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Second Circuit Court Rules EPA's Water Transfers Rule Allowed Under Chevron.

In a major water rights case that pits the practical needs of drinking water system operators against environmentalists, conservationists, and some state and tribal governments, the Court of Appeals for the Second Circuit decided recently that water transfers for drinking water systems are exempt from the Clean Water Act pollution permitting program.

In upholding the 2008 Water Transfers Rule, the Second Circuit Court of Appeals held that the U.S. Environmental Protection Agency was entitled to exclude water system transfers from the National Pollutant Discharge Elimination System (NPDES) permitting requirements. The plaintiffs argued that such water transfers could move harmful pollutants from one body of water to another. Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill III), 14-1823, (2d Cir., 2017).

The dispute bears the hallmark of a case bound for the U.S. Supreme Court, as national environmental organizations, led by Trout Unlimited, Inc., fishermen, sportsmen, Riverkeeper, Inc. and northeastern states, including New York, Connecticut, Delaware, Illinois and Maine, line up against the EPA, western states, and water districts and utilities from San Francisco to New York City and South Florida.

“Because New York City cannot tap the rivers, bays, and ocean that inhabit, surround, or, on occasion, inundate it to slake the thirst of its millions of residents, it must instead draw water primarily from remote areas north of the City, mainly the Catskill Mountain/Delaware River watershed west of the Hudson River, and the Croton Watershed east of the Hudson River and closer to New York City,” Judge Sack waxed poetically in a lengthy opinion that even starts out quoting poetry.1

Water transfers, which drinking water systems have been conducting for decades, connect and convey water supplies between two water bodies before any end user, such as an industrial, commercial or municipal consumer, uses the water. While EPA had never required such water transfers to become subject to the NPDES permitting requirements of the Clean Water Act, it ultimately enacted the Water Transfer Rule to respond to a growing chorus from environmental and conservation groups that claimed water transfers can move harmful pollutants from one water body to another.

The court analyzed the case using the classic two-step analysis set forth by the U.S. Supreme Court in Chevron v. Natural Resources Defense Council (referred to as “Chevron deference”), pursuant to which the Court first determines if the language of the statute at issue clearly proscribes the matter and, if not, whether the agency’s interpretation of the statute is reasonable. After concluding that the Clean Water Act does not expressly address water transfers and, therefore, inferring that Congress must have decided to defer to the EPA the interpretation of the statute to water transfers, the Court examined the reasonableness of EPA’s judgment. “The agency provided a sufficiently reasoned explanation for its interpretation of the Clean Water Act in the Water Transfers Rule,” the Court explained.

Among the justifications for EPA's reasoning, the Court relied on the longstanding practice of and Congress's acquiescence to water transfers, practical concerns regarding compliance costs (the defendants' arguments in the case indicated compliance costs could exceed $4.2 billion), and the existence of alternative means for regulating pollution resulting from water transfers. New York City argued that it would be required to construct an expensive water treatment plant if an NPDES permit were required for its transfers. Other federal statutes, including the Safe Drinking Water Act, provided an acceptable alternative to regulation, the Court concluded.

Footnote

1."Water, water, everywhere/Nor any drop to drink," by Samuel Taylor Coleridge's The Rime of the Ancient Mariner (1798).

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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