

EPA Proposes CWA Rule Excluding Water Transfers From NPDES Permitting Requirements

June 8, 2006

On June 7, the Environmental Protection Agency (EPA) published a proposed rule clarifying that water transfers are excluded from regulation under Section 402 of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program. *See* NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (June 7, 2006). The proposed rule codifies an August 2005 EPA legal opinion, explaining that EPA has had a long-standing practice of not issuing NPDES permits for mere water transfers because there is no "addition" of a pollutant. **Comments on the proposed rule are due on July 24, 2006.**

Background

Both EPA's proposed rule and its August 2005 legal opinion are responses to the United States Supreme Court's 2004 decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*. There, the Court vacated a decision by the 11th Circuit, which held that a CWA permit was required for transferring water from one navigable water into another. The Court remanded the case for further fact-finding as to whether the two waters in question are "meaningfully distinct." If they are not, the Court indicated that no permit would be required. Because the Court remanded the case without resolving the substantive legal issues, the scope of Section 402 has continued to be debated. Of particular concern is whether the movement of pollutants from one navigable water to another by means of a water transfer constitutes the "addition" of a pollutant, thereby potentially subjecting the activity to the NPDES permitting requirement.

EPA Clarifies that Permits are Not Required for Water Transfers

EPA's proposed rule would amend its CWA regulations to expressly exclude water transfers from regulation under the NPDES permitting program. Under the proposed rule, a water transfer would be defined as "an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use."

Once adopted, the rule would apply to water transfers between two waters of the United States, including water transfers through tunnels, channels, or natural stream courses for public water supplies, irrigation, power generation, flood control, and environmental restoration. With respect to dams, EPA explains in the preamble that the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody. Thus, neither the movement of water through a dam, nor water transfers between two waters of the United States, would require NPDES permits because no "addition" of a pollutant would have occurred.

The proposed rule, however, would not apply to pollutants added by the water transfer activity itself to the water being transferred. For instance, an NPDES permit would be required if substances such as oil or grease from a malfunctioning pump contaminate the water being transferred. Furthermore, NPDES permits are still required for transfers when the water is subject to an intervening industrial, municipal, or commercial use in the course of its transfer between the donor and the receiving waterbodies.

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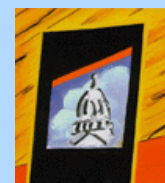
A Professional
Corporation

1050 Thomas Jefferson
Street, NW
Washington, DC
20007-3877
(202) 298-1800
(202) 338-2416

The Millennium Tower
719 Second Avenue
Suite 1150
Seattle, Washington
98104
(206) 623-9372
(206) 623-4986

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Micosukee Tribe on Remand

The United States District Court for the Southern District of Florida is scheduled to hear arguments on remand in *Micosukee Tribe* beginning on September 13, 2006. Moreover, the same court is expected to issue a ruling in a separate, but related, water transfer case concerning Lake Okeechobee. That case contends that the South Florida Water Management District is transferring heavily contaminated urban stormwater and agricultural runoff through flood-control canals into Lake Okeechobee.

Potential Implications

EPA's proposed rule, if adopted, would clarify the scope of Section 402 by codifying long-standing interpretations that the NPDES permit requirements do not apply to water transfers. Such a rule would directly benefit those hydropower facilities that depend on water transfers between two bodies of water, where the transfers meet the proposed definition. For those hydropower facilities employing only a single waterbody, the preamble to the proposed rule clearly articulates EPA's interpretation that the movement of such water through a dam does not require an NPDES permit. Such guidance, therefore, will go a long way toward eliminating much of the confusion and unnecessary litigation related to the applicability of Section 402 to hydroelectric facilities. Accordingly, the adoption of this rule could have far-reaching impacts in proceedings before state and federal courts and agencies.

For Additional Information

If you would like more information on this proposed rule, please contact Mike Swiger or Sam Kalen at (202) 298-1800, or visit our website at www.vnf.com.

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