

**10. OLD BUSINESS**

a. Water Quality Issues

3. Correspondence

a. Letter to Department of Environmental Protection (DEP)  
Director Castillo





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**DELIVERED BY HAND, BY E-MAIL, AND VIA eRULEMAKING PORTAL**

Water Docket  
Environmental Protection Agency  
Mailcode 4203M  
1200 Pennsylvania Ave., NW.  
Washington, DC 20460  
Attention: Docket ID No. EPA-HQ-OW-2006-0141

Re: National Pollutant Discharge Elimination System (NPDES) Water  
Transfers Proposed Rule, Docket ID No. EPA-HQ-OW-2006-0141

To Whom It May Concern:

On June 7, 2006, the U.S. Environmental Protection Agency published the proposed Water Transfers Rule, soliciting public comment and establishing a deadline of Monday, July 24, 2006 for submission of written comments. This deadline was subsequently extended to August 7, 2006. 71 Fed. Reg. 41752 (July 24, 2006). The City of Sanibel, Florida ("Sanibel" or the "City") is pleased to respond to that solicitation, and provides the following timely comments for the Agency's consideration.

**BACKGROUND**

Sanibel lies directly in the path of an inter-basin water transfer of the kind that would be exempted from NPDES permitting under the proposed rule. That transfer results from periodic discharges by the U.S. Army Corps of Engineers (the "Corps") of the nutrient- and sediment-contaminated fresh water of Lake Okeechobee through the man-made connection of the Caloosahatchee Canal, and thence into the historic Caloosahatchee River and Estuary. During the past two years this discharge has devastated marine resources in and around Sanibel, including the precious habitat contained within the J.N. "Ding" Darling National Wildlife Refuge – a refuge that comprises roughly one-third of the area of Sanibel Island. Further catastrophic transfers of Lake water into the Caloosahatchee basin are anticipated in the coming years, resulting in additional violations of water quality standards and the eventual destruction of these exceptional ecological resources.

In the absence of any effective regulatory control by the state or self-regulation by the Corps, the protections offered by the NPDES program represent the last, best hope of the City and the Refuge to protect themselves against this onslaught. Without Clean Water Act permitting, the Corps will continue to degrade, and ultimately will destroy our unique and nationally-celebrated marine ecosystem. The proposed rule would enable that result. For that reason, the City is adamantly opposed to its adoption as proposed.

## OVERVIEW OF COMMENTS

The proposed rule is based upon a misinterpretation of the language and intent of the Clean Water Act. Rather than revealing an intent to immunize inter-basin water transfers from federal permitting, the City believes that the plain language of the statute requires such permitting.

Moreover, even if the Agency were correct that the exemption of *some* inter-basin transfers is necessary to preserve the integrity of state water management programs, that exemption would necessarily be more limited than the one proposed. Discharges beyond the control of a state – that is, discharges directed by a federal instrumentality whose activities are not subject to direct control under state law – cannot and should not be excused from federal permitting based on the pretense of protecting meaningful state oversight. Where no state control of water quality *can* be exercised, there is no legal or policy rationale for excusing a discharge from the rigors of the NPDES program.

## SPECIFIC COMMENTS

### A. EPA Misinterprets Its Clean Water Act Mandate

EPA's proposal would exempt otherwise permittable inter-basin water transfers from regulation under the NPDES permitting program. The basis for this proposed exemption is the Agency's inference that Congress never intended to impose federal regulation on such discharges. Based on that erroneous interpretation of legislative intent, EPA proposes to eliminate any application of the Clean Water Act's permitting processes to inter-basin discharges, leaving them instead to be regulated solely by, and largely at the discretion of individual states.

The flaws with this argument from statutory structure and legislative intent have been ably catalogued by the United States Court of Appeals for the Second Circuit in its recent opinion in *Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. City of New York, et al.*, Docket Nos. 03-7203 (L); 03-7253 (XAP) (June 13, 2006). There, New York City requested that the Second Circuit re-examine its 2001 holding that an inter-basin transfer in the City's water supply system required an NPDES permit.<sup>1</sup> The court agreed to this unusual request and, in so doing, considered both the Supreme Court's intervening decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and the Agency's own August 2005 Interpretive

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<sup>1</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. City of New York, et al.*, 273 F.3d 481 (2<sup>nd</sup> Cir. 2001).

Memorandum<sup>2</sup> announcing the Agency's position that inter-basin transfers are not subject to permitting under the NPDES program.

Importantly, the Agency's 2005 Interpretive Memorandum provides the totality of the legal analysis upon which the current regulatory proposal is based.<sup>3</sup> Thus, the Court's opinion speaks directly, and we believe dispositively, to the rationale underlying this proposed exemption. After taking these new developments into account, the Court re-affirmed its determination that inter-basin transfers are subject to NPDES permit requirements.

First, the court addressed the Agency's contention that Sections 101(g) and 510 of the Act reserve such broad authority to states to allocate quantities of water within their boundaries that they eliminate any room for federal control of the quality of those waters through the NPDES program. Rejecting this interpretation, the Court held that "[t]he power of the states to allocate quantities of water within their borders is not inconsistent with federal regulation of water quality." *Catskill Mountains*, slip op. at 14 (emphasis in original). That finding is supported by the Supreme Court's holding of 12 years standing 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. Washington Department of Ecology*, 511 U.S. 700, 720 (1994). Thus, neither Section 101(g) nor Section 510 provides a basis for exempting inter-basin transfers from the water quality protections afforded by NPDES permitting.

The court also rejected the Agency's argument that 33 U.S.C. 1314(f)(2)(F) requires it to exempt inter-basin transfers from the NPDES program. EPA argues (in both its 2005 Interpretive Memorandum and the preamble to the proposed rulemaking) that Section 304(f) of the Act associates water quality issues related to the construction of dams and other flow diversion facilities so closely with concerns about non-point source pollution as to imply that they should be managed solely ". . . by States under their nonpoint source program authorities, rather than the NPDES program."<sup>4</sup> Once again, the Second Circuit rejected the Agency's argument on the basis of on-point, unquestioned Supreme Court precedent – this time drawn from the 2004 *Miccossukee* opinion: ". . . 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the 'point source' definition." 541 U.S. at 106 (emphasis in original). It seems clear after *Catskill Mountains* that any attempt to limit point source permitting on the basis of 33 U.S.C. 1314(f)(2)(F) will be unavailing.

Contrasted with these failed efforts to justify the proposed exemption on the basis of amorphous notions of congressional intent and inferences drawn from the structure of the Act, it is the statute's plain language that clearly announces the law. NPDES permits are required for "the discharge of any pollutant." 33 U.S.C. 1311 (a). Such discharges

<sup>2</sup> "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" (August 5, 2005).

<sup>3</sup> "This proposed rule is based on the legal analysis contained in the interpretive memorandum and explained below." 71 Fed. Reg. at 32889, cols. 2 and 3.

<sup>4</sup> 71 Fed. Reg. at 32890, col. 3.

are further defined to be “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. 1362(12). This plainspoken command (along with the absence of a clearly stated exemption in the statute) trumps any effort to read a reservation of exclusive State regulatory control into the Act. Point sources that add pollutants to waters of the United States must be permitted – even where the addition is the result of an inter-basin transfer of water.

To the extent that EPA elects to base its proposal on a policy determination that the Clean Water Act is better executed with control over inter-basin transfers relegated to the states, its argument also fails. First, inter-basin water transfers often are also inter-state transfers of pollution. Just how individual states are to exert adequate leverage over their sister jurisdictions solely on the basis of their own sovereign powers is not explained. Second, state programs to control even intra-state transfers of water from one basin to another are anything but well developed. Indeed, Sanibel’s plight is an example of just how poorly developed the control of intra-state/inter-basin water transfers can be. The Agency cannot and should not defer to programs that do not exist to justify a policy that deprives endangered waters of the protections available under Sections 401 and 402 of the Clean Water Act. Finally, of course, if there were a policy basis for this proposal, it would be reflected in the preamble to the proposed regulation and in the administrative record. It is present in neither location.

Thus, both as a matter of law and policy, the Agency’s proposal is unsound. Far from reserving to states the power to manage the water quality implications of inter-basin water transfers, the Act clearly requires NPDES permits of those transfers that meet the basic prerequisites for permitting. Similarly, there is no valid policy basis for the proposed exemption. Because there is no legal or policy basis for the proposed rule, it must be withdrawn.

#### **B. Even if Valid in Part, EPA’s Proposed Exemption is Overbroad**

Even assuming, for the sake of argument, that the Agency has correctly identified the intent of Congress and that its reliance on that unstated intention would not contravene the plain language of the statute, the extension of a permitting exemption to all inter-basin water transfers would still be an overbroad response to EPA’s statutory analysis.

The Agency’s basic contention is that the authority to manage both water allocations<sup>5</sup> and the pollution resulting from “changes in the movement, flow or circulation of any navigable waters . . .”<sup>6</sup> are reserved to the states, thereby limiting the

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<sup>5</sup> “Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section [Section 101(g)] 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.” 71 Fed. Reg. at 32890, col. 2 (emphasis added).

<sup>6</sup> “While section 304(f) does not exclusively address nonpoint sources of pollutions, it nonetheless . . . reflects an understanding by Congress that water movement could result in pollution, and that such

natural reach of the federal NPDES permitting program. Even if this assessment of congressional intent proves persuasive, it cannot justify elimination of NPDES coverage in situations where state programs are powerless to control harmful discharges. Perhaps without intending it, the proposal would extend its exemption far beyond that inherent limitation.

Specifically, discharges by a federal instrumentality such as the Corps often are beyond the control of even the best-crafted state laws. For example, both the Supremacy Clause of the United States Constitution and certain specific statutory grants of immunity can limit the ability of state law to function against a federal entity. Without offering an opinion as to the ultimate disposition of a claim under either theory, Sanibel offers the following general discussion of factors that (among others) could limit a state's ability to exert direct control over a federal agency.

State laws can run afoul of the Constitution's Supremacy Clause in either of two ways. First, they may attempt to regulate the federal government directly or discriminate against it. *See McCulloch v. Maryland*, 4 Wheat. 316, 425-437 (1819). On the other hand, state laws are limited by the Clause if they conflict with an affirmative command of Congress. *See Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824); *see also Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-713 (1985). State laws that seek to protect water quality by limiting statutorily-authorized flood control discharges by the Corps would arguably violate the Clause on both grounds. *See, e.g., North Dakota, et al. v. United States*, 495 U.S. 423 (1990) (analyzing the validity of a state liquor reporting and labeling law as applied). Thus, it is reasonable to suggest that state laws may be incapable of exerting control over inter-basin discharges by federal instrumentalities such as the Corps.

Similarly, the broad immunity enjoyed by the United States in connection with flood control activities can serve to insulate Corps activities from effective control by a state. Under the Flood Control Act of 1928 (as amended), "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c. The Corps and other federal flood control instrumentalities routinely assert this immunity when faced with claims for monetary damages, as well as claims for injunctive relief. *See, e.g., Central Green Co. v. United States*, 531 U.S. 425, 427 (2001) (involving damages caused over time by flood control releases). When these broad assertions of statutory immunity in matters of flood control are upheld, states lose the ability to enforce their laws through judicial orders providing for injunctive relief. Without injunctive relief, effective control over federal flood control activities would be impossible.

These limitations constrain the ability of states to control inter-basin discharges by the Corps. Where state control is frustrated, the rationale for the permitting exemption (that viable state programs must be protected from federal interference) ceases to exist. Where the rationale ceases to exist, the exemption cannot be justified.

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pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program." 71 Fed. Reg. 32890, col. 3 (emphasis added).

If, however, the Agency persists in asserting the position that Congress intended to insulate inter-basin transfers out of concern for the sanctity of state non-point source control programs, the proposed exemption must be recast to exclude inter-basin discharges by the Corps and similar federal instrumentalities over which states can exercise no direct control under state law. Altering the scope of the exemption is crucial to the validity of the proposed rule. Failing to recast the proposal and any final rule in this way will allow the scope of the exemption to outstrip its rationale, and will render the final rule arbitrary and capricious, and vulnerable upon judicial review.

### CONCLUSION

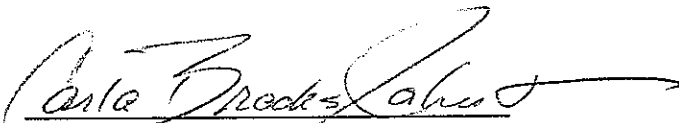
The City of Sanibel has a vital interest in the outcome of this rulemaking. Inter-basin water transfers are destroying the City's priceless estuary – an estuary that is both the pride of Southwest Florida and a major driver of the region's tourist-based economy. Equally vital is the interest of the J.N. "Ding" Darling National Wildlife Refuge, which may find its only voice through these comments. Without the protection offered by the NPDES program, these inter-basin discharges will complete their destructive work in the very near future. We are realistic enough to know that the NPDES process does not provide perfect protection against these discharges. We ask only that EPA and its NPDES program not abandon the City at the very moment when its natural heritage is being devastated.

The City is prepared to work closely with the Agency as it reviews the public comments on its proposed Water Transfers Rule and determines the scope and content of any final rulemaking. To that end, we plan to reach out to the Agency as the rulemaking process moves forward. In the interim, please feel free to contact the Mayor of the City, the Honorable Carla Brooks Johnston, or the undersigned counsel to discuss any questions you may have with respect to the City's comments.

Sincerely,



Richard S. Davis  
Special Counsel to the  
City of Sanibel, FL



Carla Brooks Johnston, in her capacity as  
Mayor of the City of Sanibel