



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

In This Issue:

**Water Transference
& the CWA 1**

**Colorado Water Law
Developments 8**

**Santa Fe's
"Wet Growth"
Planning 22**

Water Briefs 28

Calendar 31

Upcoming Stories:

EPA/NPDES Issues

Dam Removal Issues

& More!

WATER TRANSFERS & THE CLEAN WATER ACT

by Richard M. Glick, Davis Wright Tremaine LLP

Introduction

Settlement of the West has depended on the large-scale transfer of water within and between basins. Transfers are diversions of water from rivers, lakes and streams through canals, ditches, tunnels and sometimes through natural stream channels. Water moves by pump and gravity to support irrigated agriculture, public water systems, power generation, flood control and watershed restoration. Water is also stored in reservoirs behind an interrelated system of dams, sometimes for later use or simply to regulate and re-regulate flows. Most of this development has been carried out by the federal government operating through the US Army Corps of Engineers and US Bureau of Reclamation. However, much development has also been driven by the states, water and irrigation districts and investor-owned utilities. Each of these facilities involved massive investments of public money, either through taxes or utility rates.

These developments were initially praised in terms of reclaiming the wilderness and making the desert bloom. The early developers' vision was lionized in the popular culture, as in Woody Guthrie's "Roll On Columbia"—a paean to the Grand Coulee Dam. In fact, these projects accomplished their purpose, which was to encourage people to settle the West. But this progress came at a price and much has been written in the last two decades about the environmental destruction accompanying water system development. See *Cadillac Desert: The American West and its Disappearing Water*, Mark Reisner (Penguin Books 1986) and the more recent *Water Follies: Groundwater Pumping and the Fate of America's Fresh Waters*, Robert J. Glennon (Island Press 2002). These and other writings have fueled a large and growing conservation movement directed at mitigation for depredations associated with water projects, and sometimes their removal. Ongoing litigation involving dams on the Columbia-Snake River and the Klamath River are two prominent examples from the Pacific Northwest.

In the past several years, environmental organizations and Native American tribes have sought to enlist the federal Clean Water Act (CWA) in the struggle to impose mitigation requirements on existing water storage and delivery systems. In the hydroelectric relicensing context, they have successfully argued that dam projects that pass through but do not add pollutants to the stream below, are still subject to section 401 of the CWA. *S. D. Warren v. Maine Board of Environmental Protection*, 547 US ____ (2006). See *Glick*, TWR 28. More problematic are cases seeking to require a National Pollutant Discharge Elimination System (NPDES) permit under CWA section 402 for water transfers. The US Supreme Court had the opportunity to resolve a split among the circuits, but did not. In *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 US 95 (2004), the Court held that an NPDES permit may be required for water transfers where the discharge and receiving waters are "meaningfully distinct." 541 US at 112. The Court remanded back for further evidence on this issue. See *Glick*, TWR #2.

Since *Miccosukee*, the US Environmental Protection Agency (EPA) first issued an "Agency Interpretation" (Aug. 5, 2005) and then proposed a rule declaring water transfers exempt from CWA section 402. 71 Fed. Reg. 32887 (2006). However, it is not at all

Water Transfers

"Pollutant"

"Point Source"

Pre-Miccosukee Cases

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clear whether these rules will be adopted, accepted by the courts or found applicable to a number of water transfer scenarios. It seems likely that most inter-basin transfers resulting in the introduction of pollutants will require a permit. Intra-basin transfers or dam pass-throughs of inflowing pollution probably will not, assuming no addition of pollutants.

This article first examines the relevant provisions of the CWA that bear on the imposition of permit requirements on water transfers and dams and then reviews relevant judicial and agency interpretations to glean for guidance, such as it is.

Clean Water Act Requirements

Section 101 of the CWA proclaims its purpose to be "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251(a). The Act prohibits "the discharge of any pollutant by any person" except in compliance with the Act. 33 USC § 1311. Section 502(12) of the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from a point source." 33 USC § 1362(12). "Pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." CWA 502(6), 33 USC § 1362(6). "Point source" is defined in pertinent part as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA 502(14), 33 USC § 1362(14). The regulatory centerpiece of this scheme is the NPDES permit program established under section 402 (33 USC § 1342(a)). Under this program, the discharge of pollutants is subject to effluent limitations provided for in the permit.

Intra-Basin and Inter-Basin Transfers of Water

THE CASES LEADING UP TO *Miccosukee* FALL INTO TWO BROAD CATEGORIES:

- Cases involving movement of water within the same waterway: In these cases, the courts deferred to EPA's view that dams and pumped storage facilities do not require an NPDES permit if the facility itself does not add pollutants. The leading cases are *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (4th Cir. 1988).
- Cases involving inter-basin transfers or transfers from one part of a waterbody to another, finding that the water transfers at issue resulted in the addition of pollutants to the receiving waters that would otherwise not be there, and therefore an NPDES permit is required. These cases are exemplified by *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2nd Cir. 2001) (referred to as *Catskill I*), *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 451 F.3d 77 (2nd Cir. 2006) (*Catskill II*), and *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996).

In *Gorsuch*, the issue was whether water quality changes induced by the presence of a dam constitute a "discharge of a pollutant" under CWA section 502(12). Most instream dams and reservoirs do not generate pollutants, but do change the character of the river downstream. The plaintiffs in *Gorsuch* alleged that the dam affected temperature, reduced dissolved oxygen levels, released sediments and supersaturated receiving waters with oxygen entrained in spills. In looking at whether such changes are a "discharge of a pollutant," the court noted that "five elements must be present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." 693 F.2d 156 at 165 (court emphasis). It was undisputed that in some instances dams can be a point source. In addressing the other elements, the court deferred to EPA's view that for the addition from a point source to occur, "the point source must introduce the pollutant into navigable water from the outside world; dam-caused pollution, in contrast, merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river)." *Id.* at 165 (emphasis original). Further, the changes in the river's condition caused by the dam are not "pollutants" as defined by the Act.

The court then performed a careful analysis and deferred to EPA's interpretation. The court emphasized, however, that its holding is narrow:

It is not our function to decide whether EPA's interpretation of the term "discharge of a pollutant" is the best one or even whether it is more reasonable than the [plaintiffs'] interpretation. We hold merely that EPA's interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld. *Id.* at 183.

In *Consumers Power*, the Sixth Circuit came to a similar conclusion, though that case involved a pumped storage facility and not a dam. In the process of pumping water from Lake Michigan for hydroelectric generation, fish were entrained in the turbines and discharged into another area of the lake

Water Transfers

Dams Exempt?

separated by jetties. The issue was whether the introduction of fish parts, as opposed to whole fish, constitute an addition of pollutants requiring a permit. The court also deferred to EPA's interpretation, citing the factors in *Chevron, U.S.A. v. NRDC*, 467 US 837 (1984). In overruling the district court's finding that a permit is required, the appellate court observed that the hydroelectric facility did not create the fish in Lake Michigan and concluded:

If the district court decision were upheld, a § 402 permit would be required even for a dam which released alive all fish passing through it from and into waters of the United States, since the CWA does not distinguish between living and dead "biological materials."...In short, Congress and everyone involved in the water pollution problem knew that water flowed out of the dams, and that such water was often not pristine. To the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act. 862 F.2d at 585-586.

As we shall see, later courts were less deferential to EPA, the views expressed in the Agency Interpretation of August 2005 and the recent proposed rule.

Inter-Basin Transfers

The inter-basin transfer cases presented very different facts and, not surprisingly, the results were different. *Catskill I* concerned New York City's water supply system. The source of the city's drinking water is the Schoharie Reservoir in the Catskill Mountains, many miles from the city. The water is released from the reservoir through the eighteen-mile Shandaken Tunnel and discharged into Esopus Creek. The creek channel transports the water to other reservoirs and conveyances on its way to the city. The discharge from the tunnel into Esopus Creek results in high turbidity levels, and it was undisputed that the waters from Schoharie Reservoir would never reach the creek but for the diversion through the tunnel. The Second Circuit distinguished these facts from *Gorsuch* and *Consumers Power*, as the city's diversion resulted in the addition of a pollutant from the "outside world." The court reasoned:

Ladle Test

The *Gorsuch* and *Consumers Power* decision comport with the plain meaning of "addition," assuming that the water from which the discharges came is the same as that to which they go. [fn. omitted] 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 (beyond, perhaps a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagra (sic) Falls. The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. 273 F.2d at 491-492.

Addition of Pollutants

Similarly, the First Circuit in *Dubois* found that the pumping of polluted river water into a pond by a ski resort for snowmaking purposes constitutes an addition of pollutants triggering CWA section 402. The court also noted that the stream water would not have entered the pond but for the resort's pumping, and so distinguished *Gorsuch* and *Consumers Power*. 102 F.2d at 1299.

Miccosukee Hybrid

The *Miccosukee* case seemed to present a hybrid of the intra-basin and inter-basin transfer cases. Starting in the 1900s, the federal government began constructing a series of canals and levees to drain wetlands. This network, operated by the South Florida Water Management District, protects the populated areas of Broward County from inundation. Groundwater and surface runoff from urban, agricultural, and residential areas collect in the canal. That runoff contains contaminants, including high levels of phosphorous. When water in the canal reaches a certain volume, the pumping station is activated and pumps the water into a large, undeveloped wetland area, which is naturally low in phosphorous. This transfer of nutrient rich water stimulates the growth of algae and plants that were foreign to the wetlands ecosystem. A number of initiatives have been underway for some time to restore the ecological integrity of the Everglades. The Miccosukee Tribe, impatient with the pace of progress, brought a suit under the CWA to enjoin operation of the pump, arguing that the District is required to obtain an NPDES permit because the pump station transferred pollutants from the canal to the wetlands.

Discharger Arguments

IN *Miccosukee* THE DISTRICT, JOINED BY THE FEDERAL GOVERNMENT IN AN *AMICUS* BRIEF, ADVANCED THREE ARGUMENTS:

- 1) Because the pollutants originated elsewhere and merely passed through the pump, the pump was not a point source and did not require a permit
- 2) All "waters of the United States" should be viewed unitarily for purposes of NPDES permitting requirements and no permit is required when water from one navigable water body is discharged, unaltered, into another (the "unitary waters" theory)
- 3) If an NPDES permit is required here, it would also be required at the hundreds of dams scattered throughout the West, thus adding considerable cost to public water supply systems. This argument was also advanced by western states as *amici*.

Water Transfers

"Unitary Waters" Theory

Under the first argument, the Court held "that a point source need not be the original source of the pollutant" and need only convey the pollutant to navigable waters. The Court seemed dubious about the unitary waters theory and observed that the approach of the CWA was to protect individual water bodies as well as the waters of the US as a whole. More importantly, the Court noted that the Government had failed to identify any documents indicating that the EPA had adopted the unitary water theory before this case, and in fact the unitary waters approach could conflict with current NPDES regulations. The Court appeared ambivalent about the practical implications of requiring permits for situations like the one in this case, noting that such permitting authority may be necessary to protect water quality, and regulatory costs could be controlled by issuing general permits.

While the Court did touch on the merits of each argument, it concluded that because neither the District nor the Government raised the unitary waters theory in the proceedings below and, because there was a genuine issue of fact as to whether the canal and the reservoir were indeed two separate and distinct water bodies, the case must be remanded for further proceedings. Both parties are free to argue the unitary waters theory on remand. Interestingly, the Tribe did not dispute that if the canal and the wetlands were simply two parts of the same water body that pumping water from one into the other could not constitute an addition of pollutants. The Tribe only took issue with the accuracy of the factual premise and argued that there were indeed two distinct water bodies. The lower courts had applied a test that neither party defended, namely that the canal and wetlands were distinct because the transfer of water from the canal into the Everglades would not occur naturally. The Court noted that, after reviewing the full record on remand, it is possible that the trial court would conclude that there were not two meaningfully distinct water bodies and, therefore, the pump station would not require an NPDES permit.

Agency Interpretation

In response to the *Miccosukee* decision, EPA issued a legal memorandum entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (EPA August 5, 2005). The Agency Interpretation is that water transfers should not typically require an NPDES permit. Whether the movement of pollutants from one navigable water to another by a water transfer is an "addition" of pollutants raises important issues of federalism:

Federalism Issues

The question touches on the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States and water resource management agencies. The issue also requires consideration of how the statute divides responsibility between the federal and State governments for controlling sources of water pollution....Based on the statute as a whole, we confirm the Agency's longstanding practice and conclude that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA. Agency Interpretation at 3.

State Authority

EPA's "holistic" argument rests on CWA sections 101(g) and 510, 33 USC §§ 1251(g) and 1370. These two statutes reserve the authority of the states within their borders. Section 101(g) provides that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired." Section 510 provides that "[e]xcept as expressly provided in this chapter, nothing in this chapter shall...be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters...of such States." Imposition of NPDES permit requirements on water transfers, EPA argues, would effectively raise the cost of water transfers to the point where the prerogatives of the states are compromised. EPA announced its intent to conduct a rulemaking on the subject of water transfers, which it subsequently did.

Catskill II

Contemporaneously with that rulemaking, the Second Circuit considered and decided *Catskill II*. On remand from *Catskill I*, the district court entered summary judgment for plaintiffs and assessed almost \$6,000,000 in civil penalties against the city. The city appealed that penalty and requested reconsideration by the Second Circuit of its conclusion in *Catskill I* that an NPDES permit is required. The city argued that a change of law after the *Miccosukee* ruling and the EPA Agency Interpretation warrants a fresh look by the court and a different outcome.

CWA's Plain Language

In *Catskill II* the court of appeals affirmed the district court. The court was unimpressed with EPA's and the city's "holistic" arguments relating to the balance of federal and state authority in the CWA:

[These arguments] simply overlook [the CWA's] plain language. NPDES permits are required for "the discharge of any pollutant" [citation omitted], which is defined as "any addition of any pollutant to the navigable waters from any point source" [citation omitted]. It is the meaning of the word "addition" upon which the outcome of *Catskill I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context. In *Catskill I*, we pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. [citation omitted]. The CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's

**Water
Transfers**

waters. The City and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change. Slip Op. at 16.

Further, the court found that the NPDES permit program is flexible enough to allow federal and state authority “to coexist without materially impairing either.” *Id.* at 17.

EPA’s proposed rule on water transfers was posted in the Federal Register within days of the release of *Catskill II*, so neither addressed the other directly. The rule would simply add to the list of exclusions from the NPDES permit requirements contained in 40 CFR § 122.3:

**NPDES
Exclusions**

(i) *Discharges from a water transfer.* Water transfer means 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. This exclusion does not apply to pollutants added by the water transfer activity itself to the water being transferred. 71 Fed. Reg. at 32895.

**Mere
Conveyance**

The explanation for the rule recites much of the legal argument presented in the Agency Interpretation, concluding that “Congress intended to leave oversight of water transfers to water resource management agencies and the States in cooperation with Federal authorities.” *Id.* at 32891. The explanation also notes that dams would not meet the definition of “water transfer” because the “dam merely conveys water from one location to another within the same waterbody.” However, neither dams nor water transfers require an NPDES permit “because no ‘addition’ of a pollutant has occurred.” *Id.* at 32891-32892.

Backpumping

A recent case suggests that the proposed rule may not be favorably regarded by the courts. *Friends of the Everglades v. South Florida Water Management District* (Case No. 02-80309-CIV-ALTONAGA/Turnoff, Dec. 11, 2006; referred to as *FOE*). *FOE* is the first reconsideration of the cases giving rise to the Supreme Court’s decision *Miccosukee*. On similar facts, the federal court in Florida held that “backpumping” of flood waters from drainage canals into Lake Okeechobee requires an NPDES permit. Because the practical benefit to the Everglades of requiring a permit was not immediately apparent, the court ordered further proceedings to better define the scope of injunctive relief. All parties agree that backpumping is necessary to avoid flooding populated and agricultural areas.

FOE Case

In 2002, environmental organizations led by Friends of the Everglades filed a citizen suit under the CWA to compel the South Florida Water Management District to obtain an NPDES permit under CWA section 402. The drainage canals in question carry polluted municipal and agricultural runoff, which is pumped upgradient into Lake Okeechobee to avoid flooding. This case was consolidated with another against the District by the Florida Wildlife Federation. The Miccosukee Tribe, which intervened in *FOE*, filed yet another case against the District regarding different pump stations that transfer canal water to a designated conservation area. The cases were all stayed when the Supreme Court granted certiorari in the *Miccosukee* case. After *Miccosukee* was decided, the stays were lifted and the *FOE* case reopened.

**Everglades
Development**

Most of southern Florida was developed on reclaimed lands that were formerly part of the vast Everglades. The lands were drained to accommodate both high value agriculture and municipal development. The land areas in question are immediately south of Lake Okeechobee, one of the largest fresh water lakes in the United States. The boundary between the Lake and the adjacent wetlands varied historically, depending on weather conditions. These lands are almost flat, but in a natural state drained slowly to the sea. They were drained through a labyrinth of canals and levees leading from the Lake to the Gulf of Mexico. Working in conjunction with the US Army Corps of Engineers, the District operates several large pump stations to prevent canal or levee overtopping. In most cases the most practical solution is to pump flood waters back “uphill” to Lake Okeechobee.

**Agency
Interpretation
Rejected**

It is undisputed that backpumping results in the transfer of polluted water from the canals into the Lake. At issue is whether the transfer constitutes an “addition of pollutants” requiring an NPDES permit. The court declined to defer to EPA’s interpretation of the CWA in its proposed rule because “No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA.” *FOE, Slip Op.* at 84.

The District argued that an “addition to navigable waters” does not occur from backpumping, but rather simply moves water between and among navigable waters. This is the unitary waters theory advanced with ambiguous results in the *Miccosukee* case.

After a lengthy description of the physical features of the Everglades, both naturally and as transformed, the district court determined that in the *FOE* case the subject drainage canals and Lake Okeechobee are in fact meaningfully distinct. Although the court declined to “articulate a precise test,” it nevertheless offered this guidance:

**“Meaningfully
Distinct”
Waters**

But, at a minimum, the evidence must demonstrate that pollutants would not have reached the Lake were it not for backpumping, and that the Lake and canals are distinct from one another and would remain distinct if backpumping ceased. Suffice it to say that, based upon the evidence presented, the Lake is “meaningfully distinct” from the canals. *Id.* at 86.

Water Transfers

Distinct Waters Factors

In reaching that conclusion, the court cites ten factors. Among the factors are physical barriers between the water bodies, chemical and biological differences, and that the water would not normally flow from the canal areas into the lake but for backpumping.

THE TEN FACTORS CITED IN THE FOE CASE INCLUDE:

- (1) the waters are separated by a physical barrier (the Dike);
- (2) historically, water generally flowed south from the Lake (in the system's natural state);
- (3) today, water also generally continues to flow south;
- (4) there are chemical differences between the Lake and the canals;
- (5) there are biological differences between the Lake and the canals;
- (6) the canals are man-made and were cut into bedrock, while the Lake is a natural bowl-shaped water body; (7) when water enters the Lake via backpumping, a visible plume may be observed;
- (8) backpumping canal water into the Lake has a negative impact upon the Lake;
- (9) the waters are classified differently under the CWA (the Lake is a Class I water body and the canals are Class III water bodies); and
- (10) the waters that are backpumped into the Lake would not otherwise reach the Lake (in any significant amount, much less in the same quantities) but for the backpumping activities. These factors demonstrate that, in the absence of an extraordinary event, backpumping is the primary means by which pollutants from one body of water (the canals) enter another, distinct body of water (the Lake). *Id.* at 86-87.

The fact that there is some natural intermingling of water between the canals and lake is not relevant: "However, the Supreme Court has instructed that the proper question is whether the bodies of water are *"meaningfully distinct,"* not *"completely distinct."* *Id.* at 87 (court emphasis).

Conclusion

Review of these cases reveals a common sense approach to determining whether CWA section 402 applies to dams or water transfers. Courts have been more willing to defer to EPA's interpretation where the facts are clear that the facility or system in question does not add pollutants, but merely passes them through unchanged within the same waterbody. In other words, if pollutants are discharged downstream of a dam that would not be there but for the agency of the dam, then a permit is required. Alterations in river conditions due to the mere presence of the dam would not trigger section 402. On the other hand, where the record shows that inter-basin or intra-basin water transfers occur in which the waters would not naturally intermingle and where pollutants are added to the receiving water, an NPDES permit would be required. In such cases, courts have been disinclined to defer either to EPA's concept of the division of authority between the federal government and the states under the CWA, or to its unitary waters theory. While the reasoning in these cases could be applied to hydroelectric facilities undergoing relicensing, it is clear that water quality concerns will be fully examined and addressed through the CWA section 401 process, and so a challenge asserting the applicability of section 402 would probably not arise.

FOR ADDITIONAL INFORMATION:

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WEBSITE: FOE decision is available at: http://crca.caloosahatchee.org/crca_docs/LakeOruling.pdf

Cases' Applicability

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