

## Eleventh Circuit Holds that Transfers of Pollutants Among Waters of the United States Are Exempted from Clean Water Act Section 402 Requirements

### OVERVIEW

On June 4, 2009, the United States Court of Appeals for the Eleventh Circuit held in *Friends of the Everglades v. South Florida Water Management District* that Section 402 of the Clean Water Act (CWA) does not apply to discharges of pollutants resulting from a water transfer between distinct bodies of navigable water.

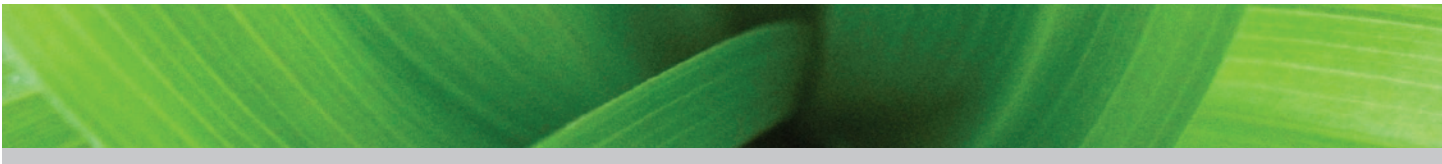
The court's 40-page opinion marked the latest phase in long-standing litigation over the jurisdictional breadth of the CWA's National Pollutant Discharge Elimination System (NPDES), which requires permits for discharges of pollutants from point sources into waters of the United States. The decision also is the first to rule on the Environmental Protection Agency's (EPA) 2008 Water Transfers Rule, which excludes from Section 402 requirements activities that convey or connect waters of the United States and do not subject the transferred water to an intervening industrial, municipal, or commercial use.

Although the factual context in *Friends of the Everglades* concerns a pumping station transferring phosphorous-laden water from a canal in southern Florida to Lake Okeechobee, the Eleventh Circuit's decision has implications for other water infrastructure, including hydroelectric facilities.

### CASE BACKGROUND

The Eleventh Circuit's opinion reversed a district court finding that had been ordered on remand from the Supreme Court's 2004 decision in *South Florida Water Management District v. Miccosukee Tribe (Miccosukee)*. In that case, the Supreme Court held that a pumping station pertaining to the Central and South Florida Flood Control Project *could* trigger NPDES requirements under Section 402 of the CWA. Section 402 bans the "discharge of any pollutant" without an EPA or state-issued permit. "Discharge of any pollutant," in turn, is defined in Section 301(a) of the CWA as "any addition of any pollutant to navigable waters from any point source." The Court concluded that the CWA definition of "point source" clearly embraces "conveyances," such as pumping stations, that merely move water without themselves adding any pollutants to the transferred water.

The Supreme Court did not rule that a NPDES permit was required, however, because it found that the district court had improperly granted summary judgment in the case without conclusively determining whether Lake Okeechobee and the canal were "meaningfully distinct" bodies of water. In remanding the case, the Court expressly reserved for future consideration the government's "unitary waters" theory, which maintains that an "addition" of a pollutant under the CWA occurs only when a pollutant is introduced from the outside world to the waters being transferred.



On remand, the district court determined that the canal was “meaningfully distinct” from Lake Okeechobee. The court also found that because the pumping station introduced pollutants from the canal to Lake Okeechobee, it caused an “addition” of pollutants to the lake and therefore required a NPDES permit.

Soon after the district court’s ruling, EPA finalized its Water Transfers Rule, which the agency originally proposed in June 2006 following the *Micosukee* decision (see June 8, 2006 Issue Alert “EPA Proposes CWA Rule Excluding Water Transfers From NPDES Permitting Requirements”). The final Water Transfers Rule interprets Section 402 of the CWA as exempting water transfers from NPDES requirements, and specifically defines a “water transfer” as “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.” In the preamble to the rule, EPA explained that its NPDES exemption for water transfers is consistent with the language and structure of the CWA, and respects Congressional intent to preserve the states’ traditional role in water resource management.

On appeal from the district court’s decision in *Friends of the Everglades*, the Eleventh Circuit accepted the lower court’s conclusion that the lake and canal were meaningfully distinct bodies of water. Nevertheless, the appellate court reversed the lower court’s holding that a NPDES permit was required, because it found EPA’s Water Transfers Rule to be a reasonable construction of the CWA and deferred to EPA’s interpretation in accordance with *Chevron v. Natural Resources Defense Council*.

## IMPLICATIONS FOR THE HYDROPOWER INDUSTRY

The Eleventh Circuit’s deference to EPA’s interpretation of the CWA as articulated in the Water Transfers Rule has potentially broad application to many forms of water diversions, including hydroelectric facilities, flood control infrastructure, and irrigation systems, all of which transfer water within and between navigable waters.

With respect to hydroelectric facilities, *Friends of the Everglades* leaves intact two previous decisions – *National Wildlife Federation v. Consumers Power Co.* and *National Wildlife Federation v. Gorsuch* — in which the Sixth and District of Columbia Circuits, respectively, deferred to EPA’s position that dam-induced water quality conditions (such as low dissolved oxygen or entrained fish) do not require NPDES permits.

In addition, *Friends of the Everglades* suggests that NPDES requirements are not triggered for activities that merely change the flow, direction or circulation of water while conveying or connecting waters of the United States – such as water passing through hydroelectric turbines. As EPA explained in the Water Transfers Rule, these types of activities would not cause the transferred waters to lose their status as waters of the United States by virtue of being subjected to an intervening industrial, municipal, or commercial use. However, as indicated in the Water Transfers Rule, NPDES permits would continue to be required for pollutants *introduced* to navigable waters by hydroelectric machinery (such as trace oil residues found in water used for cleaning).

### FOR ADDITIONAL INFORMATION

Van Ness Feldman’s hydroelectric practice provides comprehensive legal, policy, and business advisory services for the full range of issues facing the hydropower industry. If you would like additional information on the Eleventh Circuit’s opinion, please contact Chuck Sensiba in our Washington, DC office, at 202-298-1800, or any other attorney in Van Ness Feldman’s Hydro-power Practice.

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