EASTERN WATER LAW
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SECOND CIRCUIT RULING THAT NEW YORK CITY MUST OBTAIN AN NPDES PERMIT WHEN TRANSFERRING WATER BETWEEN DISTINCT WATERBODIES APPEARS IN CONFLICT WITH EPA'S PROPOSED WATER TRANSFER RULE

Catskill Mountains Chapter of Trout Unlimited V. City of New York,
___F.3d___, Case Nos. 03-7203(L) And 03-7253(XAP) (2nd Cir. June 13, 2006).

On June 13, the United States Court of Appeals for the Second Circuit issued an opinion that is virtually certain to perpetuate the recent flurry of litigation under § 402 of the Clean Water Act (CWA). In *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, the Second Circuit affirmed its own 2001 decision by again holding that New York City must obtain a National Pollutant Discharge Elimination System (NPDES) permit when transferring water between distinct waterbodies via a tunnel to support its municipal drinking water system. The court's decision was handed down just one week after the Environmental Protection Agency (EPA) proposed a rule excluding such water-to-water transfers from NPDES permitting, thus casting doubt on the validity of the proposal. Specifically, the court discredited a 2005 EPA memorandum in which the Agency articulated its longstanding position that certain water-to-water transfers are subject only to state regulation, not NPDES permitting requirements. Because that memorandum provides the legal basis for the proposed water transfer rule, the Second Circuit's holding impugns the cogency of the proposal and sets the stage for immediate legal challenge should the proposal be promulgated into binding regulation.

Background

The *Catskill Mountains* case has a long history in the federal courts that began with Trout Unlimited's claim against New York City for failing to obtain a NPDES permit for discharges associated with maintaining the city's drinking water supplies. The city's water originates 120 miles north of the city in the Schoharie Reservoir. The water leaves the reservoir through the 18-mile long Shandaken Tunnel and then empties into Esopus Creek, a popular trout stream located in a separate drainage basin at the fringe of the Catskills. In March 2000, the United States District Court for the Northern District of New York dismissed the claim, ruling that the conveyance of water from the reservoir to Esopus Creek did not constitute an "addition" of a pollutant to the waterbody and therefore did not require a NPDES permit. However, the Second Circuit reversed. Reasoning that the reservoir water flowing from the tunnel exhibited a higher turbidity than the receiving waterbody and that the tunnel qualified as a point source, the Circuit Court found that the transfer constituted a discharge of pollutants requiring a NPDES permit. On remand, the District Court ordered the city to obtain a NPDES permit and imposed a $5.75 million civil penalty for the city's CWA violation.

In 2004, as the city pursued the NPDES permit in accordance with the district court order, the United States Supreme Court issued its opinion in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In *Miccosukee*, the Supreme Court held that intrabasin water transfers are not subject to NPDES permitting requirements because such transfers occur within the same body of water. However, due to the limited facts of the case, the Court left unresolved the issue of NPDES permit-

ting for interbasin water transfers, or transfers between distinct waterbodies. *See id.* On this basis, the city sought an appeal back to the Second Circuit.

As the city's appeal was pending before the Second Circuit, EPA endeavored to end the uncertainty clouding the permitting of interbasin water transfers in the wake of the Supreme Court's *Miccosukee* decision. In August 2005, the Agency released an Interpretive Memorandum articulating its administrative policy concerning the applicability of § 402 of the CWA to water transfers between distinct waterbodies. The 2005 memorandum set forth the Agency's longstanding position that all water-to-water transfers, whether intrabasin or interbasin, are subject only to state regulation and thus are exempt from the NPDES permitting scheme. *Id.* In addition to articulating the Agency policies on the matter, the memorandum committed to codifying this policy in a future rulemaking. The release of this memorandum, together with the *Miccosukee* decision, breathed new life into the city's appeal, as the city claimed that these new developments altered the legal landscape of CWA § 402 and compelled the Second Circuit to reconsider its 2001 ruling.

On June 7, 2006, just six days before the Second Circuit delivered its ruling on the city's appeal, EPA published the proposed water transfer rule. 71 Fed. Reg. 32887 (June 7, 2006), available at http://www.epa.gov/fedrgstr/EPA-WATER/2006/June/Day-07/w8814.htm. The newly-proposed rule is a substantively identical recitation of the Agency's 2005 memorandum in that it excludes interbasin water transfers from the federal NPDES permitting requirements provided that the transfer does not subject "the water to intervening industrial, municipal, or commercial use." As EPA explains, the exclusion would not apply to "pollutants added by the water transfer activity itself to the water being transferred," including, for example, oil leaks from pumps and other equipment used to accomplish the transfer. The Agency argues that the proposed exclusion simply preserves the Agency practice of not requiring permits for the mere passage of water through control structures such as dams, while imposing NPDES controls on activities involving water withdrawal, use, and reintroduction, as well as discharges from waste treatment systems.

Now, with the June 13th issuance of the Second Circuit's decision in *Catskill Mountains*, the validity of EPA's proposed rule is already being called into question.

The Second Circuit's Analysis

In reaffirming its 2001 holding, the Second Circuit yet again determined that New York City must obtain a NPDES permit to use the Shandaken Tunnel for transferring reservoir water to Esopus Creek. Relying on the plain language of the CWA, the court reasoned that § 402 of the statute requires a permit if such interbasin transfers cause a discharge of a pollutant from a point source. According to the court, it was undisputed that the water-to-water transfer at issue in *Catskill Mountains* constitutes an interbasin transfer between two distinct waterbodies and the water discharging from the tunnel (a point source) is a pollutant due to its higher suspended solids concentration than the receiving waters of Esopus Creek. Thus, the court held that the CWA require the city to obtain a NPDES permit.

The Second Circuit arrived at its holding after analyzing the Supreme Court's *Miccosukee* decision and EPA's 2005 Interpretive Memorandum and rejecting the notion that these recent developments had changed the legal landscape. According to the Second Circuit, neither required it to modify its 2001 *Catskill Mountains* ruling. Contrary to the assertions of the city, the court explained, *Miccosukee* does not "render inter- and intra-basin transfers indistinguishable." Indeed, although the *Miccosukee* court held that NPDES permits are not required for transfers within the same basin, the case was remanded to the district court to determine whether the contested transfer in fact occurred within a single basin or between two distinct basins. *Id.* In the Second Circuit's view, "[t]his remand would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers." *Id.* Consequently, the court found that *Miccosukee* had not affected its 2001 ruling against the city.

Nor did the Second Circuit accept the city's argument concerning the impact of EPA's 2005 memorandum. In that document, the Agency contends that an unconfined reading of the CWA warrants a "holistic" construction of the statute that recognizes a congressional intent for states to regulate interbasin water transfers. However, as the court explained, the arguments set forth in the EPA memorandum "simply overlook [the] plain language" of the CWA. The perceived legislative intent identified in EPA's memorandum cannot trump Congress' express direction in the CWA that "NPDES permits are required

for 'the discharge of any pollutant,' . . . which is defined as 'any addition of any pollutant to navigable waters from any point source.'" (quoting 33 U.S.C. §§ 1311(a), 1362(12)). Thus, the court dismissed the 2005 memorandum as unpersuasive and contrary to the plain language of the CWA. As a result, the court said it was not compelled to modify its 2001 ruling requiring an NPDES permit for the city's interbasin water-to-water transfer.

Conclusion and Implications

Although the Second Circuit did not directly address EPA's proposed water transfer rule, the court's ruling in *Catskill Mountains* casts an undeniable pall upon the proposal. By flaying the Agency's 2005 memorandum as anathema to the plain language of the CWA, the court substantially undermined the legality of the proposed rule without even acknowledging its existence. Should the proposal survive agency review without drastic revision, this backdoor coup de plume will almost certainly prove effective and condemn the new regulation to a barrage of legal challenges in federal courts nationwide. But regardless of whether the Agency eventually chooses to continue proceeding on its current path or instead to amend its proposal in light of the arguments voiced in *Catskill Mountains*, the stage has been set for a protracted round of litigation.

The fate of the proposed rule will begin to take shape on July 24 when the public comment period on the proposal closes and EPA considers how best to salvage what remains of its longstanding policy of excluding interbasin water transfers from the CWA's NPDES permitting program. (PM/RD)

LITIGANT'S FAILURE TO EXPLICITLY RAISE AN ISSUE BEFORE THE DISTRICT COURT IS FORECLOSED FROM RAISING THE ISSUE FOR THE FIRST TIME ON APPEAL

Esso Standard Oil Company v. Carlos E. Rodriguez-Perez, ___F.3d___, Case No. 05-1722 (1st Cir. June 14, 2006).

Esso Standard Oil (Esso) sued Carlos Rodriguez-Perez and other defendants under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). Defendants filed state law counterclaims. On summary judgment, the magistrate judge the parties consented to dismissed defendants' counterclaims with prejudice. While Esso's claims were still pending, the United States Supreme Court issues its ruling in *Cooper Industries, Inc. v. Aviall Services, Inc.* The magistrate judge dismissed Esso's CERCLA claim as *Cooper Industries* bars a private party who has not been sued under CERCLA §§ 106 or 107(a) to obtain contribution from other liable parties pursuant to CERCLA § 113(f)(1). Like the plaintiff in *Cooper Industries*, Esso had not been sued under either §§ 106 or 107(a) of CERCLA. Defendants then challenged the magistrate judge's dismissal of their state law counterclaims alleging that in the aftermath of *Cooper Industries* the federal court lacked subject matter jurisdiction. The First Circuit affirmed the magistrate judge's rulings.

Background

Esso sought to recover its environmental remediation costs to clean-up contamination from a former gasoline service station. Operating as a retail service station from the mid-1930s until August 1998 when it was closed, the station sold gasoline, diesel fuel, automobile parts, and motor oil. The defendants owned, managed and/or controlled the station from 1979 until its closure. There was evidence of contamination at the station from hazardous substances including lead, chromium, benzene, ethylbenzene, toluene, and xylene. During the station's operation, motor oil drained from vehicles was allowed to flow in a nearby river; oil filters were found buried in large quantities in the northern part of the station; and, gasoline and diesel fuel used to clean parts was sprayed onto the ground and into the river with a high pressure hose.