



Announcement of Regulatory Development

June 2008

EPA Promulgates Final Rule on Water Transfers

On June 9, 2008, the Environmental Protection Agency (EPA) published a final rule excluding water transfers from regulation under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program. The rule 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.

Background

Water transfers are a routine means for water to be routed across the United States. Water is directed through tunnels, channels, and/or natural stream features to new uses, such as for public water supply, irrigation, power generation, flood control, and environmental restoration. For instance, many large cities, such as New York and Los Angeles, rely on water transfers to meet their municipal water needs. The transfers are administered by a variety of federal, state, and local agencies, and other entities.

The CWA prohibits the discharge of a pollutant into waters of the United States. Section 502(12) of the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Discharges of pollutants, other than dredged or fill material, may be authorized by NPDES permits issued by the EPA or States with approved permitting programs under § 402.

Generally, the EPA has not required NPDES permits for water transfers; however, the question of whether permits are required has arisen in several court cases. In response, the EPA issued a memorandum in 2005 interpreting the applicability of § 402 of the CWA to water transfers. The memo concluded that Congress did not intend for water transfers to be part of the NPDES program, but to be overseen by water resource management agencies and state authorities. In 2006, the agency published a proposed rule to begin the process of amending the CWA regulations to exclude water transfers from the NPDES program.

Water Transfers Rule

The final rule excludes water transfers from the NPDES program. To qualify as a water transfer under the rule, the transferred water must be from a water of the U.S. and be discharged into another water of the U.S. During the transfer, the water must not be subject to an intervening industrial, municipal, or commercial use.

In its rulemaking, EPA concluded that the water transfers do not require an NPDES permit, because they do not result in the "addition" of a pollutant to waters of the United States. The EPA's argument is premised on the fact that the water being transferred already contains the pollutants; pollutants, therefore, are not being added from the outside world. Additionally, the agency concluded that Congress intended to leave oversight of water transfers to state authorities working in cooperation with federal authorities.

Litigation

The final water transfers rule is likely to be challenged in court. Prior to the issuance of the final rule, several federal courts had ruled that water transfers between distinct water bodies that result in the addition of a pollutant to the receiving water body require NPDES permits. In the rulings, the courts have recognized the potential harm of combining water from different water bodies.

In *Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 451 F.3d 77 (2nd Cir. 2006), several fishing and conservation organizations brought suit against New York City and its water supply department for transferring turbid water from one water source into a second water body – a trout stream – without a CWA permit. The court held that the tunnel used to transfer the water qualified as a point source of additional pollutants, thereby subjecting it to permit requirements. The court expressly rejected the EPA’s position as stated in the 2005 interpretation memorandum and the 2006 proposed rule.

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), plaintiffs argued that an NPDES permit was necessary for the operation of a pump that conveyed water from a polluted canal to an undeveloped wetland. The U.S. Supreme Court held that if the canal and the wetlands are not meaningfully distinct water bodies no NPDES permit is required; however, the court declined to rule on whether they were distinct water bodies and remanded the case.

Although the Supreme Court has not ruled directly on the issue, courts have generally found that water transfers may add pollutants to receiving water bodies. Environmental groups are likely to use the federal court rulings to support a challenge to the final rule.

How can I find the rule?

For additional information, including a copy of the final rule, visit the NPDES website: <http://www.epa.gov/npdes/agriculture> .

Provided by:
National Sea Grant Law Center

University Of Mississippi
Kinard Hall, Wing E – Room 256
University, MS 38655

Phone: (662) 915-7775

Email: sealaw@olemiss.edu

<http://www.olemiss.edu/orgs/SGLC>