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Courts Continue to Defer to the Environmental Protection Agency in Its Interpretation of the Clean Water Act

The U.S. Court of Appeals for the Second Circuit recently reversed the U.S. District Court for the Southern District of New York which had found the U.S. Environmental Protection Agency's (EPA) 2008 "Water Transfers Rule" was invalid under the federal Clean Water Act (CWA). *Catskill Mountains Chapter of Trout Unlimited, Inc. v U.S. Environmental Protection Agency*, 846 F.3d 492 (2d Cir. 2017). Several environmental groups, a number of states, an Indian tribe and a Canadian province sued the EPA alleging that transfer of water through a series of reservoirs, tunnels and creeks from the Catskill Mountains to consumers in New York City required National Pollutant Discharge Elimination System (NPDES) permits. In reversing the district court, the Second Circuit court held that: (1) the CWA did not clearly and unambiguously speak to the question of whether NPDES permits were required for water transfers; (2) EPA's adoption of the Water Transfers Rule was not arbitrary and capricious; and (3) the Water Transfers Rule was based on a reasonable interpretation of the CWA.

In 2008, the EPA formalized its decades-long policy of not requiring NPDES permits for water transfers from one body of water to another where there is no intervening industrial, municipal or commercial use. In June and October 2008, plaintiffs filed two separate lawsuits, which were later consolidated, in the U.S. District Court for the Southern District of New York challenging the Water Transfers Rule. At approximately the same time, five parallel petitions for review of the rule were filed in the First, Second and Eleventh Circuit Courts of Appeals and subsequently consolidated and assigned to the Eleventh Circuit. The Eleventh Circuit then consolidated those actions with a sixth case. Prior to taking up the consolidated actions, the Eleventh Circuit heard a "conceptually-related" case and held that the deference set out in *Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should be accorded to the EPA, and the appellate court upheld the Water Transfers Rule. The Eleventh Circuit subsequently dismissed the six consolidated actions for lack of subject matter jurisdiction. Several of the plaintiffs and defendants from those cases intervened in the instant Southern District of the New York case.

Under the CWA a person is required to obtain a NPDES permit to discharge a pollutant from a point source into the waters of the United States. "[A] 'water transfer' is 'an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.'" According to the EPA, water transfers under the rule do not require a NPDES permit "'because they do not result in the 'addition' of a pollutant.'" In other words, a pollutant in one part of the

waters of the United States transferred to another part of the waters of the United States does not add a pollutant to those "unitary-waters."

The Southern District of New York in the instant action granted summary judgment to plaintiffs and vacated and remanded the rule to EPA. On appeal, the Second Circuit agreed with the district court that under *Chevron* a court should defer to the EPA, provided its rule was a reasonable interpretation of the CWA. Both courts agreed that the CWA does not speak clearly and unambiguously as to whether NPDES permits are required for water transfers. Unlike the district court, however, the Second Circuit concluded that EPA's Water Transfers Rule (40 C.F.R. § 122.3(i)) was a reasonable interpretation of the CWA based upon valid considerations. If the rule "is not 'arbitrary, capricious, or manifestly contrary to the statute,'" "is supported by a reasoned explanation" and is a "'reasonable policy choice for the agency[,]'" a court should accord deference to the agency's interpretation. The EPA is generally better suited than a court to make such interpretations.

The Second Circuit Court concluded that the rule was a reasonable policy decision for the EPA to make, and that the rule was "supported by a reasoned explanation that sets forth a reasonable interpretation of the [CWA]." According to the appellate court, the EPA had set forth several valid interpretive, theoretical and practical arguments supporting the rule including for example, Congress's acquiescence in not mandating that water transfers have NPDES permits, recent case law, compliance costs for water transfers and alternative means for regulating any resulting pollution. The CWA "does not require that water quality be improved whatever the costs or means" nor does the law require that the Water Transfers Rule be the best interpretation to achieve the CWA's goals.

Presuming a lighter federal hand in environmental regulation given the recent political elections, it is reasonable to conclude that judicial deference to agencies in interpreting the laws they administer is sure to be further litigated.

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