UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

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SUBJECT: Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers

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This Agency interpretation addresses the question of whether the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the Clean Water Act (CWA) is applicable to water control facilities that merely convey or connect navigable waters. For purposes of this Agency interpretation, the term "water transfer" refers to any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use. This interpretation focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.[1]

I. Overview

The question of whether or not an NPDES permit is required for water transfers has arisen because activities that result in the movement of navigable waters, such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, can also serve to move pollutants from one waterbody (donor water) to another (receiving water). The Supreme Court recently addressed this issue in South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), leaving the matter unresolved.[2]

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[1] Section VI, below, discusses activities that are beyond the scope of, and not affected by, this Agency interpretation.

[2] In this case, the Supreme Court vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from one navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were "meaningfully distinct." If they were not, no permit would be required. The Court declined to address legal arguments made

The precise legal question addressed here is whether the movement of pollutants from one navigable water to another by a water transfer is the "addition" of a pollutant potentially subjecting the activity to the permitting requirement under section 402 of the Act.[3] 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. As a matter of longstanding Agency practice, EPA has not issued NPDES permits for mere water transfers; nor has it ever stated in any general policy or general guidance that an NPDES permit is required for such transfers.[4] However, to date, the Agency's position has not been fully articulated in an administrative document.[5]

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by the parties because the arguments had not been raised in the lower court proceedings. The Court noted that EPA had not spoken to these legal issues in an administrative document. 541 U.S. at 107.

[3] The Clean Water Act prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 402. CWA § 301(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). Discharges of pollutants other than dredged or fill material may be authorized by permits issued under section 402 by EPA or States with approved permitting programs. Discharges of dredged or fill material may be authorized by permits issued by the Army Corps of Engineers and authorized States under section 404, and that provision is not addressed or affected by this Agency interpretation.

[4] The Agency has itself issued a permit on one occasion in response to the 1st Circuit's decision in Dubois v. U.S. Dep't. of Agric., 102 F.3d 1273 (1st Cir. 1996)(requiring a permit for a ski resort's snowmaking activities), discussed further below.

[5] The Supreme Court in Miccosukee noted that in an Office of General Counsel Opinion the Agency had reached the conclusion that irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters. 541 U.S. at 107. (citing In re Riverside Irrigation Dist., Op. No. 21, (EPA Off. Gen. Counsel, June 27, 1975), 1975 WL 23864. That opinion did not specifically address the question of whether an "addition" has occurred when a navigable water is merely conveyed to another navigable water. Instead, the specific issue that opinion addressed was whether "irrigation return flow [is] a properly permittable [point] source within the meaning of sections 301 and 402 of the [Clean Water] Act." Riverside, 1975 WL 23864 at *1. While the opinion answered that question in the affirmative, amendments to the Clean Water Act in 1977 and EPA's implementing regulations have exempted "return flows from irrigated agriculture" from regulation under the CWA. CWA § 402(l)(1)("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture."); CWA § 502(14)("This term

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. Furthermore, the Agency intends to initiate a rulemaking process to address water transfers.

Because Congress did not generally intend for the NPDES program to regulate water transfers, a factual, case-specific inquiry into whether a particular water transfer constitutes an "addition" is not required. If, however, EPA were required, for example in a judicial proceeding, to make a factual determination as to whether a waterbody is "meaningfully distinct" under the Supreme Court's decision in Miccosukee, section V below, discusses relevant factors that the Agency would consider.

This Agency interpretation is organized as follows. Section II discusses relevant factual background; section III analyzes the language, structure and legislative history of the Clean Water Act; section IV discusses the relevant caselaw; section V describes factors that would be relevant in applying the term "meaningfully distinct" from the Miccosukee decision to a particular set of facts; section VI describes the scope of this interpretation; and section VII summarizes the Agency's conclusions.

II. Factual Background

Water transfers occur routinely and in many different contexts across the United States. Typically, water is routed through tunnels, channels, and/or natural stream water features, and either pumped or passively directed for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. Water transfers can be relatively simple, moving a small quantity of water a short distance on the same stream, or very complex, transporting substantial quantities of water over long distances, across both political and basin boundaries. There are thousands of water transfers currently in place in the United States, including 16 major diversion projects in the western States alone, excluding numerous projects in California. Examples of large surface water to surface water transfer projects include the Colorado-Big Thompson Project in Colorado and the Central Valley Project in California.

Water transfers are administered by various federal, State, and local agencies and other entities. The Bureau of Reclamation administers significant transfers in western States to provide approximately 140,000 farmers with irrigation water. With the use of water transfers, the Army Corps of Engineers keeps thousands of acres of agricultural and urban land in southern Florida from flooding in former areas of Everglades wetlands. Many large cities in the west and

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[point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture."); and 40 CFR §122.3(f)("Return flows from irrigated agriculture" are excluded from NPDES program.). To the extent the 1975 Opinion, In re Riverside Irrigation Dist., conflicts with this Agency interpretation with respect to water transfers, it is superseded.

the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins. For example, both the cities of New York and Los Angeles are dependent on water transfers from distant watersheds to meet their municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers and these transfers are an integral component of U.S. infrastructure.

Although there have been a few isolated instances where water transfers have been issued NPDES permits, we are aware of only one State that has a practice of issuing NPDES permits for water transfers.[6] Although water transfers are not generally subject to section 402 of the Clean Water Act, the Act reserves the ability of states to regulate water transfers under State law. See CWA § 510.

III. Congress Intended to Leave Oversight of Water Transfers to Water Resource Management Agencies and State Non-NPDES Authorities Instead of the NPDES Program

Statutory construction principles instruct that the Clean Water Act should be interpreted by analyzing the statute as a whole. United States v. Boisdore's Heirs, 49 U.S. 113, 122 (1850). The Supreme Court has long explained "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." Id.[7] In general, the "whole statute" interpretation analysis means that "a statute is passed as a whole and not in parts or sections and is not animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Norman J. Singer, Statutes and Statutory Construction vol. 2A § 46:05, 154 (6th ed., West Group 2000). As the Second Circuit has explained with regard to the CWA:

> Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text, most helpful to our interpretation of the CWA in this case are two rules. First, when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure [quoting United States v. Dauray, 215 F.3d 257, 262 (2d Cir. 2000)]. Second, 'absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.' United States v. Turkette, 452 U.S. 576, 580 (1981).

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[6] Pennsylvania began issuing permits for water transfers in 1986, in response to a State court decision mandating the issuance of such permits. DELAWARE Unlimited v. DER, 508 A.2d 348 (Pa. Cmwlth, 1986).

[7] *See also,* Gustafond v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995), Smith v. United States, 508 U.S. 223, 233 (1993), United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993).

Natural Res. Def. Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001). See also, Singer, vol. 3B § 77:4, at 256-258.

A holistic approach is needed here in particular because the heart of this matter is the balance Congress created between federal and state oversight of activities affecting the nation's waters. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and state and local programs. Looking at the statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources.

We address below in turn the statutory language and structure, the legislative history, and the relevant caselaw.

A. Statutory Language and Structure

While no one provision of the Act expressly addresses whether water transfers are subject to the NPDES program, the specific statutory provisions addressing the management of water resources – coupled with the overall statutory structure – support the conclusion that Congress did not intend for water transfers to be regulated under section 402. The Act establishes a variety of programs and regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b). The Clean Water Act expresses the understanding that, as a general matter, water control facilities that merely transport "the waters of the United States" to where they can be most beneficially used are not subject to the NPDES regime.

Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries, stating:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Act]. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

CWA § 101(g). While section 101(g) does not prohibit EPA and States from taking actions under the CWA that they determine are needed to protect water quality,[8] it nonetheless establishes Congress' general direction against unnecessary Federal interference with State allocations of water rights. Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that, absent clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers. See United States v. Bass, 404 U.S. 336, 349 (1971)("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")

A second statutory provision, section 510(2), similarly provides:

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Like section 101(g), this provision supports the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation.

Finally, one section of the Act – 304(f) – expressly addresses water management activities. This section directed EPA to issue guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants,[9] as well as processes, procedures and methods to control pollution from, among other things, "changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." CWA 304(f)(2)(F) (emphasis added). While section 304(f) does not exclusively address nonpoint sources of pollution,[10] it nonetheless

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[8] PUD No. 1 of Jefferson County. v. Wash. State Dep't. of Ecology, 511 U.S. 700, 720 (1994)("Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.").

[9] Sources not regulated under sections 402 or 404 are generically referred to as "nonpoint sources." See National Wildlife Fed'n v .Consumers Power Co., 862 F.2d 580, 582 (6th Cir. 1988) ("'nonpoint source' is shorthand for and 'includes all water quality problems not subject to § 402'")(quoting National Wildlife Fed'n v. Gorsuch, 693 F.2d 156,166) (D.C. Cir. 1982)(internal quotation marks omitted)).

[10] Mere mention of an activity in section 304(f) does not mean it is exclusively nonpoint source in nature. See Miccosukee at 106 (noting that section 304(f)(2)(F) does not explicitly exempt nonpoint sources if they also fall within the definition of point source). Nonetheless,

"concerns nonpoint sources" (Miccosukee, 541 U.S. at 106) and reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program. This interpretation accords with the direction to EPA and other federal agencies in section 101(g) to work with State and local agencies to develop "comprehensive solutions" to water pollution problems "in concert with programs for managing water resources."

Thus, these sections of the Act together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution. Because the NPDES program only focuses on water pollution from point source discharges, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution that may be associated with water resource management.

In contrast with these provisions of the statute which expressly address water management activities, the general prohibition and definition sections of the statute do not explicitly discuss water management. Section 301(a) of the Act proscribes "the discharge of any pollutant by any person" except in compliance with specified sections of the CWA, including section 402. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). While the statute does not define "addition," sections 101(g), 102(b), 304(f) and 510(2) provide a strong indication that the term "addition" should be interpreted in accordance with those more specific sections of the statute. In light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its discussion of changes in the movement, flow or circulation of any navigable waters as sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret "addition" as not generally including the mere transfer of navigable waters.

The overall structure of the statute further supports this conclusion. In several important ways, water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from an industrial, commercial or municipal operation. Rather than discharge effluent, water transfers release one navigable water into another. There is no indication that Congress intended to subject the navigable waters themselves to effluent limitations.

Congress also recognized that the operators of water control facilities are frequently not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants

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section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program. See H.R. Rep. No. 92- 911, at 109 (1972), reprinted in Legislative History of the Water Pollution Control Act Amenments of 1972, Vol. 1 at 796 (Comm. Print 1973)("[t]his section . . . on . . .nonpoint sources is among the most important in the 1972 Amendments")(emphasis added)).

often enter "the waters of the United States" through point and nonpoint sources located far from those facilities and beyond control of the project operators. Congress properly envisioned that the project operators should not be saddled with curing those regional water quality problems through the Clean Water Act's NPDES permitting regime. Indeed, Congress generally intended that pollutants be controlled at the source whenever possible. See S. Rep. No. 92-414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharge of pollutants be controlled at the source").[11] Rather, those problems are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, e.g., CWA § 102(b) (reservoir planning); CWA § 208(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA § 319 (nonpoint source management programs); and CWA § 401 (state certification of federally licensed projects).

The Agency, therefore, concludes that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress did not generally intend to subject water transfers to the NPDES program. Rather, Congress intended to leave oversight of water transfers to water resource management agencies and the States.

B. Legislative History

The legislative history of the Clean Water Act also supports this conclusion. First, the legislative history of section 101(g) reveals that "[i]t is the purpose of this [provision] to insure that State [water] allocation systems are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978); see PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 721 (1994).

Notably, the legislative history of the Act discusses water flow management activities only in the context of the nonpoint source program. In discussing section 304(f), the House Committee Report specifically mentioned water flow management as an area where EPA would provide technical guidance to States for their nonpoint source programs, rather than an area to be regulated under section 402.

> This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. . . . The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control

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[11] Recognition of a general intent to control pollutants at the source does not mean that dischargers are responsible only for pollutants that they generate; rather, point sources need only convey pollutants into navigable waters to be subject to the Act. See Miccosukee at 105. Municipal separate storm sewer systems, for example, are clearly subject to regulation under the Act. CWA § 402(p).

> of pollution from such nonpoint sources as . . . natural and manmade changes in the normal flow of surface and ground waters.

H.R. Rep. No. 92-911, at 109 (1972)(emphasis added).

In the legislative history of section 208 of the Act, the House Committee report noted that in some States, water resource management agencies allocating stream flows are required to consider water quality impacts. The Report stated:

> [I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system."

H.R. Rep. No. 92-911, at 96 (1972).

Thus, Congress recognized that water resource management agencies were already addressing water quality issues associated with water resources management. While the new section 402 permitting program would now also have responsibility for addressing water quality issues, Congress did not indicate that it intended a wholesale transfer of responsibility away from water resource agencies for overseeing water transfers to the NPDES authority. Indeed, such a result would have been directly contrary to its desire for authority to remain at the State level, because NPDES authority was initially vested in EPA. Rather, Congress encouraged States to obtain approval of authority to administer the NPDES program under section 402(b) so that the NPDES program could work in concert with water resource agencies' oversight of water management activities to ensure a "balanced management control system." Id.

C. Conclusion

In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress did not intend to subject water transfers to the NPDES program. Water transfers are an integral part of water resource management; they embody how States and resource agencies manage the nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out. Finding the NPDES program generally inapplicable to water transfers is true to this intent and the structure of the Clean Water Act, and gives meaning to sections 101(g) and 304(f) of the Act.

Thus, we reject the view that Congress intended in 1972 to subject water transfers to an entirely new federal regulatory regime imposing effluent limitations envisioned principally for

industrial and municipal discharges. That interpretation runs directly counter to Congress's recognition of the need for balanced and comprehensive approach to the allocation of water resources and ignores the statutory scheme that emphasizes control of pollutants at their source where possible.

IV. Caselaw

Several judicial decisions have addressed whether dams, hydropower facilities and water transfers are subject to the NPDES permitting requirement. In general, there have been two lines of cases. One line of cases (the dams cases) has addressed whether dams and hydropower facilities are subject to the NPDES program. See National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C.Cir. 1982) and National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988). These cases have held that such facilities do not "add" pollutants and therefore are not subject to section 402 permit requirements. In two other cases (the water pumping cases), appellate courts have addressed whether the pumping of water between two different navigable waters required NPDES permits. Dubois v. U.S. Dep't. of Agric., 102 F.3d 1273 (1st Cir. 1996); Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001). In these cases, the courts held that a permit was required.

The two lines of cases took fundamentally different analytical approaches to construing the statute. In the dams cases, the courts adopted an approach similar to that articulated in this interpretation, looking to the CWA as a whole to discern Congressional intent. The water pumping cases, in contrast, were premised solely on the definition of "discharge of a pollutant" in section 502(12) and general statutory purposes. Application of this narrow approach here is undercut by the Supreme Court's analysis in Miccosukee. Furthermore, for the reasons discussed above, it is our view that the analysis applied in the dams cases, determining Congressional intent based on the CWA as a whole, is more appropriate here.

A. The Dams Cases

EPA's longstanding position has been that dams and hydropower facilities do not "add" pollutants when they are merely moving water from one location to another within the same waterbody.[12] In Gorsuch, the plaintiff National Wildlife Federation brought suit seeking a declaration that water quality changes caused by dams – low dissolved oxygen, dissolved minerals and nutrients, sediment, temperature changes and supersaturation – required NPDES permits. While acknowledging that dams contributed to these water quality issues, EPA argued that no permit was required because the impoundment and diversion of water through the dam did not physically introduce a pollutant from the outside world into navigable waters.

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[12] Where water diversion facilities, such as dams, add pollutants such as oil and grease from machinery operations to water passing through the diversion structure into the downstream water, NPDES permits are required. Consumers Power, 862 F.2d at 588; Gorsuch, 693 F.2d at 165, n. 22. Nothing in this Agency interpretation affects EPA's longstanding approach to regulation of such discharges under section 402.

The Gorsuch court concluded that Congress had not spoken to the precise question of whether dams required NPDES permits, and upheld EPA's interpretation as reasonable, noting that "[t]hroughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which . . . convey . . . polluted waters downstream." 693 F.2d at 175.

In upholding EPA's interpretation, the Gorsuch court recognized the importance of the NPDES program in the overall CWA regulatory scheme, but noted that Congress chose not to require NPDES permits in all circumstances. Id. at 176. Indeed, the court acknowledged that Congress also expressly chose to allow States to address certain pollution problems through areawide waste management plans under section 208 of the statute. The court also noted that several provisions of the statute that relate specifically to water diversion facilities, including section 304(f), supported EPA's position.

While noting the strong environmental goals expressed in section 101 of the CWA, the court highlighted that Congress "did not want to interfere any more than necessary with state water management, of which dams are an important component." Id. at 178-79. "In light of its intent to minimize federal control over state decisions on water quantity," the Court noted that "Congress might also, if confronted with the issue, have decided to leave control of dams insofar as they affect water quality to the states." Id. at 178-79 (emphasis in original). Citing the Act's legislative history, the Court concluded that "[s]uch a policy would reduce federal/state friction and would permit States to develop integrated water management plans that address both quantity and quality." Id. at 179, (citing H.R. Rep. No. 92-911, at 96 (1972)).

The Gorsuch court also noted several policy considerations that supported the reasonableness of EPA's decision not to require NPDES permits for dams, including: (1) that dam-caused pollution depends partly on whether other sources have polluted the water upstream, greatly complicating the issuance of nationally uniform standards; (2) dams are a major component of State water management activities, providing irrigation, drinking water, and flood protection, complexities that "the NPDES program was not designed to handle, it may be that state areawide water quality plans are the better regulatory tool." Gorsuch, 693 F.2d at 182.

Finally, the court noted that if dam-caused pollution was "truly of major proportions," EPA or environmental organizations "would most likely have brought it to Congress' attention , either in 1972 or in 1977" and that "[u]nless and until Congress addresses the matter," the court could not say that EPA was required to regulate dams under section 402. Id. at 183.

In the second leading dam case, Consumers Power, the 6th Circuit addressed the similar question of whether a hydropower facility that pumped water from Lake Michigan to a reservoir, and then released the water back to the lake to generate electricity, required an NPDES permit. In the course of the diversion, some fish that had been contained in the lake were entrained in the pumps, chopped up and then subsequently discharged back to the lake. The 6th Circuit agreed

with Gorsuch and deferred to EPA's position that an NPDES permit was not required for the release of the dead fish by the hydropower facility into Lake Michigan. The court noted that "Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program." 862 F.2d at 587. Citing section 304(f)(2)(F) of the statute, the court concurred with the D.C. Circuit's view that "generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category of pollution." Id. at 588. The court also declined to distinguish the hydropower facility in that case (which pumped water out of Lake Michigan), from other similar facilities or dams that sit in a stream bed and rely upon passive diversion of water, finding that whether facilities "involve a passive diversion, or pumped movement of water," the cases are fundamentally the same. Id at 589.

These cases examined the CWA as a whole and concluded that it was more consistent with the overall statutory scheme to subject water flow diversions to State nonpoint planning processes rather than the NPDES program.

B. The Pumping Cases

Prior to Miccosukee, two other courts reached different conclusions based on a literal interpretation of the term "addition," holding that certain activities required NPDES permits.

In Dubois, the plaintiff claimed that the U.S. Forest Service should not have authorized the expansion of a ski facility because, among other reasons, the facility had failed to obtain an NPDES permit to pump water uphill from a river to a mountainside pond as part of its snowmaking operation. Based on EPA's position that a permit was not required for the transfer, the Forest Service argued that the water pumped from the river to the pond had not lost its status as a water of the U.S. and therefore pollutants were not introduced to the pond from the outside world. The Forest Service also pointed out that the pond drained into the river and therefore the pond and the river were hydrologically connected and of like quality. The 1st Circuit, however, concluded that the water from the river would never reach the pond "naturally" since the flow of water was downhill from the pond to the river, that water passed through the ski facility's privately owned pipes on its way to the pond, and that the two water bodies were not necessarily of like quality. Based upon these conclusions, the court held that the two waters were "distinct" and that introduction of pollutants by the pumping was an addition for which a permit was required.

In Catskill Mountain, the plaintiffs claimed that water pumped from a reservoir in upstate New York through a tunnel into a creek on its way to being used as drinking water for New York City required a permit. The court held that an "addition" means the introduction of a pollutant from the outside world, but only "provided that 'outside world' is construed as any place outside the particular water body to which pollutants are added." 273 F.3d at 491. The 2nd Circuit characterized Gorsuch and Consumers Power as involving recirculation of water within

essentially the same waterbodies, and held that no permit was required there because nothing was being added to them. The court contrasted those cases with the facts before it, where water was pumped several miles to an otherwise unconnected body of water. On those facts, the court held that a permit was required.

These cases discerned Congressional intent solely based on one term in section 502(12) of the statute – "addition." To determine whether the pumps added pollutants to the navigable waters, the courts applied a dictionary understanding of the term "addition" as increasing the amount of pollutants in the receiving water. They determined that a permit was required because the transfer increased the amount of certain pollutants in the receiving waterbody that would not have occurred in the absence of the transfer.

While focusing solely on the term "addition" is one approach to interpreting the statute,[13] the better approach here, as discussed above, takes a holistic view and also gives meaning to those statutory provisions where Congress expressly considered the issue of water resource management, as well as Congress' overall division of responsibility between State and federal authorities under the statute.

However, even if the inquiry were narrowly limited to construing the term "addition" contained in section 502(12), the pumping cases' reasoning has been significantly undercut by the Supreme Court's decision in Miccosukee, as discussed below.

C. The Supreme Court Decision in Miccosukee

In Miccosukee, the plaintiffs claimed that a permit was required for the pumping of water by the South Florida Water Management District from a canal (the C-11 canal) containing urban stormwater runoff, including phosphorus, through a pump (S-9 pump) into an undeveloped water conservation area (WCA-3). The district court granted summary judgment for the plaintiffs, finding that the C-11 canal and WCA-3 were two separate bodies of water of differing water quality and that water would not naturally flow from the canal into the conservation area. The 11th Circuit affirmed, finding that "but for" the pumping, water would not have flowed naturally from the canal into the conservation area. Therefore, the court found that the S-9 pump was the cause-in-fact of the discharge, and a permit was required. The Supreme Court granted the Management District's petition for certiorari.

After rejecting arguments by the petitioner that a discharger is liable only for pollutants that originate from the point source itself, the Court addressed arguments by the Management District and the United States that a permit was not required because navigable waters should be

[13] The government's amicus curiae brief before the Supreme Court in Miccosukee also focused on the term "addition." The brief reached a different result than the lower court decisions, in part, because it framed the equation differently – i.e., whether the pumping of water increased the sum of pollutants in the navigable waters as a whole, as opposed to the particular receiving water. See also infra note 14 and accompanying text.

viewed unitarily for purposes of the NPDES permit requirement. Under this argument, mere conveyance of one navigable water into another did not add pollutants because they were already contained in the navigable waters. The Court noted that EPA had not articulated this position in any administrative documents and raised several concerns with the theory. 541 U.S. at 107.[14] Ultimately, the court declined to address the unitary waters theory, finding that the argument had not been raised below or articulated by the agency in any administrative context.

Finally, the Court addressed the parties' disputes about whether the C-11 canal and WCA-3 were hydrologically indistinguishable parts of a single water, as contended by the Management District and the United States, or two distinct waters. The Court noted certain facts supporting the view that the canal and conservation area were part of a single water, including significant seepage between the two, and the fact that they overlay the same porous aquifer. While the Court agreed with the lower courts' factual finding that water would not initially flow "naturally" into the WCA-3 if the pumps were turned off, the Court found that the lower courts had failed to consider the long-term effects of shutting down the pumps on the relationship between the waters, as well as other important facts. Finding that the district court had granted summary judgment prematurely without having resolved important factual questions, the Court remanded the case to the district court to determine whether the canal and the conservation areas were "meaningfully distinct water bodies." If they were not meaningfully distinct, then no permit would be required. Miccosukee, 541 U.S. at 112. The Court did not explain or define this term.

The Supreme Court's decision is relevant to this Agency interpretation in three respects. First and foremost, the Court expressly reserved judgment on the legal theory that applies in deciding whether the NPDES program applies to water transfers, noting that the Agency had not taken a position in an administrative context. By leaving the matter open, the Court essentially invited the Agency to speak to the broad legal issues in the first instance.

Second, the Supreme Court signaled that the statute needed to be construed in light of not only the language in sections 301(a) and 502(12), but also other provisions addressing management of water resources, in particular section 101(g). The Court stated, "It may be that construing the NPDES program to cover such transfers would . . . violate Congress' specific instruction that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired' by the Act." Id at 108 (citing section 101(g)). By not confining itself to interpreting solely the meaning of the term "addition," the Court's decision undercut the narrow analytical approach of the pumping cases.

Third, the Supreme Court undercut the reasoning of Catskill Mountain and Dubois by

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[14] The Court stated that the unitary waters theory could be viewed as inconsistent with statutory provisions focusing on protection of individual water bodies, and that the theory was potentially inconsistent with the NPDES regulations for intake credits, which regulate movement of water among waterbodies. 541 U.S. at 106-07. The present Agency interpretation reflects EPA's consideration of the Court's concerns.

taking a broader approach to evaluating the relationship between two waters than was taken in those decisions. The Court in Miccosukee recognized that the pumping was uphill: "The District Court certainly was correct to characterize the flow through the S-9 pump station as a nonnatural one, propelled as it is by diesel-fired motors against the pull of gravity." Id. at 111. In the Court's view, however, this fact was not dispositive. Rather, the Court looked more broadly to other factors, such as seepage between the waters and the long-term effects if pumping were ceased. Thus, the Court's decision casts significant doubt on the validity of simplistically applying a "but for/natural flow" test followed by the appellate courts in the pumping cases and instead calls for a broader evaluation of the relationship between waters.

V. Any Application of the Term "Meaningfully Distinct" Should Reflect Congressional Intent

While the Agency believes Congress intended to leave the oversight of water transfers to water resource management agencies and the States, if EPA were required, for example in a judicial proceeding, to make a factual determination as to whether a waterbody is "meaningfully distinct," the Agency would construe this term in light of Congressional intent. The following factors would be relevant to applying this term in a particular case.

The term "meaningfully distinct" suggests a two-part test for deciding whether a water transfer might constitute an addition: (1) the waters must be distinct, and (2) the distinction between them must be meaningful. We address these steps in turn.

First, to determine whether waters are distinct, the full range of hydrologic connections should be considered, both natural and man-made. The nation's waters have been extensively altered by human activity for centuries, in some cases drastically so. In some areas of the country, vast networks for delivery of water have been created. In some cases, waters that were historically one waterbody have been separated into smaller water segments. Some, once created, continue to operate via the natural force of gravity, while others involve a combination of human-caused diversions, pumps and flow controls along with natural forces. Given these extensive modifications, in many cases longstanding, it can be difficult to distinguish "natural" from human-induced water flows. Considering the full range of hydrologic connections is appropriate in light of how broadly the Supreme Court was willing to look at the relationship between the waterbodies in Miccosukee. Moreover, Congress recognized in the CWA that both natural and man-made activities have altered the hydrologic landscape. See, e.g., H.R. Rep. No. 92-911, at 109 (1972)(discussing EPA's duty under section 304(f) of the statute to provide guidance to States on "natural and manmade changes in the normal flow or surface and ground waters")(emphasis added). Finally, under the CWA, it has long been accepted that the statute applies to all waters that meet the statutory and regulatory definitions of navigable waters, regardless of whether human activity may have contributed to making the water what it is today. Leslie Salt Co. v. U.S., 896 F.2d 354 (9th Cir. 1990). It is consistent with that principle to consider both natural and manmade hydrologic features in deciding whether waters are distinct.

Thus, where two waters have been or are hydrologically connected, through human activity or otherwise, this factor strongly supports the conclusion that they are not "distinct." In some cases, the waters may have a history of having been integrated or they may have become integrated through natural changes or human activity over time. In either case, the connection has integrated the waters and they are logically not "distinct."

Nor would it be logical to conclude that waters are distinct where they have been connected by a conveyance that happens to move the water uphill via a pump as opposed to water moving downhill via gravity. The critical question is whether the waters are distinct. This question was squarely addressed by the 6th Circuit in Consumers Power, where the plaintiffs alleged the case was distinguishable from the dam at issue in Gorsuch because the facility was not located in the streambed, but rather required water to be pumped uphill into a holding reservoir as part of the operation. The court disagreed that this distinction mattered: "[Hydro-electric power facilities, whether they . . . involve a passive diversion, or pumped movement of water, are fundamentally the same. . . ." 862 F.2d at 589. The decision in Miccosukee also implicitly rejected the notion that simply having to move water uphill meant that waters were distinct, since the Court did not find that fact to be dispositive.

Because the full breadth of the historical and ongoing hydrological conditions would be relevant to deciding whether waters are distinct, it would not make sense to ignore, as have some of the appellate court decisions, the water transfer itself in deciding whether two waters are distinct. In some cases, as in the case of the S-9 pump, the transfers have been going on for decades and even predate enactment of the CWA. Such connections have been as much a part of the hydrological landscape as naturally created ones and, over time, may be difficult to distinguish from the "natural" hydrologic regime. Where two navigable waters are connected by a water transfer, they have become closely intertwined in the hydrological landscape and may even be considered part of the same tributary system. The length of time that the connection has been in place could be relevant to determining whether the waters are distinct.

If waters are distinct, the next question under the Supreme Court's decision is whether the distinction between the waters is "meaningful." Again, the Supreme Court's decision does not provide any guidance for interpreting this term. However, the fact that the Supreme Court indicated that there must be a "meaningful" distinction suggests that it is not sufficient for the waters simply to be distinct to potentially trigger the permitting requirement. Rather, over and above any hydrologic distinction between the waters, a distinction must rise to the level of being "meaningful" in order to potentially require an NPDES permit.

In the absence of specific guidance by the Supreme Court, the term "meaningfully" should be applied in light of Congressional intent to both protect water quality[15] and rely on States and water resource management for oversight of water transfers. In this context, a

[15] In this Agency interpretation "water quality" includes physical, chemical and biological integrity.

"meaningful" distinction would refer to transfers that would have a meaningful, or significant, adverse effect on water quality that is not being adequately addressed by States and water resource management agencies. Thus, it would be appropriate to consider in the first instance whether there are existing laws, regulations or programs that are being implemented that adequately address the types of water quality concerns associated with the water transfer at issue.[16] The States retain full sovereign authority to regulate water quality within their jurisdiction, see CWA § 510, and the States have independent authority to prevent the pollution of the state's waters and to protect human health and wildlife, including aquatic life. For example, many State laws addressing water diversions expressly authorize consideration of water quality impacts. In addition, where a water transfer is of environmental concern due to nonpoint source contributions to the donor water, the State may have authorities under its nonpoint source program to address the problem. Where such authorities are being adequately implemented, it would be consistent with Congressional intent to defer to them.[17]

Where authorities are not being implemented to address the water quality concerns, we believe other factors would be relevant to determining whether there is a "meaningful" distinction between waters. It would be logical to inquire first into the degree of similarity or differences between the waters. The differences in the chemical, physical and biological

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[16] An example of an existing federal law, is the Comprehensive Everglades Restoration Plan (CERP), Pub. L. No.106-541, § 601, 114 Stat. 2754 (2000), under which Congress authorized a comprehensive plan within the defined South Florida Ecosystem "for modifications and operational changes to the Central and Southern Florida Project that are needed to restore, preserve, and protect the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection." § 601(b)(1)(A). Congress mandated that "the Plan shall be implemented to ensure the protection of water quality," id., by requiring the Secretary of the Army to consider applicable state water quality standards and "include such features as the Secretary determines are necessary to ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." § 601(b)(2)(A)(ii). CERP specifically includes water storage, water transfer and water treatment projects within the Congressional authorization.

[17] While an NPDES permit may not be required for a particular water transfer, existing NPDES and water quality standards regulations still can ensure protection of receiving waters. Point source dischargers to the donor waterbody will need to have limits as stringent as necessary to meet the water quality requirements of all affected States, which would include the applicable water quality standards in the "downstream" receiving water. 40 C.F.R. § 122.4(d). Further, in designating uses of the upstream water and the appropriate criteria for that water, "the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b)(emphasis added). A waterbody receiving a water transfer would be a "downstream" water for purposes of these regulations.

characteristics should be significant in order to be considered meaningful. Merely because two waterbodies may be dissimilar does not mean, however, that any transfer between them would be environmentally meaningful within the context of the CWA. Rather, the specific context of the transfer should be evaluated to determine whether the transfer would have a substantial adverse impact on the receiving waterbody.

VI. Scope of this Agency Interpretation

This Agency interpretation addresses only water transfers -- that is, activities that convey or connect navigable waters without subjecting the water to intervening industrial, municipal or commercial use.[18] It does not address any other activities, or any jurisdictional terms under the statute other than "addition."[19]

For example, this interpretation does not affect EPA's longstanding position that, if water is withdrawn from navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, e.g., 40 C.F.R. § 122.2 (definition of process wastewater); 40 C.F.R. §§ 125.80-125.89 (regulation of cooling towers); 40 C.F.R. § 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 C.F.R. Part 132, Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Conversely, waters that are diverted and used for irrigation and then reintroduced to the navigable waters are exempt from permitting requirements under the exemption for return flows from irrigated agriculture from the definition of "point source" in section 502(14) and this Agency interpretation does not affect that exemption.

The activities addressed by this Agency interpretation also stand in sharp contrast to other activities that have long been subject to the Clean Water Act's permitting requirements. For example, section 402 subjects placer mining of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into navigable waters. See Rybachek v. EPA, 904 F.2d 1276, 1285 (9th Cir. 1990). Similarly, section 404 of the Clean Water Act subjects the deposit or redeposit of dredged

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[18] We emphasize, for purposes of clarity, that a water transfer occurs between two "waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody (although the movement of water through a dam also does not require an NPDES permit because no "addition" has occurred). Moreover, a discharge from a waste treatment system, for example, which by definition is not a water of the United States, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 C.F.R. § 122.2.

[19] Thus, this interpretation does not address the meaning of the terms, "point source," "pollutant" or "navigable waters."

or fill material to a specialized permitting program because that activity results in the point source discharge of those materials into navigable waters. See CWA § 404; United States v. Deaton, 209 F.3d 331, 335-336 (4th Cir. 2000); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1503-1506 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923-925 (5th Cir. 1983). The Clean Water Act also clearly imposes permitting requirements on publicly owned treatment works, and large and medium municipal separate storm sewer systems. See CWA §§ 402(a), 402(p)(1)-(4). Congress amended the Clean Water Act in 1987 specifically to add new section 402(p) to better regulate storm water discharges from point sources. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987). Again, this interpretation does not affect EPA's longstanding regulation of such discharges.[20]

VII. Conclusion

For the reasons explained above, based on the CWA as a whole, the Agency concludes that Congress intended to leave the oversight of water transfers to authorities other than the NPDES program. While resort to a case-specific evaluation of waters is not necessary or appropriate in light of Congressional intent, if such an evaluation were determined to be needed, a permit would not be required for waters that are not "meaningfully distinct" and that term should be construed in light of the water quality goals of the statute and Congressional intent to rely on non-NPDES authorities for overseeing water management activities. Finally, the Agency intends to initiate a rulemaking process to address water transfers.

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[20] This Agency interpretation also does not change EPA's longstanding position, upheld by the Supreme Court in Miccosukee, that the definition of "discharge of a pollutant" in the CWA includes coverage of point sources that do not themselves generate pollutants. The Supreme Court stated, "A point source is, by definition, a 'discernible, confined, and discrete conveyance' § 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' § 1362(7)." Miccosukee, 541 U.S. at 105.