for transfers of water from one navigable water into another. [34] The memorandum reasoned that congressional intent was not to require NPDES permits for water transfers, and therefore a factual inquiry into whether a specific water transfer constitutes an addition is not required. However, the Agency Interpretation discussed factors that would be relevant if it was necessary to determine whether a body of water is "meaningfully distinct."[35] EPA noted that to be meaningfully distinct, waters must not only be distinct, but also meaningfully, so considering both natural and man-made hydrologic features that connect two waters. Where two waters have been or are hydrologically connected through human activity or otherwise, such factors strongly support a conclusion that they are not distinct.[36] The memorandum suggested that the chemical, physical, and biological similarity or differences between the waters are factors to consider whether waters are meaningfully distinct. [37] The Agency Interpretation also noted that simply because waters are connected through an uphill water pump, the waters are not necessarily distinct.[38] Another factor to consider was the length of time the water transfer has been in place.

The Agency Interpretation also discussed how the term "meaningful" covers transfers that would have a significant, adverse effect on water quality that is not being adequately addressed by states and water resource management agencies. Thus, EPA felt that it would be appropriate to consider whether there are existing laws, regulations, or programs that are being implemented that adequately address the types of water quality concerns associated with the water transfer. Where state authorities are addressing the pollution problem adequately, deferring to state regulation would be more in keeping with the intent of Congress. Additionally, the Agency Interpretation noted that the specific context of the transfer should also be evaluated.[39]

The U.S. District Court for the Southern District of Florida addressed EPA's memorandum in *Friends of the Everglades v. South Florida Water Management District*.[40] The *Friends* court held that the SFWMD must obtain an NPDES permit in order to continue back-pumping water from canals into Lake Okeechobee for flood control and water supply augmentation.[41] The court thus concluded that transfers of polluted water from one navigable water into another required NPDES permits.[42] The court considered congressional intent in the CWA to be unambiguous in requiring permits for water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body. The SFWMD's appeal of the district court decision is currently pending in the Eleventh Circuit.[43]

In 2006, the Second Circuit in the second *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* [44] case also addressed the EPA memorandum, holding that NPDES permits were required for water transfers between distinct bodies of water via a tunnel. In *Catskill*, the court rejected arguments by the city of New York (NYC) holding that movement of water by NYC from the Schoharie Reservoir through an 18-mile tunnel to the Esopus Creek, the main tributary to the Ashokand Reservoir, required an NPDES permit.

III. EPA's June 2008 Water Transfer Rule

On June 9, 2008, EPA issued a Final Rule (Rule) that excluded water transfers from the CWA's NPDES permit requirements.[45] The Rule was based on the 2005 Agency Interpreta-

27. *Id.*
28. *Id.* at 112.
29. 273 F.3d 481, 492, 32 ELR 20229 (2d Cir. 2001).
30. *Miccosukee*, 541 U.S. at 110.
31. *Id.*.
32. *Id.* (internal quotations omitted).
33. *Id.* at 111.
34. U.S. EPA, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 2-3 n.5 (2005), *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. No. 02-80309, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006).
41. *Id.*
42. *Id.*
43. Friends of the Everglades v. South Fla. Water Management Dist., No. 07-13829-HH (11th Cir.) (appeal pending).
44. 451 F.3d 77, 89, 36 ELR 20111 (2d Cir. 2006).
45. 73 Fed. Reg. 33697 (June 9, 2008).

tion. According to EPA, a water transfer is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal or commercial use."[46] However, pollutants introduced by the water transfer activity itself to the water being transferred are still subject to permitting requirements.[47]

EPA reviewed the CWA's legislative history and case law in concluding that water transfers do not normally involve "additions" of pollutants that require NPDES permits unless there was an intervening industrial, municipal, or commercial use.[48] EPA 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 to various provisions of the Act such as §101(g), which states that the CWA is not to be construed in a manner to unduly interfere with the ability of states to allocate water within their boundaries.[49] The Rule, however, does provide examples of when NPDES permits would be required. One such example is where a drinking water treatment facility withdraws water from streams, rivers, and lakes; removes solids to make the water potable; and then discharges the removed solids back into the source water.[50]

In the Rule, EPA distinguished conflicting decisions of the First, Second, and Eleventh Circuits, reasoning that the CWA is ambiguous as to Congress' intent, and under such circumstances, courts must defer to EPA's reasonable interpretation of the CWA.[51] The Rule was immediately challenged by the Florida Wildlife Federation in a petition to vacate the final rule in the Eleventh Circuit.[52]

IV. Impact of the Water Transfer Rule and the Pending Litigation on the Water Resources Supply and User Communities

The Rule and the outcome of any future litigation will significantly affect state agencies, water districts, local governments, and their customers. The implementation of the Rule and the resolution of pending litigation will be particularly important in the western United States where much of the water supply arrives via interbasin transfer. If this rule is overturned, a permit could be required for every water diversion structure that transfers any amount of water from one water body into another distinct water body of navigable water.

States, localities, and residents are dependent upon the thousands of water transfers currently in place in the United States.[53] Interbasin water transfers through various diversion structures are a necessity for numerous water districts around the country, especially in areas where the demand for water outpaces historic localized supply. Within the water management and supply facilities found throughout the nation, millions of water diversion structures qualify as point sources.[54] Typically, water transfers route water through tunnels, channels, or natural stream water features, and either pump or passively direct it for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration.[55]

The scope of facilities affected by the Rule is quite large. Water management facilities include those 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.[56]

The Rule also has a profound effect on the need to supply potable water. Water transfers ensure adequate water supplies for large cities in the west and east.[57] For example, both New York and Los Angeles depend on water transfers from distant watersheds to meet their municipal demand.[58] Using water transfers, the U.S. Army Corps of Engineers keeps thousands of acres of agricultural and urban land in southern Florida from returning to their former state—flooded Everglades wetlands.[59]

Further, the water supply and user communities submit that the time-consuming NPDES permitting process would cost federal, state, and local agencies millions of dollars.[60] In some cases, merely counting the number of times water is combined with water from another distinct source during its trip through a water management system would be a challenge.[61] Additionally, the NPDES process involves costly and time-consuming permit compliance assessments.[62] Should NPDES permits be required, the increased regulatory compliance costs could force states to rethink water distribution systems.[63] Water management systems battling these regulatory challenges may alter or abandon their operations.[64] This could potentially jeopardize the supply of adequate drinking water in large cities, interrupt the flow of water to irrigation-dependent farms, disrupt the operation of flood control facilities that pump out encroaching water from populated areas, and encumber efforts to protect threatened and endangered species and preserve critical habitat.[65] There may be public safety risks associated with the possible disruption of flood control operations, such as the potential risk of inadequate drinking

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. The petition is available at http://www.earthjustice.org/library/legal_docs/fwf-petition-to-vacate-11th-circuit-court-of-appeals.pdf.
53. 73 Fed. Reg. at 33697.
54. Amicus Curiae Brief of The Nationwide Public Projects Coalition et al., in South Florida Water Management District v. Miccosukee Tribe of Indians et al., 541 U.S. 95 (2003) (No. 02-626) [hereinafter Amicus Curiae Brief of The Nationwide Public Projects Coalition et al.].
55. 73 Fed. Reg. at 33697.
56. Amicus Curiae Brief of The Nationwide Public Projects Coalition et al., *supra* note 54.
57. 73 Fed. Reg. at 33697.
58. *Id.*
59. *Id.*
60. Amicus Curiae Brief of The Nationwide Public Projects Coalition et al., *supra* note 54.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

water supply, and the seasonal impacts of the hydrologic cycle on irrigation-dependent agriculture.[66]

In sum, resolution of current litigation over EPA's water transfer rule, particularly the unitary waters issue, will have a profound impact on achieving the important goals of the CWA while also ensuring adequate and safe water supply for essential public needs.

66. *Id.*