EPA's Water Transfers Rule Resurrected, but For How Long?

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The United States Court of Appeals for the Second Circuit recently resurrected EPA?s embattled Water Transfers Rule (?WTR?) in a case particularly important to municipal water suppliers and others engaged in interbasin transfers of raw water supplies. The WTR codified EPA?s 2008 interpretation of the federal Clean Water Act (?CWA?) that mere transfers of water from one water body to another, without any intervening industrial, commercial or municipal use, do not require a NPDES discharge permit. In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* (*Catskill III*), the court reversed the ruling of a lower district court and held that the WTR warranted deference by the courts because it was a reasonable interpretation of the CWA by EPA.

Catskill III is the third in a line of cases involving the same parties and similar issues to be decided by the Second Circuit. Other federal courts, including the U.S. Supreme Court, have played key roles in reviewing related issues over the years. The fundamental question driving most of these cases is whether a water transfer should be considered a discharge of a pollutant requiring an NPDES permit. ?Discharge of a pollutant? is defined in the CWA as ?any addition of any pollutant to navigable waters from a point source.? ?Navigable waters? is defined in the CWA as ?waters of the United States.? Along with a number of states and many public water suppliers, industries, and agricultural interests, EPA has held the view that water transfers merely constitute the movement of any preexisting pollutants within waters of the United States, rather than an addition of pollutants to such regulated waters. This reflects the so-called ?unitary waters? principle of interpretation of the term ?waters of United States.? While this distinction may seem like a fine point, it has substantial implications: across the nation, thousands of such water transfers exist and many more are planned, forming the basic infrastructure of many raw water supply systems. Subjecting them to NPDES permitting could significantly change their use and operation and present new and substantial regulatory hurdles.

Catskill III involves key principles of court deference to an agency?s regulation where that regulation serves as the agency?s interpretation of a statute. These principles were established in 1984 by the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Under *Chevron?s* two-step analysis, a court must first find that the statutory language in question is either

silent or ambiguous as to the issue at hand. If so, then the court must determine whether the agency?s interpretation of the statute is reasonable. In doing so, the court examines whether there is a rational explanation and policy choice by the agency for its interpretation. The agency interpretation need not be what the court believes is the most correct or logical interpretation; the interpretation just needs to be reasonable and reasonably supported. (While sounding similar, this standard of review is different than the arbitrary and capricious standard of review under the federal Administrative Procedure Act.)

The Second Circuit found that both *Chevron* requirements were met when EPA issued the WTR, even if the WTR arguably is not completely aligned with the CWA?s primary goal of reducing pollutants in regulated waters. However, there was a spirited dissent by one of the court?s judges, and the matter is not yet completely finalized, as *Catskill III* could yet be reheard by the full panel of the Second Circuit or appealed to the U.S. Supreme Court.

The decision may have other, broader implications, as the new Trump Administration and Congress contemplate restricting federal court deference to agency interpretative rulemakings. The *Catskills III* case reminds all stakeholders that a *Chevron* deference analysis can cut both for and against the regulated community, depending on the interpretative rule issued by the agency. It seems possible that the WTR?s legal footing, as supported in the *Catskills III* case, could be undermined should legislation undo a court?s deference to agency interpretations of statutes, particularly without an amendment to the CWA to expressly secure the exclusion from NPDES permitting for water transfers. How this potential dilemma will unfold remains to be seen, but it certainly warrants continued and close observation.

Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. Environmental Protection Agency (*Catskill III*), 2017 WL 192707 (2d Cir., Jan. 18, 2017); 73 Fed. Reg. 33697 (June 13, 2008), *codified at* 40 C.F.R. § 122.3(i) (Water Transfers Rule).

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