

Water Transfers Rule

The “Water Transfer Rule”, adopted by EPA in 2008, can be found at 40 CFR 122.3(i). The Rule excludes discharges from “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use from the traditional “wastewater” point source discharge permitting (NPDES) requirements of the Clean Water Act (CWA). In other words, the Rule protects the ability to move water, into which no outside pollutants have been introduced, to a beneficial end use. Such transfers are extremely common in the United States, especially in the prior appropriation states of the arid West, where water is moved, pursuant to state law, between basins and sub-basins utilizing ditches, tunnels, pipelines, canals and other such conveyance structures in order to meet essential agricultural, municipal and industrial/commercial water demands. Water transfers pose few water quality issues, although states have extensive non-NPDES authority to address any concerns.

Various courts have addressed water transfers, with the Second Circuit finding (pre-Rule) that a point source discharge permit is necessary, *City of New York v. Catskill Mountains Chapter of Trout Unlimited*, 273 F. 3d 481 (2nd Cir. 2001), the 11th Circuit deferring (post-Rule) to EPA’s position as codified in its Water Transfers Rule, *Friends of the Everglades v. S. Fla. Water Management Dist.*, 570 F. 3d 1210 (11th Cir. 2009) and, most recently, *Catskill Mountain Chapter of Trout Unlimited v. EPA*, Case No. 14-823 (Jan. 18, 2017) (Water Transfer Rule interpretation of CWA is reasonable and EPA entitled to Chevron deference). See also, *Friends of Everglades v. Florida Water Mgmt. Dist.*, 570 F. 3d 1210, 1228 (11th Cir. 2009) (upholding Water Transfers Rule “until the EPA rescinds or Congress overrides the regulation”); *Oregon Natural Resources Council v. US Bureau of Reclamation*, 798 F.3d 933 (9th Cir. 2105) (no permit required where waters not meaningfully distinct). Although the U.S. Supreme Court has had opportunities to opine on the water transfer issue, see e.g., *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 551 US 95 (2004) and *Los Angeles County Flood Control District v. NRDC*, 133 S. Ct. 710 (2013), it has never squarely addressed whether water transfers require discharge permits under the CWA.

Given the critical role of water transfers in meeting our nation’s water supply needs, and the extreme costs and physical difficulties associated with treating all such transferred water prior to that treatment necessary to meet Safe Drinking Water Act mandates or other requirements associated with the end use, it is imperative that the Rule remain in place. Congress can ensure that this is the case by simply codifying the Rule through the adoption of legislation.

Water Transfers Legislative Proposal

Exclude water transfers from the definition of point source by adding the exclusionary language of EPA's Water Transfers Rule to the definition of "point source" in subsection 502(14) of the Clean Water Act, 33 U.S.C. 1362(14). This is how Congress previously chose to clarify that agricultural stormwater and return flows from agriculture are exempt.

Amend subsection 502(14) of the CWA as follows:

(14) The term "point source means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include EITHER agricultural stormwater discharges and return flows from irrigated agriculture OR DISCHARGES FROM A WATER TRANSFER PROVIDED THAT THE WATER TRANSFER ACTIVITY ITSELF DOES NOT INTRODUCE POLLUTANTS INTO THE WATER BEING TRANSFERRED.

Add a new subsection 502(21) to the CWA which provides:

THE TERM "WATER TRANSFER" MEANS AN ACTIVITY THAT CONVEYS OR CONNECTS WATERS OF THE UNITED STATES WIHTOUT SUBJECTING THE TRANSFERRED WATER TO INTERVENING INDUSTRIAL, MUNICIPAL, OR COMMERCIAL USE.