No Permit, No Problem: Second Circuit Determines EPA's Regulation Exempting Water Transfers from NPDES is Reasonable

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I. INTRODUCTION

In a recent Second Circuit decision, a split panel reversed the district court's decision granting summary judgment in favor of the plaintiffs,[1] regarding the Environmental Protection Agency's ("EPA") Water Transfers Rule exempting water transfers from National Pollutant Discharge Elimination System ("NPDES") requirements.[2] The NPDES permitting program[3] is a part of the Clean Water Act (the "Act"), which has the primary objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's Waters."[4] The Act requires a permit for the discharge of pollutants,[5] which is defined as "'any addition of any pollutant to navigable waters from any point source,' where 'navigable waters' means 'the waters of the United States, including the territorial seas.'"[6] One can receive a NPDES

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1. The plaintiffs included numerous environmental, conservation, and outdoors groups: Catskill Mountain Chapter of Trout Unlimited, Theodore Gordon Flyfishers, Catskill-Delaware Natural Water Alliance, Federal Sportsmen's Clubs of Ulster County, Riverkeeper, Trout Unlimited, National Wildlife Federation, Environment America, Environment New Hampshire, Environment Rhode Island, Environment Florida, Friends of the Everglades, Florida Wildlife Federation, and Sierra Club; the U.S. states of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington; the Canadian province of Manitoba; and the Miccosukee Tribe of Indians of Florida. Catskill Mountains Chapter of Trout Unlimited v. EPA, 846 F.3d 492 (2d Cir. 2017).

2. *Id.*; 33 U.S.C. § 1342 (2012); 40 C.F.R. § 122.3(i) (2016).

3. 33 U.S.C. § 1342.

4. *Id.* § 1251(a).

5. *See id.* § 1311(a).

6. *Catskill*, 846 F.3d at 502 (internal citations and footnotes omitted) (quoting 33 U.S.C. § 1362(12)(A), (7)).

permit "to discharge a specified amount of a specified pollutant" legally.[7]

At issue in this case are water transfers, "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use,"[8] which under EPA regulations does not require a NPDES permit. Water transfers are critical to large cities, as they provide water from more remote areas to densely populated areas without adequate water supplies nearby.[9] However, not requiring permits for water transfers could provide an avenue for pollutants to move "from one body of water to another, potentially endangering ecosystems, portions of the economy, and public health near the receiving water body—and possibly beyond."[10] The district court held that EPA's regulation was an unreasonable interpretation of the statute and granted the plaintiff reliefs, from which EPA appealed.[11]

II. SECOND CIRCUIT'S ANALYSIS

The majority opinion in the Second Circuit takes a step-by-step approach, considering both steps of *Chevron* deference in turn. The first step of a *Chevron* analysis requires the court to consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[12]

In considering this step, the court concluded that the statute is ambiguous as to "whether [the Clean Water Act] plainly requires a party to acquire an NPDES permit in order to make a water transfer,"[13] for a few reasons. First, the court reasoned that previous courts' analysis and holdings using *Skidmore* deference,[14]

7. *Id.*
8. 40 C.F.R. 122.3(i).
9. *Catskill*, 846 F.3d at 503.
10. *Id.*
11. *Id.* at 506.
12. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 US 837, 842–43 (1984).
13. *Catskill*, 846 F.3d at 508.
14. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492 (2d Cir. 2001) (hereinafter *Catskill I*) (holding that when water from two different bodies of water is artificially diverted there is "an 'addition' of a 'pollutant' from a 'point source' . . . to a 'navigable water'"); Catskill Mountains Chapter of Trout Unlimited, Inc. v.

rather than using *Chevron* deference—due to the fact that EPA had yet to formalize its regulation through the Water Transfers Rule—did not preclude a finding that the language of the statute was ambiguous under *Chevron*.[15]

Second, the statute's text, structure, purpose, and legislative history did not clarify the ambiguity. For instance, the language "any addition of any pollutant to navigable waters from any point source," could refer to the waters of the United States as a unified whole, which is known as the "unitary waters theory,"[16] or each individual body of water as a collection.[17] That is, an addition requiring a permit could be understood as just the initial addition into the navigable waters as a whole; or it could be each instance of an addition into an individual waterbody. Moreover, comparing those same words to other provisions in the Act did not clarify its meaning.[18] In addition, the purpose of the Act, "'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[19] must be considered in light of the complexity of the Act's goals, as a whole, which led the court to the conclusion that the broad purpose of the Act does not "unambiguously require[] that water transfers be subject to NPDES permitting."[20] Furthermore, the extensive legislative history was silent on the matter and provided no additional clarification.[21]

Finally, the court considered four canons of statutory construction: (1) when Congress specifically enumerates exceptions, additional exceptions should not be implied; (2) when statutes are interpreted, absurd results should be avoided; (3) where a regulation is clearly at the outer bounds of the statute's limits, a clear statement of Congress is required to allow the regulation; and (4) where two interpretations of a statute are

City of New York, 451 F.3d 77, 86 (2d Cir. 2006) (hereinafter *Catskill II*) (refusing to rehear or modify the pertinent holding in *Catskill I*).

15. *Catskill*, 846 F.3d at 510–11 ("Our application of the *Skidmore* deference standard in *Catskill I* and *Catskill II* makes clear that we did not decide and have not decided that the statutory language at issue in this case—'addition . . . to navigable waters'—is unambiguous.") (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944); *Catskill II*, 451 F.3d 77*; Catskill I*, 273 F.3d 481)).

16. *Catskill*, 846 F.3d at 533 (defining the "unitary waters theory" as "all water bodies in the United States, that is, all lakes, rivers, streams, etc., constitute a single unit").

17. *Catskill*, 846 F.3d at 512-13 (quoting 33 U.S.C. § 1362(12)).

18. *Id.* at 513–14.

19. *Id.* at 514 (quoting 33 U.S.C. § 1251(a)).

20. *Id.* at 515.

21. *Id.*

possible and one creates a constitutional problem, choose the interpretation that avoids the issue. The court determined that none of the canons apply or clear up the statute's ambiguity.[22]

Because the statute was deemed ambiguous, the court moved onto the second step of *Chevron*, considering if the agency's interpretation was reasonable. Agency interpretations of ambiguous statutes are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[23] First, the Second Circuit took issue with the standard used by the district court taken from *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, which is a more stringent standard used to evaluate the procedural soundness of the regulation, not the substantive reasonableness.[24] The Second Circuit concluded that the *Chevron* standard was more appropriate for this case, where there was "[a]n agency's initial interpretation of a statutory provision" at issue.[25]

Moving on to the substance of the regulation, the court considered the reasonableness of EPA's rationale for its interpretation and the reasonableness of the interpretation itself. The broad scope of the Act, the alternative regulatory mechanisms available for water transfers, Congress's intent to primarily leave water transfer oversight to states, and the detrimental effect that permits could have on states' abilities to manage their water rights, were enough to convince the court that the rationale for EPA's interpretation was reasonable.[26]

For four additional reasons, the court held that EPA's interpretation of the Act, through the promulgation of the Water Transfers Rule, was reasonable. First, Congress had been silent on the issue of required NPDES permits for water transfers for nearly forty years.[27] Second, precedent, specifically an Eleventh Circuit decision that went through a similar analysis to the one the Second Circuit was currently tasked with, concluded that EPA's unitary waters theory, deeming the waters of the United States as one collective whole, was reasonable—which makes it difficult for water

22. *Id.* at 515–20.

23. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 US 837, 843 (1984); *Catskill*, 846 F.3d at 520.

24. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); *Catskill*, 846 F.3d at 521.

25. *Catskill*, 846 F.3d at 521.

26. *Id.* at 524–25.

27. *Id.* at 525.

transfers to add pollutants to navigable waters,[28] because if the waters constitute a single unit then "transfer of water from a pollutant-laden water body to a pristine one is not an 'addition' of pollutants to the 'navigable waters' of the United States because the pollutants are already present in the overall single unit."[29] Third, the NPDES permitting program would be burdensome and costly if applied to water transfers.[30] Fourth, and finally, there were other alternatives, both state and federal, to regulate water transfers.[31] Thus, as the statute was ambiguous, and the "Water Transfers Rule is a reasonable construction of the Clean Water Act supported by reasoned explanation, it survives deferential review under *Chevron*, and the district court's decision must therefore be reversed."[32]

The dissent disagreed with the majority based on three grounds. At the forefront of the dissent's argument, Judge Chin argued that the Water Transfers Rule fails the first step of *Chevron*, as the statute's plain meaning of the words "navigable waters" and "addition" clearly suggest that the statute implies multiple water sources, which allows the water transfers to be classified as additions.[33] Furthermore, the dissent bolstered its statutory argument by analyzing the structure of the Act, which has specific exceptions for the NPDES program, but not water transfers, and the purpose of the Act, which is to protect waters from dangerous pollutants, and concluded that the Water Transfers Rule undermines both.[34] The dissent also argued that there is no ambiguity at step one of *Chevron* based on Second Circuit precedent, which held that the language of the Act was not ambiguous, and Supreme Court precedent, which seemingly disapproved of the unitary waters theory.[35] Finally, even assuming step one was met, the dissent argued that the agency's regulation was unreasonable based on the belief that *Chevron* deference has

28. *Id.* at 525–28; Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1227–28; *see also* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

29. *Catskill*, 846 F.3d at 533.

30. *Id.* at 529.

31. *Id.* at 530–31.

32. *Id.* at 533.

33. *Id.* at 535–37.

34. *Id.* at 537–41.

35. *Id.* at 541–46; *see also* L.A. County Flood Control Dist. v. Nat. Res. Def. Council, Inc., 133 S. Ct. 710 (2013); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001).

limits, the regulation is at odds with the purpose of the Act, and the rule will lead to absurd results.[36] Thus, at its crux, the dissenting opinion believes the Act is unambiguous and would invalidate the regulation at step one of *Chevron*.

III. IMPLICATIONS

The majority decision leaves open the possibility of potentially damaging consequences for the navigable waters of the United States. For instance, as both the majority and dissent mention, "[a]rtificial transfers of contaminated water present substantial risks to water quality, the environment, the economy, and public health."[37] These risks include, but are not limited to, endangerment to animal and plant species by introducing new pollutants into various habitats, creation of droughts in areas where water is diverted, and economic hardship for those who rely on the depleted water sources for their livelihood.[38] As a result, it is clear that environmental advocates will not be deterred from continuing to fight EPA's regulation.

However, how will the regulation be combatted? Prior to and even after this decision, many legal experts believed that there was almost a guarantee that an appeal would be sought and granted in this case.[39] Recently, the plaintiffs in the case filed a petition for rehearing en banc in the Second Circuit.[40] As the standard for granting a petition for en banc review is extremely difficult to

36. *Catskill*, 846 F.3d at 546-47.

37. *Id.* at 503, 540.

38. *See Water Transfers Between River Basins: Interbasin Transfers Threaten World's Freshwater Sources*, WORLD WILDLIFE FUND, http://wwf.panda.org/about_our_earth/about_freshwater/freshwater_problems/infrastructure/water_transfers [https://perma.cc/8AD4-V8ED] (last visited Feb. 21, 2017) (providing a non-exhaustive list of harmful effects of water transfers).

39. Patrick Parenteau & Laura Murphy, *What a Long Strange Trip It's Been: The Saga of EPA's Water Transfers Rule*, 31 NAT. RESOURCES & ENVT. 16, 19 (2016) ("Regardless of the outcome, an appeal is virtually guaranteed."); Stephen J. Humes, *Second Circuit Rules EPA's Water Transfers Rule Allowed Under Chevron*, HOLLAND & KNIGHT (Feb. 6, 2017), https://www.hklaw.com/EnergyBlog/Second-Circuit-Court-Rules-EPAs-Water-Transfers-Rule-Allowed-under-emChevronem-02-06-2017 [https://perma.cc/U2NX-L57J] ("The dispute bears the hallmark of a case bound for the U.S. Supreme Court .").

40. Juan Carlos Rodriguez, *Tribe, Enviros Seek En Banc Review of Water Transfers Ruling*, LAW360 (Mar. 6, 2017), https://www.law360.com/environmental/articles/898507/tribe-enviros-seek-en-banc-review-of-water-transfer-ruling?nl_pk=bc02860c-3aef-404f-ad35-60a010abbce7&utm_source=newsletter&utm_medium=email&utm_campaign=environmental [https://perma.cc/WA7H-BX5B].

meet[41] and the Second Circuit tends to grant rehearing more sparingly than other circuits,[42] it seems unlikely that the Second Circuit will rehear the case. Thus, if the rehearing is denied, the last resort would be to petition for a writ of certiorari to the United States Supreme Court. However, as the vacancy in the Supreme Court has yet to be filled; as the confirmation of President Trump's pick, Judge Gorsuch, is situated (as of this writing) in a contested hearing and political battle;[43] and, if the en banc rehearing in the Second Circuit is denied, as the Second Circuit's current holding solidifies the reasonableness of EPA's interpretation in two circuits, the Second and the Eleventh, an appeal to the Supreme Court has become less certain. Thus, environmental and conservation groups might have to look for protection from alternative sources. For example, the majority opinion mentions a few possibilities, such as: "nonpoint source programs; other federal statutes and regulations; . . . the Federal Energy Regulatory Commission's regulatory scheme for non-federal hydropower dams; state permitting schemes . . . ; other state authorities and laws; interstate compacts; and international treaties."[44] As a rehearing en banc and a writ of certiorari are uncertain, these other federal and state regulations and programs might need to be utilized to avoid the harms associated with water transfers.

Overall, the true effect of the Second Circuit's recent decision will depend in large part on whether the Second Circuit rehears the case; whether the Supreme Court has the opportunity to hear the case; and whether the Supreme Court obtains its ninth member. With all these factors in the balance, it might be prudent for environmental and conservation advocates to search for other

41. *See* Watson v. Geren, 587 F.3d 156, 160 (2d Cir. 2009) ("*En banc* review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice.").

42. Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, N.Y. L. J. (Aug. 23, 2016), http://www.newyorklawjournal.com/id=1202765782781?keywords=The+Rarity+of+En+Banc+Review+In+the+Second+Circuit [https://perma.cc/7WVH-QB5Q] ("Since 1979, the U.S. Court of Appeals for the Second Circuit has consistently granted fewer petitions for rehearing en banc than any other circuit court, both in absolute terms and relative to the court's caseload.").

43. Byron Tau, *Fight Over Supreme Court Pick Neil Gorsuch Set to Ramp Up: Conservative Groups Will Rally Behind the Nominee While Democrats Plot Their Opposition*, WALL STREET J. (Feb. 21, 2017), https://www.wsj.com/articles/fight-over-supreme-court-pick-neil-gorsuch-set-to-ramp-up-1487682002 [https://perma.cc/7KNS-ZBGR].

44. Catskill Mountains Chapter of Trout Unlimited v. EPA, 846 F.3d 492, 529 (2d Cir. 2017) (footnotes omitted).

solutions to protect the quality of water from pollutants passed along in water transfers.