

Executive Summary of Critical Issues
Topic — Miccosukee and Related Cases

Last Update

August 1, 2007

CAP Position

CAP's operations and costs could be significantly affected if a National Pollutant Discharge Elimination System (NPDES) permit or treatment were required whenever Colorado River water is introduced into Lake Pleasant, CAP recharge facilities or the Salt River Project through the SRP Interconnect. Congress did not intend for the Clean Water Act to interfere with the rights and responsibilities of States to manage their water resources.

Summary of Issue

In South Florida Water Management District v. Miccosukee Tribe of Indians, 124 S.Ct. 1537 (March 23, 2004), the Supreme Court decided that the transfer of water from one water body to another can require an NPDES permit under the Clean Water Act, if the two water bodies are different in quality. Under the Miccosukee opinion, any transfer of water from one basin to another through a ditch, tunnel, canal, pipeline or other conveyance structure in the legitimate exercise of water rights, and in order to fulfill statutory or contractual responsibilities to meet municipal, agricultural and Native American water demands, could require a Clean Water Act point source discharge permit (an NPDES permit). This could subject the raw water source to onerous treatment requirements without any discernable environmental benefit. This would be true despite the fact that the entity delivering the water does not add any pollutants; it merely transports the water from the source of supply to the place of need. Since all waters naturally contain regulated constituents ("pollutants"), all water conveyers could be subject to the mandates of the NPDES permitting process.

The Miccosukee opinion could affect the regulatory storage component of the CAP, where Colorado River water is transported through the aqueduct system and pumped into Lake Pleasant, the reservoir behind New Waddell Dam. CAP uses New Waddell Dam to store CAP water during the winter months for eventual release downstream during the summer months to meet peak water demands. The regulatory storage provided by New Waddell Dam is critical to our ability to manage the Project's water and power resources. New Waddell Dam provides critical "back-up" reliability in the event of an up-stream outage of the CAP delivery system and also helps us keep our power costs down and

generate additional revenues for Project repayment. During the environmental reviews preceding the construction of the CAP aqueduct system and New Waddell Dam, the water quality impacts of introducing Colorado River water into the Salt, Verde and Agua Fria River systems were considered by Reclamation and EPA. It was never suggested that an NPDES permit would be required for the transportation, storage or delivery of CAP supplies.

Further, the Miccosukee opinion could affect the operation of CAP recharge projects such as the Agua Fria Recharge Project, where Colorado River water is released into the Agua Fria River channel for underground storage. These recharge projects help protect water users against drought and also help Arizona make full use of its CAP supplies. Up to this point, no NPDES permit has been required for the recharge of CAP water supplies.

The Miccosukee opinion could also affect CAP's continuing ability to make deliveries to the Salt River Project and its water users through the SRP Interconnect, including the major municipalities in the greater Phoenix metropolitan area. CAP water deliveries have helped conserve SRP water supplies and supplemented those supplies during the current drought.

In the Catskill Mts. case, the United States Court of Appeals for the Second Circuit considered the issue of whether an NPDES permit is required for New York City's transfer of water from a reservoir to a creek, where the water from the reservoir is higher in suspended solids (turbidity) than the water in the creek. The Court decided that an NPDES permit was required, resulting in a \$6 million penalty being imposed on the city for not having a permit.

Status as of August 1, 2007

On June 7, 2006, EPA published a proposed rule that would have the effect of excluding water transfers, as they are defined in the rule, from the NPDES permit program. The stated purpose of the rule is to clarify that NPDES permits are not required for water transfers. The agency recognizes that certain water transfers may deliver pollutants from the source water to the receiving water body, but EPA has concluded that Congress intended for water transfers to be subject to oversight by state water resource management agencies, not the federal NPDES permitting program. CAP submitted comments in support of the proposed rule.

CAP is working with the Western Urban Water Coalition and others to address issues raised by the Miccosukee and Catskill Mts. cases and to

support the EPA rule. Among other things CAWCD has contributed funds toward and participated in several friend of the court briefs to make the courts aware of the concerns of Western water providers.

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