

## US EPA Issues Proposed Rulemaking on Water Transfers

June 9, 2006

On June 7, 2006, the United States Environmental Protection Agency (EPA) published in the Federal Register a proposed amendment to its regulations concerning whether a permit is required for water transfers under Section 402 of the Clean Water Act (CWA). EPA had previously issued an interpretive memorandum on August 5, 2005, which concluded that Congress did not intend for water transfers to fall within the permit requirements of the CWA, and therefore the EPA would not require permits for parties engaged in such transfers. That memorandum indicated a future intention to engage in rulemaking, and this proposed amendment is the result.

Section 402 of the CWA allows a person to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the EPA or an appropriate state agency for the discharge of a pollutant to navigable waters from a point source. The question has arisen whether an NPDES permit is required for a project that diverts water from one natural water body and discharges it into another water body considered to be navigable waters of the United States without altering the quality of the water, based on the transferred water containing pollutants. Put simply, the question is whether a person needs a permit to move water from one surface water body to another, and, ultimately, whether that person may be required to treat the water before its discharge.

Under the proposed regulations, no permit would be required for a water transfer, 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.” Included within that definition would be many types of projects, particularly flood control and the use of natural channels to convey water supplies. That last activity should be a prime concern of water resource managers across the country, and they have closely followed a series of decisions in the

federal courts over the past 20 years. The EPA has itself noted that water transfers are common throughout the United States and are crucial for supplying water to large numbers of farmers and municipalities, including Bureau of Reclamation projects throughout the western states and the cities of New York and Los Angeles.

The most recent court decision on this topic was issued by the United States Supreme Court in 2004 in the case of *Miccosukee Tribe of Indians v. South Florida Water Management District*. In *Miccosukee*, the Supreme Court held that a discharge permit would be required only if the source and receiving waters were “meaningfully distinct water bodies,” but did not identify the test that should be used to make such a determination. The Supreme Court noted specifically that the EPA had not issued any official agency guidance regarding when permits are required for water transfers under the CWA. The currently proposed EPA rulemaking would fill that gap.

The EPA is seeking comments on the proposed rulemaking through July 24, 2006. Specifically, they have requested comments on whether the proposed definition of water transfers achieves the goal of excluding appropriate transfers from the NPDES permit requirement, while preserving EPA’s jurisdiction over other currently regulated activities. They have also requested comments on an additional amendment that EPA considered, but has not proposed, which would allow the states to designate particular water transfers as subject to the NPDES program on a case-by-case basis.

For more information on the proposed amendment or to discuss submitting comments to the EPA on the proposed rulemaking, please contact Wes Strickland at (805) 882-1490, [WStrickland@hatchparent.com](mailto:WStrickland@hatchparent.com).