

Water Resources

## No Discharge Permit Needed for Water Transfers: Appeals Court

### BNA Snapshot

- Second Circuit upholds 2008 EPA rule that exempts water transfers from NPDES permits
- Appeals Court rules 2-1 saying it defers to EPA interpretation of Clean Water Act
- Dissenting judge said the water transfers rule is “incompatible” with goal of Clean Water Act



By Amena H. Saiyid

Water transfers through tunnels, channels or natural stream courses to supply drinking water, irrigate fields, generate power and control floods do not require Clean Water Act discharge permits, a federal appeals court ruled Jan. 18 ( *Catskill Mountains Chapter of Trout Unlimited v. EPA* , 2d Cir., No. 14-1991, 1/18/17).

In a 2-1 decision, the U.S. Court of Appeals for the Second Circuit upheld an Environmental Protection Agency rule exempting water transfers from National Pollutant Discharge Elimination System permitting requirements. The appeals court decision overturned a district court ruling striking down the agency rule.

Appeals Court Judges Robert Sack and Susan Carney deferred to the EPA's interpretation of the Clean Water Act to exempt water transfers and agreed to reinstate the 2008 water transfers rule, saying it was a “reasonable construction of the Clean Water Act supported by a reasoned explanation.”

Judge Denny Chin dissented.

“Congress did not intend to give a pass to interbasin transfers of dirty water, and excluding such transfers from permitting requirements is incompatible with the goal of the Act to protect our waters,” Chin wrote.

### ‘Complex Statute’

In their majority opinion, Sack and Carney argued that the Clean Water Act is the most complex of statutes that requires balancing of competing goals and interests.

“Congress's overarching goal in passing the Act does not imply that the EPA could not accommodate some of the compromises and other policy concerns embedded in the statute in promulgating the Water Transfers Rule,” they wrote.

Chin disagreed, saying “the plain language and structure of the Act is unambiguous and clearly expresses Congress's intent to prohibit the transfer of polluted water from one water body to another distinct water body without a permit.”

The EPA joined New York City, Western states, Alaska and several water districts in asking the Second Circuit to review and reverse the 2014 ruling by the U.S. District Court for the Southern District of New York striking down the water transfers rule as inconsistent with the Clean Water Act.

Water transfers include routing water through tunnels, channels or natural stream courses for public water supplies, irrigation, power generation, flood control and environmental restoration.

The 2008 rule in question interpreted EPA's longstanding policy by allowing water that has been transferred from one point to

another without being subjected to intervening industrial, municipal or commercial use to be permanently exempted from the NPDES permitting requirements.

The rule was opposed by environmental, conservation and sporting organizations, including the Waterkeeper Alliance Inc. The states of Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, New York and Washington as well as the province of Manitoba also opposed the rulemaking in court.

“Extremely disappointed” is how Daniel Estrin, general counsel and legal director for Waterkeeper Alliance Inc., termed the Second Circuit's decision in a Jan. 18 e-mail to Bloomberg BNA.

“We continue to believe that the Water Transfers Rule is facially inconsistent with the Clean Water Act's pollutant discharge prohibition and its bedrock objective to ‘restore and maintain the chemical, physical, and biological integrity of the Nation's waters,’” he said.

In contrast, Timothy Bishop, a partner with Mayer Brown LLP, filed a friend of the court brief on behalf of the American Farm Bureau Federation in support of the EPA rule. He told Bloomberg BNA Jan. 18 that he was “delighted” with the result as he has been involved in litigating this rule for at least a decade.

### Next Steps

Estrin said Waterkeeper was still studying the opinion and the dissent and hadn't yet decided on next steps when asked whether the group would file a motion for a rehearing with the full court.

Bishop, however, was doubtful whether the Second Circuit would agree to rehearing because it is the “stingiest” of all federal appeals courts with “barely one case a year” getting en banc review, if that.

“Those who challenged the rule may try for en banc review, but I very much doubt that this case—in which the majority upheld an EPA rule under standard Chevron principles—is one in which it would be granted,” Bishop said.

He was referring to a 1984 decision in *Chevron U.S.A. Inc. v. NRDC* that established a two-part test for judicial review of agency actions. A court must first decide whether the plain text of the law is clear. If it is ambiguous, then the court must decide whether the agency's interpretation of the law is reasonable.

Vermont Law Professor Patrick Parenteau, who filed a friend-of-the-court brief opposing the EPA rule, said he is convinced that the EPA would lose under a Chevron Step one analysis if the court grants an en banc rehearing.

“Congress said ANY point source not any point source except those that transport polluted water from one water body to another,” Parenteau said in a Jan. 18 e-mail to Bloomberg BNA.

The 2008 rule exempting water transfers from NPDES permit requirements was prompted by disputes over transfers of phosphorus-contaminated water from canals in the Everglades into Lake Okeechobee by the South Florida Water Management District, as well as transfers within the New York City drinking water supply's Catskill/Delaware watershed and other water transfers by municipal water systems and corporations.

The Second Circuit has already ruled twice on the EPA's attempts to avoid issuing permits for water transfers, once in 2001 and again in 2006. The Supreme Court ultimately denied review in 2007.

To contact the reporter on this story: Amena H. Saiyid in Washington, D.C., at [asaiyid@bna.com](mailto:asaiyid@bna.com)

To contact the editor responsible for this story: Larry Pearl at [lpearl@bna.com](mailto:lpearl@bna.com)

### For More Information

The U.S. Court of Appeals for the Second Circuit's majority opinion in *Catskill Mountains Chapter of Trout Unlimited v. EPA* is available at <http://src.bna.com/luJ>.

The U.S. Court of Appeals for the Second Circuit's dissenting opinion is available at <http://src.bna.com/lv9>.