proposed rule will be posted on EPA's Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

Comment Period

We received a request to extend the public comment period to July 5, 2006. We agreed to this request, therefore the public comment period will now end on July 5, 2006, rather than June 5, 2006.

How Can I Get Copies of the Proposed Amendments and Other Related Information?

EPA has established the official public docket for the proposed rulemaking under docket ID No. EPA–HQ–OAR–2003–0199. Information on how to access the docket is presented above in the **ADDRESSES** section.

Dated: June 1, 2006.

William L. Wehrum,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. E6–8813 Filed 6–6–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA–HQ–OW–2006–0141; FRL–8180–7]

RIN 2040–AE86

National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing an amendment to its Clean Water Act (CWA) regulations to expressly exclude water transfers from regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. The proposed rule would define water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This proposed rule focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.

DATES: Comments must be received on or before July 24, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2006–0141 by one of the following methods:

(1) Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments. EPA prefers to receive comments submitted electronically.

(2) E-mail: *ow-docket@epa.gov*, Attention Docket ID No. EPA–HQ–OW–2006–0141.

(3) Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OW–2006–0141.

(4) Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–OW–2006–0141. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2006–0141. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the Regulations index at *http://www.regulations.gov/.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the Water Docket in the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For additional information contact Jeremy Arling, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–2218, e-mail address: *arling.jeremy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action applies to those involved in the transfer of waters of the United States. The following table provides a

list of standard industrial codes for operations covered under this revised rule.

TABLE 1.—ENTITIES POTENTIALLY REGULATED BY THIS RULE

Category	NAICS	Examples of potentially affected entities
Resource management parties (includes state departments of fish and wildlife, state departments of pesticide regulation, state environmental agencies, and universities).	924110 Administration of Air and Water Resource and Solid Waste Management Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of water resource programs; the administration and regulation of water pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.
	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
	237110 Water and Sewer Line and Related Structures Construction.	This category includes entities primarily engaged in the construction of water and sewer lines, mains, pumping stations, treatment plants and storage tanks.
	237990 Other Heavy and Civil Engineering Construction.	This category includes dam Construction and management, flood control structure construction, drainage canal and ditch construction, flood control project construction, and spillway, floodwater, construction
Public Water Supply	221310 Water Supply	This category includes entities engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be regulated. EPA welcomes comment identifying those other entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting Confidential Business Information.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

Water transfers occur routinely and in many different contexts across the United States. Typically, water transfers route water through tunnels, channels, and/or natural stream water features, and either pump or passively direct it 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 state 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. Examples 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 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 entities responsible for water transfers have been issued NPDES permits, EPA is aware of only one State that has a practice of issuing NPDES permits for water transfers.[1] Water transfers are not generally subject to section 402 of the Clean Water Act. However, the Act reserves the ability of States to regulate water transfers under State law and this proposed rulemaking does not affect this state prerogative. *See* CWA section 510.

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

On August 5, 2005, EPA issued a legal memorandum entitled ''Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers.'' (interpretive memorandum) The precise legal question addressed in the interpretive memorandum was whether the movement of pollutants from one water of the U.S. 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. Based on the statute as a whole and consistent with the Agency's longstanding practice, the interpretive memorandum concluded 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.

Today, EPA is proposing an amendment to its Clean Water Act (CWA) regulations to expressly exclude water transfers from regulation under section 402 of the CWA. The proposed rule would define water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This proposed rule focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.

This proposed rule is organized as follows. Section III discusses the rationale for this exclusion, based on the language, structure, and legislative history of the Clean Water Act; section IV describes the scope of this proposed rule; and section V describes ''designation authority'' as an additional element that the Agency chose not to propose but for which the Agency is interested in receiving public comment.

III. Rationale

As stated in EPA's August 5th interpretive memorandum (available at Docket No. EPA–HQ–OW–2006–0141), 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. This proposed rule is based on the legal analysis contained in the interpretive memorandum and explained below.

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. 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). In general, the ''whole statute'' interpretation analysis means that ''a statute is passed as a whole and not in parts or sections and is 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).

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.

[1] For instance, courts required NPDES permits for water transfers associated with the expansion of a ski resort and the supply of drinking water. See *Dubois* v. *United States Dept. of Ag.,* 103 F.3d 1273 (1st Cir 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York,* 273 F.3d 481 (2nd Cir 2001). 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).

The analysis below addresses in turn the statutory language and structure and the legislative history.

A. Statutory Language and Structure

The Clean Water Act prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 402. CWA section 301(a). The term ''discharge of a pollutant'' is defined as ''any addition of any pollutant to navigable waters from any point source.'' CWA section 502(12). Where discharges of pollutants occur, they are generally regulated by a permit under the NPDES program. 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.

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 section 101(b).

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 section 101(g). While section 101(g) does not prohibit EPA from taking actions under the CWA that it determines are needed to protect water quality,[2] 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 a 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. 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, 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 Amendments 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)). This section directed EPA to issue guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants,[3] 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, it 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 proposed rule 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 transfers.

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 section 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

[2] *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.'').

[3] 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 section 402'') (quoting *National Wildlife Fed'n* v. *Gorsuch,* 693 F.2d 156,166) (D.C. Cir. 1982) (internal quotation marks omitted)).

''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 inclusion of changes in the movement, flow or circulation of any water of the U.S. in a section of the Act addressing 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 waters from one water of the U.S. to another.

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 water of the U.S. into another.

The operators of water control facilities are generally not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants 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 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'').[4] The pollutants in transferred waters are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. *See, e.g.,* CWA section 102(b) (reservoir planning); CWA section 208(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA section 319 (nonpoint source management programs); and CWA section 401 (state certification of federally licensed projects). Congress acknowledged this when it directed Federal agencies to 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.

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 in cooperation with Federal authorities.

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 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 the new section 402 permitting program was not the only viable approach for addressing water quality issues associated with State water resource management. The legislative history makes clear that Congress did not intend a wholesale transfer of responsibility for water quality away from water resource agencies to the NPDES authority. 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.

IV. Scope of This Proposed Rule

This proposed rule would expressly exclude discharges from water transfers from requiring an NPDES permit. The rule would define a water transfer as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. Waters of the U.S. are defined for purposes of the NPDES program in the Code of Federal Regulations in § 122.2.

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. However, in both cases (water transfers between distinct water

[4] 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 section 402(p).

bodies and movement of waters within the same waterbody), an NPDES permit is not required because no ''addition'' of a pollutant has occurred.

Water transfer facilities should be able to be operated and maintained in a manner which ensures that they do not add pollutants to the water being transferred. If no pollutants are added, a permit would not be required. However, where these point sources do add pollutants to water passing through the 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 rulemaking affects EPA's longstanding approach to regulation of such discharges under section 402.

This proposed rule would not affect EPA's longstanding position that, if water is withdrawn from waters of the U.S. 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 CFR 122.2 (definition of process wastewater); 40 CFR 125.80–125.89 (regulation of cooling towers); 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR part 132, Appendix F, Procedure 5–D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Moreover, a discharge from a waste treatment system, for example, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). *See* 40 CFR 122.2. These situations are distinguished from the water transfers that are the subject of this notice because if water is withdrawn from navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of that intake water and associated pollutants physically introduces pollutants from the outside world into navigable waters and, therefore, is an ''addition'' subject to NPDES permitting requirements. The fact that some of the pollutants in the discharge may have been present in the source water does not remove the need for a permit, although, under some circumstances, permittees may receive ''credit'' in their effluent limitations for such pollutants. See, 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR part 132, Appendix F, Procedure 5–D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes).

Similarly, an NPDES permit is normally required if a facility withdraws water from a water of the U.S., removes preexisting pollutants to purify the water, and then discharges the removed pollutants (perhaps in concentrated form) back into the water of the U.S. while retaining the purified water for use in the facility. An example of this situation is drinking water treatment facilities, which withdraw water from streams, rivers, and lakes. The withdrawn water typically contains suspended solids, which must be removed to make the water potable. The removed solids are a waste material from the treatment process and, if discharged into waters of the U.S., are subject to NPDES permitting requirements, even though that waste material originated in the withdrawn water. *See, e.g., In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants,* 9 E.A.D. 515, 2000 WL 1664964 (EPA Envtl. App. Bd. November 1, 2000) (rejecting, on procedural grounds, challenges to NPDES permits for two drinking water treatment plants that draw raw water from the Arizona Canal, remove suspended solids to purify the water, and discharge the solids back into the Canal; *Final NPDES General Permits for Water Treatment Facility Discharges in the State of Massachusetts and New Hampshire,* 65 FR 69,000 (2000) (NPDES permits for discharges of process wastewaters from drinking water treatment plants).

Waters that are diverted and used for irrigation and then reintroduced to the waters of the U.S. 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 proposed rule 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 waters of the U.S. *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 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 section 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 sections 402(a), 402(p)(1)–(4). Congress amended the Clean Water Act in 1987 specifically to add new section 402(p) to better regulate stormwater discharges from point sources. Water Quality Act of 1987, Public Law 100–4, 101 Stat. 7 (1987). Again, this interpretation does not affect EPA's longstanding regulation of such discharges.

This proposed rule also would 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*' Section 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.' Section 1362(7).'' *Miccosukee,* 541 U.S. at 105.

EPA solicits comment on the proposed definition of a water transfer. Does the definition properly achieve the Agency's objective of excluding water transfers from NPDES permitting (as intended by Congress) while affirming section 402 jurisdiction over all other currently regulated activities? Does the proposed rule clearly distinguish between situations where the water transfer facility ''adds'' pollutants to the water being transferred and thus must obtain a permit, and those situations where waters merely pass through the facility without the addition of any pollutant?

V. Designation Authority

EPA considered, but ultimately did not propose, an additional provision allowing States to designate particular water transfers as subject to the NPDES program on a case-by-case basis. EPA did not select this option but is seeking comment on it.

Under this approach, the permitting authority would have the discretion to

issue a permit on a case-by-case basis if a transfer would cause a significant impairment of a designated use and no State authorities are being implemented to adequately address the problem. A significant impairment would occur when, as a result of the water transfer, the designated use of the receiving water could no longer be maintained. This designation would be at the sole discretion of the State NPDES authority, and would only apply in States authorized to implement the section 402 program.

Again, the Agency is not proposing to establish designation authority, but EPA is interested in the programs States have to address water quality impacts from water transfers, how they are being implemented, and what is the best way to fill any gaps in how States address those impacts currently. EPA notes that, regardless of whether it includes this designation authority in the final rule or not, States retain the authority under State law to regulate water transfers as they see fit, including requiring permits for such transfers. Without designation authority, however, these permits could not be issued under NPDES program authority.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action.'' As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This proposed rulemaking would expressly exclude discharges from water transfers from requiring an NPDES permit. This rule does not seek to require potentially affected entities to generate, maintain, retain, or disclose information to or for a Federal agency and therefore would not impose any information collection burden.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant adverse economic impact on a substantial number of small entities. Because EPA is simply codifying the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States, this proposed action will not impose any requirement on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments

to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule would not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. EPA is proposing to simply codify the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of a water of the United States into another water of the United States. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's proposed rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6(b) of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. Under section 6(c) of Executive Order 13132, EPA may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

EPA has concluded that this proposed rule does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's proposed rule does not change the relationship between the government and the States or change their roles and responsibilities. Rather, this proposed rulemaking would confirm the Agency's longstanding practice that Congress generally 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. In addition, EPA does not expect this rule to have any impact on local governments.

Further, the revised regulations would not alter the basic State-Federal scheme established in the Clean Water Act under which EPA authorizes States to carry out the NPDES permitting program. EPA expects the revised regulations to have little effect on the relationship between, or the distribution of power and responsibilities among, the Federal and State governments. Thus, Executive Order 13132 does not apply to this rule.

Consistent with EPA policy, EPA nonetheless consulted with representatives of State governments early in the process of developing the proposed regulation to permit them to have meaningful and timely input into its development. EPA asked States for data regarding the number of water transfers within their jurisdiction and the mechanisms under State law that could be utilized to address any possibly adverse water quality impacts from those transfers. In considering the designation authority provision, EPA also sought data from the States regarding their use of similar authorities in their stormwater phase II and Concentrated Animal Feeding Operations (CAFO) rules. In addition to data collection, EPA sought States' opinions on water transfers generally, and designation, specifically. States varied in their concerns, with some opposed to NPDES permitting for water transfers and some supportive of an ability to use it.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled, ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Today's proposed rule would clarify that Congress did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States. Nothing in this rule would prevent an Indian Tribe from exercising its own organic authority to deal with such matters. Thus, Executive Order 13175 does not apply to this rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From EnvironmentalHealth and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective

and reasonably feasible alternatives considered by the Agency.

This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under E.O. 12866, and because the Agency does not have reason to believe that it addresses environmental health and safety risks that present a disproportionate risk to children. Today's proposed rule would simply clarify Congress's intent that water transfers generally 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.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule would not be subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not an economically significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: June 1, 2006.

Stephen L. Johnson,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 122 is proposed to be amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 122.3 is amended by adding paragraph (i) to read as follows:

§ 122.3 Exclusions.

* * * * *

(i) *Discharges from a water transfer.* Water transfer means an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants added by the water transfer activity itself to the water being transferred.

[FR Doc. E6–8814 Filed 6–6–06; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0493; FRL–8072–4]

Inert Ingredient; Revocation of a Tolerance Exemption with Insufficient Data for Reassessment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes under section 408(e)(1) of the Federal Food, Drug, and Cosmetic Act (FFDCA) to revoke the existing exemption from the requirement of a tolerance for residues of one inert ingredient because there are insufficient data to make the determination of safety required by FFDCA section 408(b)(2). The inert ingredient tolerance exemption under 40 CFR 180.920 is ''α-Alkyl (C_{10}-C_{16})-ω-hydroxypoly(oxyethylene) mixture of dihydrogen phosphate and monohydrogen phosphate esters and the corresponding ammonium, calcium, magnesium, monoethanolamine, potassium, sodium, and zinc salts of the phosphate esters; the poly(oxyethylene) content averages 3–20 moles.'' The revocation action in this document contributes towards the Agency's tolerance reassessment requirements under FFDCA section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996. By law, EPA is required by August 2006 to reassess the tolerances that were in existence on August 2, 1996. The regulatory action in this document pertains to the revocation of one tolerance exemption which is counted as tolerance reassessment toward the August 2006 review deadline.

DATES: Comments must be received on or before July 7, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2006–0493, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2006–0493. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The Federal regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If