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Discharge Permits Not Required to Transfer Water: Court Upholds EPA Rule

The U.S. Court of Appeals for the Second Circuit recently issued a long-awaited ruling confirming the legality of the Environmental Protection Agency's ("EPA's") Water Transfers Rule in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, No. 14-1823, 2017 WL 192707 (2d Cir. Jan. 18, 2017). EPA's Water Transfers Rule, promulgated in 2008, determined that "water transfers" are not activities that require a National Pollutant Discharge Elimination System ("NPDES") permit. Under the rule, a "water transfer" is defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." [i] Water transfers are employed throughout the country and are especially important in arid Western states, where water providers seek water supplies from rivers, lakes and streams located in entirely different watersheds.

Since the rule's promulgation, environmental and conservation groups have widely challenged the Water Transfers Rule in court, claiming that it allows one water body to pollute another water body in contravention of the Clean Water Act ("Act"), which broadly prohibits the "addition of any pollutant to navigable waters from any point source." [ii] EPA has historically defended the rule based on a "unitary waters" theory, reasoning that water transfers do not "add" pollutants—unless the transfer activity itself introduces a new pollutant—because water transfers merely convey or connect water.

In *Catskill Mountains*, environmental organizations and a group of predominately Eastern and Midwestern states challenged the rule, claiming that the Water Transfers Rule does not "achieve the Act's overall goal of restoring and protecting the quality of the nation's waters." [iii] EPA and a broad array of intervenor-defendants, including many Western states and water providers, defended the rule.

Ultimately, a 2-1 majority of the three-judge panel upheld the rule based on principles of judicial deference following the two-step test established by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the court held that "the Clean Water Act does not speak directly to the precise question of whether NPDES permits are required for water transfers." [iv] Second, the court held that EPA's rule is entitled to deference, as it is "precisely the sort of policymaking decision that the Supreme Court designed the *Chevron* framework to insulate from judicial second- (or third-) guessing." [v] Because the court found the rule to be a reasonable interpretation of the Act, it was entitled to the court's deference.

In a thorough dissent, Judge Denny Chin contended that under *Chevron* step one, the plain language and structure of the Act unambiguously "expresses Congress's intent to prohibit the transfer of polluted water from one water body to another distinct water body without a permit." [vi] Second, he asserted that even if the Act were ambiguous, the Water Transfers Rule is an unreasonable, arbitrary, and capricious interpretation of the Act, as the rule conflicts with the language, structure and purpose of the Act.[vii]

Continued challenges will likely emerge. Nevertheless, the *Catskills Mountains* ruling is significant, as it reinforces the legality of the Water Transfers Rule. In conjunction with the Ninth Circuit's recent decision in *ONRC Action v. U.S. Bureau of Reclamation*, 798 F.3d 933 (9th Cir. 2015), the *Catskill Mountains* decision offers additional assurance to water providers that employ or intend to develop water transfers. Consistent with the rule and these opinions, water transfers may continue without NPDES permitting.

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[i] 40 C.F.R. § 122.3(i)
[ii] 33 U.S.C. §§ 1251, 1311(a), 1362(12).
[iii] *Catskill Mountains*, at *2.
[iv] *Id.*
[v] *Id.*
[vi] *Id.* at *28.
[vii] *Id.* at *28, 38-39.