



Second Circuit Reinstates EPA's Water Transfers Rule

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In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, No. 14-1823, decided on January 18, 2017, the United States Court of Appeals for the Second Circuit reinstated the Environmental Protection Agency's (EPA) Water Transfers Rule. The Rule, adopted in 2008, codifies EPA's longstanding policy that water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute an "addition of pollutants" to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act (CWA). The Second Circuit reversed a U.S. District Court for the Southern District of New York decision vacating the Water Transfers Rule and remanding it to EPA for further assessment, holding that the rule could not survive judicial scrutiny because it was based on an unreasonable interpretation of the CWA. The district court's decision raised concerns for the hydropower industry because reversal of the Water Transfers Rule could have ultimately subjected certain dams to NPDES permitting in the future.

Van Ness Feldman authored an amicus brief for the hydroelectric industry urging the result reached by the Second Circuit.

BACKGROUND

In June 2008, EPA promulgated the Water Transfers Rule, which codified the agency's longstanding interpretation that the CWA exempts water transfers from regulation under the NPDES permitting program. The Rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. Under the "Unitary Waters" theory adopted in the Rule, all water bodies in the United States constitute a single, unitary entity, and even if a water transfer between navigable waters conveys water in which pollutants are present, it does not result in the addition of a pollutant to navigable waters. Many hydropower projects involve such cross-basin transfers of water that do not add pollutants to the water.

Shortly after EPA released the Rule, several environmental organizations and state, provincial, and tribal governments filed complaints under the CWA and the Administrative Procedure Act challenging EPA's promulgation of the Rule. On March 28, 2014, the district court granted summary judgment in favor of the plaintiffs, vacating the Rule and remanding it to EPA for further consideration. Applying the U.S. Supreme Court's two-part test under *Chevron v. Natural Resources Defense Council* for judicial review of an agency's formal interpretation of a statute administered by the agency, the district court found under *Chevron* step one that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers. In deciding whether the agency should be afforded deference in its interpretation of the statute, the court found under *Chevron* step two that the Rule was an unreasonable interpretation of the CWA because EPA failed, under the Supreme Court's standard for evaluating agency action under *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, to give a reasoned explanation for its interpretation exempting water transfers from the NPDES program.

THE SECOND CIRCUIT'S DECISION

A divided Second Circuit panel reversed the district court's decision and reinstated the Water Transfers Rule. While the court agreed with the district court that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers, the court found that the Water Transfers Rule "represents a reasonable policy choice" and should be afforded deference under the second prong of the *Chevron* test. The Second Circuit held that the more searching *State Farm* standard applied by the

district court does not apply to judicial review of an agency's interpretative rule. Applying the more deferential *Chevron* step two test, the Second Circuit found that EPA offered a sufficient explanation for adopting the Rule, and the Rule itself is a reasonable interpretation of the CWA. In upholding the Rule, the court noted that the CWA "does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers."

Importantly, the Second Circuit's opinion also expressly preserved longstanding precedent that hydropower dams are generally not subject to NPDES permits. The court held that these cases "have no bearing on the outcome of this appeal."

In a dissenting opinion, Judge Denny Chin argued that the plain language of the CWA clearly expresses Congress's intent to prohibit the transfer of polluted water from one water body to another without an NPDES permit. In rejecting the Unitary Waters theory, Judge Chin argued that the transfer of contaminated water from a polluted water body through a conveyance to a less-polluted water body is an "addition" of a pollutant to a navigable water from a point source. Even if the CWA was ambiguous, Judge Chin argued that the Water Transfers Rule was an unreasonable interpretation of the CWA. He argued that an agency's interpretation of an ambiguous statute is not entitled to deference if it is at odds with the statute's manifest purpose—here, to address environmental harms caused by the discharge of pollutants into water bodies.

IMPLICATIONS

The Second Circuit's opinion reinstates the Water Transfers Rule, removes uncertainty by avoiding a split among the U.S. courts of appeal regarding the continuing applicability of the Rule—as the U.S. Court of Appeals for the Eleventh Circuit upheld the Rule in its 2009 decision in *Friends of the Everglades v. South Florida Water Management District*. While the now-vacated district court ruling appropriately distinguished between water transfers and recirculation of waters in-river through a dam or pumped-storage hydropower project, many hydropower projects involve transfers of water between water bodies that do not add pollutants to the water. Some of these projects divert water from one river basin to another. Others move water among tributaries within the same river basin. Had the district court's decision been affirmed, all such hydropower projects could have become subject to NPDES permitting, with enormous regulatory and operational implications. Because NPDES permits must be obtained every five years, this requirement could have interfered significantly with Federal Energy Regulatory Commission-issued long-term licenses that already contain compliance requirements, including water quality conditions under section 401 of the CWA. With the Water Transfers Rule reinstated, all hydropower dams, including those involving transfers of water between water bodies, remain generally exempt from the NPDES program.

Parties have 45 days to petition for a panel rehearing or rehearing en banc, or go days to file a petition for a writ of certiorari before the U.S. Supreme Court.

For more information

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