EARTHJUSTICE
COMMENTS ON PROPOSED RULE
PART I

The following section outlines the legal arguments made by Earthjustice against the proposed water transfer rule and illustrates how EPA is attempting to create new pollution exemptions that are not exemptions in the Clean Water Act.

COMMENTS BY EARTHJUSTICE
ON BEHALF OF FLORIDA WILDLIFE FEDERATION
ON
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
PROPOSED RULE CONCERNING THE APPLICABILITY
OF NPDES PERMITS TO INTER-BASIN TRANSFERS OF POLLUTED WATER

EPA Docket I.D. No. EPA-HQ-2006-0141

Proposed Rule Published: 71 Fed. Reg. 32887 (Wed. June 7, 2006)

Comments with Appendices Submitted August 7, 2006

INTRODUCTION

Earthjustice (Florida) submits these comments on behalf of Florida Wildlife Federation ("Federation"), a Florida statewide non-profit conservation and education organization with its main office in Tallahassee, Florida. It is a membership-based organization with approximately 12,500 members throughout Florida.[1] The organization's mission includes the preservation, management, and improvement of Florida's water resources and its fish and wildlife habitat.

The Federation and Earthjustice (Florida) have an extensive background on the issues in this rule having recently finished a five-week trial in the Southern District of Florida on the question of whether the South Florida Water Management District ("SFWMD") is required to obtain NPDES permits for pumping stations that transfer water from Everglades Canals into Lake Okeechobee. That case is currently under advisement. *Friends of the Everglades and Florida Wildlife Federation v. South Florida Water Management District*, Case No. 02-80309-CIV-Altonaga/Turnoff ("*FWF* case"). The Miccosukee Tribe intervened in support of Plaintiffs; United States Sugar Corporation and the United States (representing the interests of the United States Environmental Protection Agency and the United States Army Corps of Engineers) intervened in support of Defendant. EPA's "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" dated August 5, 2005, was attached to the United States Summary Judgment Motion filed on the same date. Summary judgment on the basis of the motion and stipulated facts was denied. SFWMD has informed the court in the *FWF* case that this rulemaking "is expressly designed for this litigation."[2] Extensive comments discussing this case and related materials are being submitted by the Miccosukee Tribe. Earthjustice and Florida Wildlife Federation incorporate those comments and attached documents (including trial transcripts) into our comments by reference so as not to burden the record with duplicative filings.

***Recommendation*:** We recommend that the EPA permanently withdraw the proposed rule. The rule is unlawful because it is contrary to the plain meaning of the Clean Water Act and advances an impermissible and unreasonable interpretation of the Clean Water Act which lacks any rational basis.

I. THE PROPOSED RULE IS UNLAWFUL BECAUSE EPA LACKS THE LEGAL AUTHORITY TO ADOPT RULES THAT CONTRAVENE THE PLAIN MEANING OF THE CLEAN WATER ACT

A. The plain meaning of the Clean Water Act requires permits for all discharges that result in the addition of pollutants into the waters of the United States.

The premise of the proposed rule exempting transfers of polluted water from NPDES permitting absent an intervening industrial, municipal or commercial use is that the Clean Water Act ("CWA") is ambiguous as to whether section 402 NPDES point source permits are required for discharges from water transfer systems that add pollutants to a distinct receiving water body. Courts, however, are required to give effect to the statute, not the regulation, *Dobbs v. Costle*, 559 F.2d 946, 948 (11th Cir. 1977), and courts have consistently found that the plain language of the Clean Water Act expresses a clear intent that discharges of polluted water into a distinct receiving water body require NPDES permits. *See Catskill Mountains Ch. of Trout Unlimited. v. City of New York,* 451 F.3d 77 (2d Cir. 2006) (plain meaning of Clean Water Act requires NPDES permits for interbasin transfer of water from reservoir into river via tunnel); *Dubois v. U.S.D.A.* (pumping of water from polluted river up into pristine pond required NPDES permit),102 F.3d 1273 (1st Cir. 1996); *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002) (plain meaning of Act required NPDES permits for discharges from pump station that pumped water from drainage canal up into remnant Everglades); *North Plains Res. Council v. Fidelity Exploration & Dev. Co.,* 325 F.3d 1155 (9th Cir. 2003) (pumping of unaltered groundwater into river required NPDES permit).

B. EPA lacks the statutory authority to create a categorical exception to point source permitting requirements beyond those exceptions specifically enumerated by Congress.

EPA contends that the Clean Water Act does not expressly require permits for point source discharges that involve transfers of polluted water. This interpretation overlooks the central provisions of the CWA which require a permit for "the discharge of any pollutant by any person." §§ 301, 402, and 502(12)(A). As the Supreme Court has explained, "*[e]very* point source discharge is prohibited unless covered by a permit." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981) (emphasis in original).

Congress has created certain enumerated exceptions to this broad prohibition – irrigation return flows and certain discharges from oil and gas operations – but did not include the exception that the EPA seeks to add through the proposed rule. *See* § 402(l). In Section 510(6), Congress defines the term "pollutant" and then lists exceptions to this definition – for sewage discharges from vessels, for discharges from Armed Forces vessels, and for water pumped into wells incident to oil and gas extraction operations – but did not list the exception proposed in this rule. In Section 510(14), Congress defines the term "point source" and again lists enumerated exceptions – agricultural stormwater discharges and return flows from irrigated agriculture – but does not list the exemption proposed by the EPA in the proposed rule.

Where Congress has specifically listed exemptions to a general prohibition, additional exceptions are not to be implied. *United States v. Smith*, 499 U.S. 160, 167 (1991) (stating the rule). Congress has created no exemption for discharges of pollutants which originate in some other already polluted navigable water; therefore EPA lacks the authority to exempt that category of point source from the permit requirements of section 402. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (EPA lacks authority to promulgate rule exempting categories of point sources EPA considered to be less significant sources of pollution from NPDES permitting requirements because of "plain Congressional intent to require permits in any situation of pollution from point sources"); *Northwest Environmental Advocates v. EPA*, 2005 WL 756614 (N.D. Cal.) (ordering EPA to repeal rule that exempted ballast water discharges from NPDES permitting because Congress had clearly spoken on issue of whether discharges of pollutants from ships required an NPDES permit and EPA lacked authority to create categorical exclusion).

C. EPA lacks the statutory authority to exempt transfers of polluted water from NPDES permitting requirements because "addition" has a plain meaning and because EPA's basis for its claim that the term "addition" is ambiguous is foreclosed by the Supreme Court's ruling in the Miccosukee case.

EPA argues that the term "addition" is not defined and that leaves it free to interpret "addition" as "not generally including the mere transfer of waters from one water of the U.S. to another." The fact that "addition" is not defined does not make the statute ambiguous. If not otherwise defined, words in a statute "will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Under the Supreme Court's decision in *Miccosukee*, 541 U.S. 95 (2004), discharges of polluted navigable waters result in the addition of a pollutant to another navigable water where it is shown that the two water bodies are "meaningfully distinct." *Id*. at 1547. Water bodies are clearly "meaningfully distinct" when pollutants are added as a result of an interbasin transfer, *i.e*., under circumstances where the pollutants are being added "from the outside world." *Catskill*, 451 F.3d at 80-81.

In *Legal Environmental Assistance Foundation, Inc .v. USEPA*, 118 F.3d 1467 (11th Cir. 1997), the Eleventh Circuit was faced with a similar statutory interpretation argument by EPA. The *LEAF* case involved the Safe Drinking Water Act. That Act, like the Clean Water Act, requires regulation of all underground injection wells. Underground injection is defined as "well injection" but "well injection" (like the term "addition") was not further defined by Congress. *Id*. at 1474. EPA argued that Congress' failure to define the term "well injection" in the Safe Drinking Water Act gave EPA the discretion to define that term as it saw appropriate to accomplish the purposes of the Act. *Id.* EPA then exempted hydraulic fracturing (which involves injection of water and contaminates into wells) from regulation on the theory that the wells that were the subject of the fracturing were primarily used for gas extraction rather than underground injection. *Id*. at 1473-74. The Eleventh Circuit rejected EPA's interpretation because the activity EPA was exempting from regulation was an activity which fell within the plain meaning of the term "well injection":

> Contrary to EPA, "[w]e do not start from the premise that [the statutory] language is imprecise. Instead, we assume that in drafting legislation, Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, ----, 117 S.Ct. 1673, 1677, 137 L.Ed.2d 1001

> (1997). It is only after we have determined that words used by Congress are ambiguous, or that Congress left a gap in the statutory language, that we turn to the agency's interpretation of these words to ascertain whether it deserves any deference. *See K Mart*, 486 U.S. at 291, 108 S.Ct. at 1817 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."). "Giving the words used their ordinary meaning," *LaBonte*, 520 U.S. at ----, 117 S.Ct. at 1677 (internal quotation marks omitted), we readily find that the word "injection" means the act of "forc[ing] (a fluid) into a passage, cavity, or tissue." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 983 (2d ed. unabridged 1987). Sensibly, therefore, "underground injection" means the subsurface emplacement of fluids by forcing them into cavities and passages in the ground through a well. The process of hydraulic fracturing obviously falls within this definition, as it involves the subsurface emplacement of fluids by forcing them into cracks in the ground through a well. Nothing in the statutory definition suggests that EPA has the authority to exclude from the reach of the regulations an activity (i.e., hydraulic fracturing) which unquestionably falls within the plain meaning of the definition, on the basis that the well that is used to achieve that activity is also used-even primarily used-for another activity (*i.e.*, methane gas production) that does not constitute underground injection. EPA's argument that a methane gas production well is not an "injection well" because it is used primarily for gas extraction is spurious. Congress directed EPA to regulate "underground injection" activities, not "injection wells." In view of clear statutory language requiring the regulation of all such activities, they must be regulated, regardless of the other uses of the well in which these activities occur.

Id. at 1474-75.

EPA's Clean Water Act interpretation is similarly (if not identically) flawed. Congress directed EPA to regulate conveyances of water which result in the discharge of a pollutant into waters of the United States; the fact that the entity who conveys the water is not the entity who generated the pollutants discharged with the water is irrelevant. *Miccosukee*, 541 U.S. at 1543 (rejecting District's "conveyance theory", i.e., the argument that no "addition" occurred if the District was merely conveying water that contained pollutants added by someone else). Section 402 permits are required if the water being conveyed is discharged into a "meaningfully distinct" water body. *Id*. at 1547. EPA's claim that it is entitled to exempt water transfers from NPDES permitting because "the discharges are unlike the primary focus of Congressional attention in 1972" in that the "operators of the facilities are generally not responsible for the presence of pollutants in the waters they transport" rests upon an interpretation of "addition" that has already been rejected by the Supreme Court.

D. EPA's rule is unlawful because the "holistic approach" theory EPA uses to rationalize the rule contravenes the plain meaning of the Clean Water Act.

In the face of the statute's plain meaning that requires NPDES permits whenever a point source adds pollutants to water of the United States, the proposed rule attempts to cobble together disparate policy statements and provisions from outside the NPDES permitting mandate and clothes them with a claim that the Clean Water Act must be construed using a "holistic"

approach which should exempt water transfers from NPDES permitting. The Second Circuit summarized its holding on this exact "holistic approach" theory, finding that it contravenes the plain meaning of the Clean Water Act:

> In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for interbasin transfers of pollutants, these "holistic" arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for "the discharge of any pollutant," 33 U.S.C. § 1311(a), which is defined as "any addition of any pollutant to navigable waters from any point source," *id*.§ 1362(12). It is the meaning of the word "addition" upon which the outcome of Catskills 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.

Catskill Mountains Ch. of Trout Unlimited. v. City of New York, 451 F.3d 77, 84 (2d Cir. 2006). In reaching this conclusion, the Second Circuit was explicitly rejecting the "holistic" arguments made in the Agency Interpretation Memo of August 5, 2005 – the memo upon which the proposed rule is based. *Catskill*, 451 F.3d at 82-88.

E. EPA's argument that 304(f)(2)(f) creates the basis for an exemption to NPDES permitting requirements is directly contradicted by the plain language of the CWA and has been rejected by the courts and by EPA itself.

Section 304 is an information and guidelines section found in Subchapter III. § 304 ("Information and Guidelines"). Section 304(f) simply provides for: (1) the identification and evaluation of nonpoint sources of pollution and (2) processes, procedures and methods to control pollution resulting from certain enumerated activities. Neither subsection (1) or (2) of section 304(f) state that they are exemptions to, or substitutions for, permit requirements of the CWA.

Although, section 304(f)(1) applies only to nonpoint sources and provides that the EPA Administrator, after consultation with federal and state agencies and other interested persons shall issue guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, section 304(f)(2) does not state that it applies only to nonpoint sources. Indeed, section 304(f)(2) provides that the Administrator shall issue processes, procedures and methods to control pollution resulting from: (A) agricultural and silvicultural activities, including runoff; (B) mining activities, including runoff; (C) all construction activity, including runoff; (D) disposal of pollutants in wells; (E) salt water intrusion resulting from reduction of fresh water flow from any cause; (F) changes in the movement, flow, or circulation of any navigable waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities. *See* § 304(f)(2). The activities listed in section 304(f)(2) are not limited to nonpoint sources. In fact, the list specifically includes recognized point sources, such as construction activities. *See* 40 C.F.R. § 122.26(a)(1)(ii); § 122.26(b)(14), (b)(14)(x) and (b)(15).

Courts that have examined this section in relation to section 402 have agreed that 304(f)(2)(F) was not intending to exempt point sources from NPDES permitting requirements. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-07 (2004); *Catskill*, 451 F.3d at 84, *United States v. Earth Sciences*, 599 F.2d 368, 373 (10th Cir.

1979) (§ 304(f)(2) lists activities that "may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation."); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (same); *Sierra Club v. Abston Constr. Co., Inc*., 620 F.2d 41, 44 (5th Cir. 1980) (same); see also 40 C.F.R. §§ 122.2, 122.23, 122.24, 122.262, 122.27. Indeed, EPA itself has not previously accepted the position that section 304(f)(2)(F) exempts point source discharges from NPDES regulation. *See, e.g., Earth Sciences*, 599 F.2d at 303; *National Wildlife Fed. v. Gorsuch*, 693 F.2d 158, 168 n.36 (D.C. Cir. 1982) (noting that EPA documents show that § 304(f)(2)(F) "does not preclude a finding that any particular pollution problem involves a point source of pollutants").

EPA also attempted to parley a Congressional listing of problems into an exemption in the *LEAF* case which involved EPA's claim that "hydraulic fracturing" activities were exempted from regulation under the Safe Drinking Water Act. In that case, EPA found Congressional intent to exempt hydraulic fracturing from regulation on the theory that: 1) Congress had identified specific underground injection problems it was intending to deal with in a House Report; 2) the problems all involved wells whose principle function was underground injection; 3) the well injection activity at issue (hydraulic fracturing) wasn't one of the problems listed; and 4) the principle function of the wells at issue was not underground injection but methane production. *LEAF*, 118 F.3d at 1475-77. The Eleventh Circuit rejected this argument. Hydraulic fracturing was clearly an underground injection activity that fell with the plain meaning of "well injection" and thus required regulation. The listing could not override this clear expression of Congressional intent to regulate because nothing in the listing clearly excluded the activity from regulation. *LEAF*, 118 F.3d at 1474-77.

Section 303(f) describes problems to be addressed; it is not a clear expression of legislative intent to exempt point sources from permitting and cannot be used to support EPA's categorical exemption of water transfers from section 402 point source permitting.

F. EPA's argument that the general policy statements in sections 101(b), 101(g) and 510(2) serve as the basis for an exemption to NPDES permitting requirements is directly contradicted by case law, by legislative history, and by former policies of EPA.

Another justification offered for the rule are the provisions of sections 101(b), 101(g) and 510(2), which preserve the rights of states to allocate water supplies and pre-existing rights of states not in conflict with the requirements of the Clean Water Act. The theory that water diversions relate to water allocation and are therefore exempt from permitting was squarely rejected by the Second Circuit in *Catskill*:

> The power of the states to allocate quantities of water within their borders is not inconsistent with federal regulation of water quality. Section 510 provides for the preservation of the preexisting rights of states not in conflict with the other requirements of the CWA ("except as expressly provided in this chapter"). Indeed, the Supreme Court has held that "[s]ections 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. . . . " *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994). To be sure,

> Miccosukee acknowledged the possibility that "construing the NPDES program to cover such transfers would . . . raise the costs of water distribution prohibitively, and violate" section 101(g). *Miccosukee*, 541 U.S. at 108. But in the next sentence, the Court recognized that, despite their potential cost, such permits nevertheless might be necessary to protect water quality.

Catskill, 451 F.3d at 84.

Section 101(b) does not exempt discharges of polluted navigable waters from the Act's permit requirements. Instead, it sets forth a general policy statement recognizing the responsibilities and rights of the States to prevent, reduce and eliminate pollution. § 101(b). The CWA implements this policy by requiring States to set water quality standards and TMDL's and by authorizing States to implement the NPDES program. §§ 303, 402(b). Section 101(b) specifically mentions as a Congressional goal that "the states . . . implement the NPDES permit program." Rather than providing an exemption to the CWA's permit requirements, section 101(b) specifically announces as a policy and goal that the States implement the permit sections of the CWA, including the NPDES permit program. Section 101(b) does not provide any justification for an exemption from the NPDES permit requirement for water transfers.

Nor does section 101(g) exempt the discharge of polluted navigable waters from the NPDES permit requirement for water transfers. That provision expresses the policy of preserving the states' authority to allocate quantities of waters within its jurisdiction and encourages federal, state, and local cooperation to reduce pollution. This is not a blanket exemption from NPDES permitting. As explained by the Supreme Court, section 101(g) "gives the States authority to allocate water rights" but does not exempt them from legitimate water pollution permitting requirements. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 721 (U.S. 1994).

Perhaps perceiving, as it did in the *LEAF* case, "that its statutory construction argument is weak," *LEAF*, 118 F.3d at 1475, EPA relies heavily upon legislative history to defend its decision to exclude water transfers from the reach of section 402. The problem here, as in the *LEAF* case, is that where Congressional intent to regulate water transfers that add pollutants to distinct water bodies is clear, the only relevant evidence would be legislative history which "clearly express[es] legislative intent" to exclude water transfers from regulation. *Id*. at 1476 n.12. EPA admits that the legislative history clearly expresses nothing of that sort: "Congress recognized that the new section 402 permitting program was not the only viable approach for addressing water quality issues associated with State water resource management." The fact that section 402 is not the only "viable approach" does not express a clear intent to completely exempt all water management activities from NPDES permitting.

The problem, as in the *LEAF* case, is that EPA's interpretation of legislative history is simply incorrect and "far from evidencing a legislative intent contrary to the plain meaning of the statute, the legislative history supports it." *Id*. at 1475.

In *PUD No. 1*, the Court there quoted the purpose of section 101(g) as expressed by its sponsor, Senator Wallop, who expressly indicated the section was not intended to preclude

legitimate water quality measures which may incidentally affect water allocation, but rather to ensure that the Act would not be used for other purposes. 123 Cong. Rec. 39,212 (1977). In a 1978 EPA interpretation of § 101(g) made contemporaneously with the Wallop Amendment, EPA confirmed that § 101(g) does not prohibit regulation under the Clean Water Act which might incidentally affect water usage:

> Confusion has apparently arisen over the intent and effect of new § 101(g) of the Clean Water Act . . . Many persons have interpreted § 101(g) as prohibiting EPA from taking any action which might affect water usage. You should be aware that such an interpretation is incorrect.[3]

G. Because Congress has provided "clear Congressional intent" to the contrary, section 101(g) does not authorize a categorical exemption for transfers of polluted water.

EPA and western water owners made their 101(g) argument to the Supreme Court in *Miccosukee* in the context of the heavily disparaged plain meaning "unitary waters theory" which EPA has now abandoned. Instead, EPA finds ambiguity in the same language it formerly found plain and relies upon section101(g) to support a finding that:

> While 101(g) does not prohibit EPA from taking actions under the CWA that it determines are needed to protect water quality [citing to *PUD No. 1*], it nonetheless establishes Congress' general direction against unnecessary Federal interference with State allocations of water rights . . . . [T]his section provides additional support for the Agency's interpretation that absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers.

In other words, EPA now admits *that section 101(g) does not clearly express legislative intent to exempt water transfers from regulation*. In the *Miccosukee* case, the Supreme Court clearly agreed with this interpretation of 101(g):

> It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and 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. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs. See 40 CFR § § 122.28, 123.25 (2003).

Miccosukee, 541 U.S. at 1545.

Since Congress *has* clearly expressed a legislative intent to require NPDES permits for water transfers that add pollutants to distinct receiving water bodies, *Catskill*, 451 F.3d at 84, and EPA admits that neither section 101(g) nor legislative history contain clear expressions of a legislative intent to create an exemption to that permitting requirement, EPA lacks the statutory

authority to create a categorical exemption that Congress did not create and neither the *PUD No. 1* case nor the *Miccosukee* case supports.

H. EPA lacks the legal authority to decide that water quality problems caused by water transfer discharges are more " appropriately" dealt with or more "sensibly" addressed by other provisions of the Clean Water Act or by state agencies under state law.

EPA argues that the Clean Water Act can reasonably be interpreted to exempt transfers of polluted water from NPDES permitting requirements because other provisions of federal and state law appear to EPA to be the more "sensible" means of regulating the pollutants discharged in transferred water. This argument was made to and summarily rejected by the Second Circuit in the *Catskill* case. There the City argued that the Safe Drinking Water Act (which limits contaminates in drinking water), section 303(d) of the CWA (the Total Maximum Daily Load Program which regulates pollution from both point and non-point sources), and provisions of state law regulating water quality entitled it to a reading of the Clean Water Act that exempted its discharges from NPDES permitting requirements. The court stated:

> While these provisions no doubt contribute to the goals of pollution reduction and regulation, the City does not explain how their existence invalidates a separate, independent requirement imposed by the permitting scheme of the Clean Water Act.

Catskill, 451 F.3d at 85.

I. The failure Of EPA to require NPDES permits for transfers of polluted water unless under court order does not validate an agency interpretation that is contrary to the statute's plain meaning.

EPA argues that its interpretation is reasonable because it is "consistent with the Agency's longstanding practice of not requiring NPDES permits for water transfers" unless ordered to do so by a court. EPA made the identical argument in the context of the Safe Drinking Water Act in the *LEAF* case; it was summarily rejected:

> [N]o deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language. *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989).

LEAF, 118 F.3d at 1477-78.

J. EPA lacks the statutory authority to give states a discretionary "Designation Authority" over transfers of polluted water.

Although EPA did not propose the provision, it has asked for comments on whether it should allow states to designate particular water transfers as subject to the NPDES program on a

case-by-case basis. Designation authority would lie only if the transfer would "significantly impair" the receiving water body and only if no state authorities were being implemented to adequately address the problem. "Significant impairment" would occur when "as a result of the water transfer, the designated uses of the water could no longer be maintained." Designation for permitting would be at the "sole discretion" of the state, *i.e.*, neither the EPA nor a citizen could bring a suit requiring designation.

Based upon documents obtained in Earthjustice's FOIA request, EPA was apparently modeling this provision after a designation provision in its municipal and industrial stormwater rules.[4] That provision authorizes EPA or the states to continue to exercise the authority given them by Congress under section 402(p)(2)(E) to require permits for municipal and industrial discharges not designated for regulation by Congress if EPA or the state determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. That rule was upheld in *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 873 (9th Cir. 2003). Transfers of polluted navigable water into another navigable water are not municipal or industrial stormwater discharges. Nothing in section 402(p)(2)(E) specifically authorizes EPA or the states to conduct rulemaking with regard to water transfers that pollute the receiving water body.

The designation provision also runs afoul of black letter law prohibiting EPA from creating categorical exemptions of point sources from § 301 pollution prohibition and NPDES permitting requirements. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Under the considered but not proposed provision, two categorical exemptions would be created – both are illegal.

First EPA is categorically exempting from NPDES permitting all water transfers whose discharges do not "significantly impair" the receiving water body. The Clean Water Act requires NPDES permits for all point sources (unless specifically exempted by Congress), including all water transfers that add pollutants to a distinct receiving water body that is a water of the United States. *Catskill Mountains Ch. of Trout Unlimited. v. City of New York*, 451 F.3d 77 (2d Cir. 2006). EPA lacks the statutory authority to exempt a category of point sources that would be implicitly defined as "all water transfers that have not yet destroyed the designated uses of the receiving water body."

Second, the provision represents an attempt by EPA to give delegated states the authority to categorically exempt all water transfers the states simply choose not to regulate under their NPDES permitting program – even those that *do* "significantly impair" the receiving water body. The question of whether EPA can authorize a state to effectively create an exception from the CWA for a discharge otherwise subject to NPDES permitting arose in the *Fidelity* case. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*,325 F.3d 1155, 1164 (9th Cir. 2003). The primary issue in *Fidelity* was whether discharges of unaltered groundwater into a river required an NPDES permit. On this core issue the court held that the plain meaning of the CWA required permits for these discharges. *Id*. at 1160-63. Fidelity then argued that, even if permitting was required under the Clean Water Act, it was exempted from NPDES permitting by a Montana law that exempted its discharges from permitting. *Id.* at 1064. The court rejected this argument explaining:

> Montana had no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process. *See* 33 U.S.C. § 1370 (states may not adopt or enforce standards that are less stringent than federal standards). Just as the EPA does not have the authority to create an exemption for unaltered groundwater, neither does the State of Montana, as the EPA cannot delegate to a state more authority than the EPA has under the CWA.

Id. EPA lacks the statutory authority to adopt the considered provision as a rule.

II. THE PROPOSED RULE IS INVALID BECAUSE IT RESTS UPON AN IMPERMISSIBLE AND UNREASONABLE INTERPRETATION OF THE CLEAN WATER ACT.

A. The proposed rule is invalid because it rests upon an impermissible and unreasonable interpretation of the term "addition."

The question presented by the SFWMD in the *Miccosukee* case was:

> Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

Miccosukee, 541 U.S. at 1543. This argument, that NPDES regulation of a discharge depends upon whether the discharger is the source of the pollutants, was summarily rejected by the Supreme Court:

> This initial argument is untenable, and even the District appears to have abandoned it in its reply brief. Reply Brief for Petitioner 2. 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). Tellingly, the examples of "point sources" listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them. § 1362(14). In addition, one of the Act's primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants. See, e.g., § 1311(b)(1)(B) (establishing a compliance schedule for publicly owned treatment works). But under the District's interpretation of the Act, the NPDES program would not cover such plants, because they treat and discharge pollutants added to water by others. We therefore reject the District's proposed reading of the definition of " 'discharge of a pollutant' " contained in § 1362(12). That definition includes within its reach point sources that do not themselves generate pollutants.

Id.

Despite this absolutely clear and unanimous holding, EPA claims that it can reasonably interpret the term "addition" as "not generally including water transfers" because : 1) water managers are not generating pollutants but engaging in "the mere transfer of waters from one water of the U.S. to another," 2) because "operators of water control facilities are generally not responsible for the presence of pollutants in the waters they transport"; 3) because "pollutants often enter the 'waters of the United States' through point and non-point sources located far from those facilities and beyond control of the project operators;" and 4) because the pollutants were generated as the result of an exempted activity such as irrigation. These arguments are nothing but semantic variations on the "conveyance theory" which was unanimously rejected as an "untenable" basis for an exemption from section 402 permitting requirements for an operator of a water control facility. They are equally untenable as the basis for an exemption here. EPA's interpretation of "addition" is neither "reasonable" nor "permissible" because its argument relies upon a factor (the original source of the pollutants discharged) which the Supreme Court has deemed irrelevant to the question of whether a section 402 permit is needed.

B. The proposed rule is invalid because it relies upon a Congressional prohibition on NPDES permitting of all transfers of polluted water that simply does not exist.

EPA also argues that its interpretation is reasonable because the CWA must be construed in accordance with statutory provisions it interprets as requiring a balancing of the federal interest in ensuring clean water for all users and the states' interest in allocating that water among users. The problem is that no balancing occurs; EPA simply exempts all water transfers from NPDES regulation. The basis for the exemption is a completely unsupported factual assumption that the existence of water transfers will "unnecessarily interfere" with state decisions on allocation without any consideration or discussion of the federal interest in regulating the substantial adverse water quality impacts that courts, based on sworn testimony, have found do occur with water transfers. Without facts to support its balancing, EPA's exemption of all water transfers must necessarily rest upon an assertion that the Clean Water Act prohibits *any* point source permitting of *any* discharge of polluted water by *any* water manager regardless of whether or not an impact on state allocation decisions will occur.

While EPA has broad authority to balance competing policy objectives, it does not have authority to assert congressional prohibitions which do not exist in order to avoid responsibility for its own policy decision. *National Association of Regulatory Utility Commissioners v. Interstate Commerce Commission*, 41 F.3d 721, 728 (D.C. Cir. 1994) (agency charged with balancing policy objectives cannot rely upon nonexistent statutory prohibition to promulgate rule which implements one policy goal and ignores the other). The Supreme Court has ruled that the CWA contains no statutory prohibition on point source regulation of water transfers that discharge pollutants that water managers do not generate. In response to arguments from water managers and water owners in western states that 101(g) was an exemption for water transfers, the Supreme Court articulated an understanding of section101(g) as a policy which could be invoked under certain circumstances to deal with the "practical consequences" created by NPDES permitting requirements. *Miccosukee*, 541 U.S. at 1545. EPA also ignores the finding in *Catskill* (which did involve facts) that it is unlikely that 101(g) would ever require an exemption because the flexibility of the CWA and the NPDES permitting scheme, "will allow

federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." *Catskill*, 451 F.3d at 85.

EPA's interpretation is "not so much a balance of conflicting policy goals as the acceptance of one without any real consideration of the other." *National Association of Regulatory Utility Commissioner,* 41 F.3d at 728. That the rule is born out of EPA's desire to support the interests of western water owners in overruling the Supreme Court's holding in the *Miccosukee* case is evidenced by the process by which the rule was developed. (*See* Section VII, *infra*). That the rule fails to place in the balance the legitimate federal interest in ensuring clean water for all users is evidenced by the adverse impacts resulting from water transfers that EPA has chosen to ignore. (*See* Sections III-VI). EPA's failure to conduct any balance on the basis of non-existent Congressional policy against regulation of water transfers renders the interpretation of the statute impermissible and unreasonable, and the rule arbitrary and capricious.

III. ENGINEERED TRANSFERS OF WATER FROM ONE DISTINCT WATER BODY TO ANOTHER ARE MAN-MADE CONVEYANCES THAT RESULT IN THE ADDITION OF POLLUTANTS INTO A WATER OF THE UNITED STATES

The NPDES permitting question, as set forth by the Supreme Court in *Miccosukee*, is whether the engineered transfer is adding pollutants to a meaningfully distinct waterbody. *Miccosukee,* 541 U.S. at 1547. Obviously, where the engineered transfer is moving polluted water from one stream basin into another stream basin where it would not otherwise normally go, a transfer to a meaningfully distinct water body has taken place and an NPDES permit is required for the transfer.[5] *Catskill*, 451 F.3d at 80-82 (water transfer from reservoir to stream in different watershed via tunnel).

These "interbasin" transfers create the potential to shift a pollutant problem that had been confined in one watershed into a completely distinct watershed, with substantial adverse consequences for the receiving water body. Toxic chemicals from abandoned mines, metals, PCBs from landfills, percholates from abandoned military sites,[6] pesticides, invasive aquatic species,[7] pathogens, and bacteria formerly confined in one watershed can be introduced into a completely separate watershed as a result of an engineered transfer. For example, a water district in Southern California that imports water from the Sacramento-San Joaquin Delta via the State Water Project reports that the Delta water it receives is contaminated by TOC (total organic carbons), bromide, pathogens, nutrients, sediment, algae, pharmaceuticals, and personal care products (found in wastewater discharges in the Delta) and also contains high levels of total dissolved solids.[8]

Furthermore, because the two separate water bodies are likely to be chemically, biologically, and physically distinct, the temperature, turbidity, nutrient level, color, and pH of the water being discharged can also have profound effects on the designated uses of the receiving waterbody. In the *Catskill* case, the water quality issue was turbidity.[9] New York's water quality standards require that there be "[n]o increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp.Codes R. & Regs. tit. 6, § 703.2.[10] Figure 1 below provides an

illustration of how the introduction of polluted water from an engineered transfer can cause pollution problems and violate turbidity and other standards.

Figure 1. Photograph of the Shandaken Tunnel discharge from NEW YORK TIMES ARTICLE: "New York's Water Supply May Need Filtering" by Anthony DePalma, July 20, 2006.

The Clean Water Act also lists "biological materials" as pollutants. § 502(6). "Biological materials includes fish, aquatic nuisance species, invasive species, and other living materials found in water." *See, e.g., Northwest Environmental Advocates v. USEPA*, 2005 WL 756614 (N.D. Cal. 2005) (ordering repeal of 30-year old EPA regulation that categorically exempted discharges of ballast water containing biological pollutants such as zebra mussels from NPDES permitting requirements). The Ninth Circuit has also ruled that transport and discharge of water containing naturally occurring materials that degrade the receiving water body subjects the discharge to NPDES permitting requirements:

> It is the introduction of contaminants, not their transformation by humans, that renders them pollutants . . . Fidelity's interpretation is not correct . . . for it would allow someone to pipe the Atlantic Ocean into the Great Lakes and then argue there is no liability under the Clean Water Act because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes. . . . Such an argument can not be credited.

Fidelity, 325 F.3d at 1163 (discharge of unaltered "salty" groundwater transported from deep aquifers of Powder Basin to surface water of Tongue River which impaired use of river water for irrigation purposes required NPDES permit).

---

[1] App. 95 (Affidavits of FWF members)
[2] App. 124 (SFWMD reply to FWF opposition to motion to stay in *FWF* case)
[3] App. 98 (1978 EPA Guidance Memo)

[4] App. 105A.
[5] App. 199 (*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2nd Cir. 2006)).
[6] App. 15 (LA TIMES: Colorado River Taint Worries Some Officials); App. 16 (Reuters: Rocket Fuel Components in U.S. Lettuce)
[7] App. 17 (USGS and NPS: Interbasin Biota Transfers); App. 131 (MONTANA OUTDOORS (MFWP): A State Under Siege)
[8] App. 17 (Santa Clara Valley Water District Drinking Water Source Assessment)
[9] App. 100 (*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, *80 (2nd Cir. 2006)). "Because water in the Schoharie Reservoir contains suspended solids from both natural and man-made causes, discharges from the Tunnel into the Creek are more turbid than the waters of the Esopus. This turbidity impairs use of the Esopus for fly fishing and other recreational activities."
[10] App. 100 (*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 n.9 (2nd Cir. 2006)).