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Contacts

Washington Office

1900 K Street, NW
Washington, DC 20006-1109

[Brent A. Fewell](#)

(202) 955-1891
bfewell@hunton.com

[Virginia S. Albrecht](#)

(202) 955-1943
valbrecht@hunton.com

[Kristy A.N. Bulleit](#)

(202) 955-1547
kbulleit@hunton.com

Atlanta Office

Bank of America Plaza, Suite 4100
600 Peachtree Street, NE
Atlanta, Georgia 30308-2216

[Catherine E. Little](#)

(404) 888-4047
clittle@hunton.com

Richmond Office

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

[James N. Christman](#)

(804) 788-8368
jchristman@hunton.com

[Andrea W. Wortzel](#)

(804) 788-8425
awortzel@hunton.com

Raleigh Office

One Bank of America Plaza,
Suite 1400
421 Fayetteville Street
Raleigh, North Carolina 27601

[Charles D. Case](#)

(919) 899-3045
ccase@hunton.com

Los Angeles Office

550 South Hope Street, Suite 2000
Los Angeles, CA 90071-2627

[Chris M. Amantea](#)

(213) 532-2102
camantea@hunton.com

New York Office

200 Park Avenue
New York, New York 10166-0091

[Kathy Robb](#)

(212) 309-1128
krobb@hunton.com

EPA Issues Final Rule Exempting Water Transfers from Federal Permits

On June 9, 2008, the U.S. EPA Administrator signed the Final Water Transfer Rule, which exempts those seeking water conveyances from one U.S. water body to another U.S. water body from having to obtain a permit under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) program. The rule has been submitted to the Federal Register for publication and an unofficial version of the rule is available at www.epa.gov/npdes/agriculture. Environmental groups have vowed to challenge the rule.

EPA promulgated the final rule in response to increasing litigation and uncertainty surrounding the regulation of water transfers in the wake of the 2004 U.S. Supreme Court decision in *South Florida Water Management District (SFWMD) v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In *Miccosukee*, the Court addressed the issue of whether a water transfer involved an "addition" of a pollutant to a navigable water within the meaning of Section 502(12), thereby prompting the need for an NPDES permit. Ultimately, the Court remanded the case to the district court to determine whether the waters were "meaningfully distinct," the determinative fact. That decision was stayed pending the resolution of a similar case involving SFWMD now before the 11th Circuit Court of Appeals.

On June 7, 2006, EPA proposed clarifying regulations that integrated the Agency's August 2005, Interpretive Statement entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers." Both the guidance and the proposed rule expressly reiterated EPA's long-standing interpretation that Congress intended water resource management agencies and State non-NPDES authorities, not the federal CWA permitting program, to govern the propriety of water transfers. The final rule confirms this approach, and is virtually identical to the proposed rule.

The final rule expressly exempts water transfers from NPDES permits, since such transfers do not result in the "addition" of a pollutant. A water transfer is defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." The rule only applies to transfers where the donating and receiving water bodies are both waters of the United States.

Given the broad definition of "pollutant," both donating and receiving waters will always contain "intrinsic pollutants" that emanate from background and upstream sources. These pollutants are already present in the conveyed water and do not constitute an "addition," because the

pollutant is merely conveyed along with the water. If the water is not diverted for an intervening use, then it never loses its status as a “water of the United States.” This rationale is at the heart of EPA’s final rule. The rule does not apply to pollutants introduced by the water transfer activity itself (e.g., oil and grease) to the water being transferred, but EPA expects “these additions to be rare.”

EPA’s Assistant Administrator for Water, Benjamin H. Grumbles, explained that “Clean water permits should focus on water pollution, not water movement” and the rule “gives communities greater certainty and makes clear they have the flexibility to protect water quality and promote the public good without going through a new federal permitting process.”

Thousands of water transfers exist across the nation, and are essential for providing drinking water, irrigation, power generation, flood control, and environmental restoration. Water transfers may be of varying complexities and sizes, utilizing transport through multiple reservoirs, canals, tunnels, or pumps. These transfers comprise an essential component of U.S. infrastructure and are necessary to allocate water resources to meet the water needs of various states, localities and citizens.

The final rule merely espouses EPA’s position with regard to the regulation of water transfers and does not alter the

interpretation or regulation of other uses subject to NPDES permitting. Under the rule:

- NPDES permits are still required for water which is withdrawn for an “intervening industrial, municipal, or commercial use” and then discharged into a water of the U.S. This includes water withdrawn and used as cooling water or other intervening uses that cause the water to lose its status as a water of the U.S.
- NPDES permits are still required when a facility withdraws water, purifies it of pollutants and discharges the pollutants back into the water of the U.S., even though the waste material originated in the withdrawn water.
- Hydroelectric operations, including pump storage activities, do not require NPDES permits unless the facility itself introduces a pollutant, such as grease, to the water.
- Naturally occurring physical changes caused during the transfer of water (e.g., temperature, pH, BOD and dissolved oxygen) do not trigger a NPDES permit requirement.
- The application of pesticides directly to the waters of the U.S. remains excluded from NPDES permitting under the requirements described in 40 C.F.R. 122.3(h).
- States retain the right and authority under state law to regulate the move-

ment of water within their borders and may, at their discretion, establish water quality standards and total maximum daily loads (TMDLs) as appropriate to meet the needs of a particular water body.

EPA’s final rule codifies the Agency’s long-standing position that Congress did not intend the administration of the CWA to interfere with State decisions on the allocation of water through water transfers. The rule accords with EPA’s goal to work in conjunction with federal, state and local agencies to develop comprehensive approaches to water pollution in “concert with programs for managing water resources.”

Water supply concerns are on the rise nationwide, and are no longer just an issue for the arid western states. This final rule signals flexibility for states and local governments in identifying and pursuing options for ensuring adequate water supplies for their communities. Those options may trigger other potential regulatory and judicial scrutiny, however.

Hunton & Williams’ Regulatory, Resources and Environmental Law practice professionals have extensive experience providing guidance to clients on all aspects of the federal Clean Water Act. If you have questions about the substance or applicability of the U.S. EPA’s Final Water Transfer Rule, or any other environmental issue, please contact us.

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