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CLIENT ALERT

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Court of Appeals Holds Federal Water Permits Not Required For Water Transfers

On June 4, 2009, in a welcome victory to water users and managers around the nation, the U.S. Court of Appeals for the Eleventh Circuit held that the movement of water from one navigable water body to another (commonly referred to as inter- and intra-basin water transfers) is not subject to a Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permit (click here for a copy of the decision). This decision is significant, because it stands in sharp contrast to decisions by the First and Second Circuit Courts of Appeal, which had previously concluded that NPDES permits are required for water transfers. In light of this decision, environmental groups are vowing to seek review by the U.S. Supreme Court of the Eleventh Circuit's decision.

In 2002, the Friends of the Everglades and the Fishermen Against Destruction of the Environment filed suit against the South Florida Water Management District ("District"), alleging the District had violated the CWA by pumping water from irrigation canals through the District's S-2, S-3, S-4 pump station into Lake Okeechobee without a NPDES permit. The United States and other parties, including the Miccosukee Tribe and environmental groups, were allowed to intervene.

The central issue before the Court was whether the transfer of water containing pollutants from one navigable water to another is a "discharge of a pollutant" within the meaning of the CWA, thereby triggering the requirement for a NPDES permit. While the pump station itself did not add any pollutants to the water, the water being pumped, according to the Court, contained "a loathsome concoction of chemical contaminants including nitrogen, phosphorous, and un-ionized ammonia."

During the course of litigation and in response to the significant uncertainty and risks posed by the litigation, on June 13, 2008, the U.S. Environmental Protection Agency ("EPA") finalized a regulation clarifying that a water transfer does not qualify as a "discharge of pollutants" and exempting them from NPDES requirements, unless the water had an intervening industrial, municipal or commercial use (click here for a copy of EPA's water transfers rule). That rule has been challenged in parallel proceedings and is now pending before the Eleventh Circuit, where challenges in multiple Circuit Courts were consolidated, and before a federal district Court in New York, where environmental groups, various states and the Province of Manitoba, Canada, have sought to overturn the rule.

In the present case, the District and the U.S. argued that EPA's final water transfer

rule mirrored the unambiguous meaning of the CWA under the unitary water theory or, alternatively, even if the statute was ambiguous, EPA's rule was entitled to *Chevron* deference. Under the unitary water theory there is no "addition . . . to navigable waters" if the pollutants are already in the water and the water is merely being transferred from one water body to another. However, this Court, along with all other courts that had considered this theory, had previously rejected this same argument.

The Court, having previously ruled against the District in the S-9 case, and rejecting the unitary water theory, signaled its decision this time would have been the same if EPA had not finalized the water transfer rule. As the Court noted, "if nothing had changed, we might make it unanimous. But there has been a change. An important one." The Court concluded that, if the CWA was ambiguous on this matter, it is bound to give deference to EPA's rule, provided the rule is a reasonable interpretation of the statute. This is exactly what the Court concluded, i.e., that the statute is in fact ambiguous and EPA's rule is reasonable. The Court noted that, although the unitary water theory is inconsistent with the CWA's lofty goals of eliminating the discharge of pollutants by 1985, Congress had exempted various activities from the NPDES permitting program, including nonpoint sources, agricultural stormwater discharges and irrigation return flows, which are likewise inconsistent with the same lofty goals. According to the Court, "unless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it."

Once the Court's mandate is issued, it will be binding only on entities in Florida, Alabama and Georgia (states within the Eleventh Circuit). However, the implications of the decision are broader and significant for several reasons. This decision marks the first appellate court decision holding that NPDES permits are not required, and sets up a likely sequel to the 2004 Supreme Court *Miccosukee* case. *Miccosukee Tribe v. S. Fla. Water Mgt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002) (the "S-9" case), vacated 541 U.S. 95, 112 (2004). This decision, although not determinative of the pending rule challenge, signals that the rule is likely to survive challenge in the Eleventh Circuit. However, a question of whether the courts of appeals or district courts have original jurisdiction in the rule challenge has not been resolved, leaving in limbo the rule's future and who decides its fate. If the rule is ultimately upheld, such a holding, combined with this decision by the Eleventh Circuit, would provide persuasive precedent to use in other Circuits, including those that have reached different results in the absence of the EPA rule.

While this decision marks a positive development, there will be many challenges ahead, including a likely petition by the plaintiffs for *writ of certiorari* to the Supreme Court or, should that effort fail, an appeal to Congress or the EPA to reverse the rule. Given the current Obama Administration's positions on various Bush-era rules, such a possibility is not far-fetched.

Despite the plaintiffs placing all their eggs in the federal permitting basket, the various states retain their own independent authority to regulate water transfers pursuant to state law where such transfers may result in serious water pollution. Additionally, the CWA nonpoint source program remains a viable and important tool in helping to reduce pollutants before they reach navigable waters.

About Our Practice

The Hunton & Williams water and natural resources practice attorneys have extensive experience with federal and state regulatory programs. In the present action, the firm's efforts were critical in advocating key support by various states, which filed an *amicus curiae* brief in support of the District. The firm also represents the interests of various commercial, industrial, and agricultural stakeholders in the ongoing dispute over the potential federal regulation of water transfers. The firm routinely advises clients on all aspects of compliance with the Clean Water Act and permitting requirements. Our clients seek the most efficient way to evaluate and implement compliance with increasingly complex water regulations.

If you have questions regarding the Court's decision or water transfer permitting generally, please contact us.

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