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Catskill Mountains Chapter of Trout Unlimited, Inc. v. United States Environmental Protection Agency

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***Catskill Mountains Chapter of Trout Unlimited, Inc. v. United States Environmental Protection Agency*, 846 F.3d 492 (2d Cir. 2017)**

Benjamin Almy

Trout Unlimited's effort to overturn the EPA's Water Transfers Rule was stifled by the Second Circuit. The court's comprehensive *Chevron* analysis determined that while the NPDES Water Transfers Rule may be at odds with the Clean Water Act's mission, it was based on a reasonable interpretation of the statute's ambiguous language, and therefore it did not violate the Administrative Procedures Act.

I. INTRODUCTION

According to the United States Court of Appeals for the Second Circuit, water transfers are an essential part of the United States' water-supply infrastructure, providing many of the nation's homes, farms, and factories with adequate supplies of usable water.[1] A water transfer "conveys or connects waters of the United States without subjecting those waters to any intervening industrial, municipal, or commercial use."[2] Historically, the United States Environmental Protection Agency ("EPA") adhered to an informal position that water transfers were not subject to the National Pollutant Discharge Elimination System ("NPDES") permitting program under the Clean Water Act ("CWA").[3] This position was codified in 2008 when the EPA released the NPDES Water Transfers Rule ("the Rule") which clarified that "water transfers are not subject to regulation under the NPDES permitting program."[4] The Rule states that a NPDES permit is not required if the water is being transferred from one "water of the United States" ("WOTUS") to another WOTUS because the transfer does not result in the "'addition' of a pollutant."[5] As a result, if a pollutant is present in one body of water and transferred to another, it does not equate to an "addition" because the pollutant already existed in "the waters of the United States."[6]

Catskill Mountains Chapter of Trout Unlimited, Inc. v. United States Environmental Protection Agency concerned a challenge by a coalition of environmental conservation and sporting organizations as well as several state, provincial and tribal governments (collectively "Plaintiffs") to the Rule under the Administrative Procedures Act ("APA"), as an "unreasonable interpretation" of the CWA.[7] In reviewing the United States District Court for the Southern District of New York's

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1 Catskill Mountains. Chapter. Of Trout Unlimited, Inc. v. Environmental Protection Agency, 846 F.3d 492, 500 (2d Cir. 2017).

2 *Id.* at 503 (quoting 40 C.F.R. § 122.3(i) (2017)).

3 *Id.* at 504.

4 *Id.* at 504 (quoting 73 Fed. Reg. 33,697 (June 13, 2008)).

5 *Id.* (quoting 73 Fed. Reg. 33,699).

6 *Id.* at 504-05 (quoting 73 Fed. Reg. 33,699).

7 *Id.* at 506.

decision, the Second Circuit applied the two-step *Chevron* analysis to determine the Rule's validity.[8] In reversing the decision of the district court, the Second Circuit held that the Rule was a reasonable interpretation of the CWA and was therefore entitled to *Chevron* deference.[9]

II. LEGAL BACKGROUND

Congress passed the Clean Water Act in 1972 as a response to the growing national concern about pollution in our nation's waters.[10] Congress's objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[11] The CWA prohibits "the discharge of any pollutant by any person" unless compliant under the CWA.[12] A "discharge" is defined as "any addition of any pollutant into navigable" WOTUS from any point source without a permit.[13] Section 402 of the CWA establishes the NPDES permitting program, which requires a party to obtain a permit before discharging a pollutant into a navigable WOTUS.[14]

III. FACTUAL AND PROCEDURAL HISTORY

Throughout the 1990s and 2000s, with the EPA acting under an informal position and without the authority granted to formal agency rules under *Chevron* deference, environmental groups and other interested parties won several lawsuits challenging the requirement of NPDES permits for some water transfers.[15] As a result the EPA moved to adopt a final rule regarding these water transfers.[16]

Following the EPA's codification of the Rule in 2008, several complaints were filed by conservation and sporting organizations in the United States District Court for the Southern District of New York.[17] The complaints requested that the district court set aside the Rule as arbitrary and capricious and not in accord with the CWA.[18] The district court granted the EPA's petition to stay proceedings before it pending a petition for review that was being considered by the Eleventh Circuit Court of Appeals on a similar challenge.[19] On June 4, 2009, the Eleventh Circuit upheld the Rule, determining under *Chevron* that it was based on a

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[8] *Id.* at 507 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[9] *Id*. at 506.

[10] *Id*. at 501.

[11] *Id.* at 502 (quoting 33 U.S.C. § 1251(a) (2017)).

[12] *Id*. (quoting 33 U.S.C. § 1311(a)).

[13] *Id*. (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A), 1362(7)).

[14] *Id.*

[15] *Id.* at 504.

[16] *Id.*

[17] *Id.* at 505.

[18] *Id*.

[19] *Id.* at 506.

reasonable interpretation of the CWA.[20] Following the Eleventh Circuit's ruling, the district court lifted the stay and proceeded with the case.[21] The district court, in conducting its own *Chevron* analysis, held the Rule to be an unreasonable interpretation of the CWA. Thus, the district court granted the Plaintiff's motion for summary judgement and vacated the Rule.[22]

IV. ANALYSIS

On de novo review, the Second Circuit analyzed the district court's summary judgment ruling under the APA's "arbitrary or capricious" standard.[23] The court reviewed the district court's determination that the Rule was "manifestly contrary" to the CWA, and was therefore an unreasonable interpretation of the CWA.[24] The court evaluated the Rule within the two-step *Chevron* framework.[25] The two-step *Chevron* analysis was developed to evaluate whether an agency's interpretation of a statutory provision is reasonable and not arbitrary, capricious or manifestly contrary to the statute.[26]

a. Chevron Step One

At *Chevron* Step One, a court must determine "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."[27]

However, if a statute is "silent or ambiguous" as to an issue the agency is seeking to interpret,[28] a court will then determine if the agency meets the test set forth in *Mead*.[29] To satisfy the *Mead* test, there must be both a clear congressional delegation of authority to the agency to make rules which carry the force of law, and the agency interpretation must be promulgated under that given authority.[30]

In its analysis of *Chevron* Step One, the court walked through two stages attempting to decipher Congressional intent.[31]

First, the court reviewed prior case law to determine whether Congressional intent had been discovered in prior rulings.[32] Plaintiffs

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20 *Id.* (citing Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 507.

25 *Id.*

26 *Id*. at 520-21.

27 *Id.* at 507 (quoting *Chevron*, 467 U.S. at 842-43).

28 *Id*. at 507 (quoting *Chevron*, 467 U.S. at 843).

29 United States v. Mead Corp., 533 U.S. 218 (2001).

30 *Id*. at 226-27.

31 *Trout Unlimited*, 846 F.3d at 508.

32 *Id*.

argued that the case should be settled at *Chevron* Step One because the court had previously held in *Catskill I* and *Catskill II* that no ambiguity existed in the CWA's requirement of NPDES permits for water transfers.[33] In both *Catskill I* and *Catskill II*, the issue was a transfer of turbid water, which is water carrying high levels of solids in suspension.[34] The court in both cases held that the transfer of turbid water without an NPDES permit violated the CWA because it determined that turbid water was an "addition" of a pollutant.[35] However, both cases were decided while the EPA was still operating under an informal policy, so a *Chevron* analysis was inappropriate because the EPA had not formalized or codified its position on the regulation of water transfers.[36] As a result of this informality, the court found the prior case law non-binding.[37]

Next, Plaintiffs argued that due to the court's reasoning in *Catskill I*, the term "navigable waters" unambiguously refers to a collection of individual waters and not a collective unitary entity.[38] However, here, the court held that nowhere in its previous rulings had it definitively held that the term "navigable waters" could hold only one unambiguous interpretation.[39] Further, the court held that such a determination would be in contrast to an accurate *Chevron* analysis on a formal agency interpretation.[40]

Second, the court analyzed the text, structure, and purpose of the CWA to determine whether Congress had directly spoken to whether NPDES permits are required for water transfers.[41] The court concluded that "nothing in the language or structure" of the CWA provides a clear indication as to whether Congress intended to require NPDES permits for water transfers.[42]

To conclude the first step of the *Chevron* analysis, the court looked to the CWA's statutory purpose and legislative history to try and deduce Congress's intent.[43] Plaintiffs argued that an exemption for water transfers from the NPDES permitting program could result in the transfer of water from a heavily polluted body to a unspoiled body, and such an outcome would be in direct contrast to the CWA's main objective.[44] The court disagreed, holding "Congress's broad purposes and goals in passing

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33 *Id.* at 508 (citing Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) [hereinafter *Catskill I*]; Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006) [hereinafter *Catskill II*]).

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 511.

39 *Id.*

40 *Id.*

41 *Id.* at 512.

42 *Id.* at 514.

43 *Id.*

44 *Id.*

the CWA do not alone establish that the CWA unambiguously requires that water transfers be subject to NPDES permitting."[45]

b. Chevron Step Two

At *Chevron* Step Two, a court must determine whether an agency rule is "arbitrary or capricious in substance, or manifestly contrary to the statute."[46]

In conducting its *Chevron* Step Two analysis, the court reviewed three aspects of the EPA's construal of the Rule. Ultimately, the court determined that the EPA's interpretation of the CWA was neither arbitrary nor capricious and not manifestly contrary to the statute, and was therefore reasonable.[47]

First, the court determined that *Chevron* was the correct legal standard to be applied.[48] Plaintiffs argued that the court should include the more-strict *State Farm*[49] standard into the *Chevron* Step Two analysis.[50] However, the court reasoned the *State Farm* standard was inappropriate because an agency's initial interpretation of a statutory provision should be analyzed using the *Chevron* Two Step framework.[51]

The court then evaluated the EPA's reasoning for its interpretation of the Rule.[52] The court concluded that, while the interpretation was not "immune to criticism or counterargument," it was adequately reasoned to pass *Chevron*'s low bar for agency reasoning underlying an interpretation.[53] The EPA reasoned that Congress intended to leave oversight of water transfers primarily to state authorities to avoid interference with states' ability to effectively allocate water and water rights.[54] Therefore, the court held that the EPA's interpretation was not arbitrary or capricious.[55]

Finally, the court evaluated the reasonableness of the EPA's interpretation.[56] Holding that the EPA's interpretation was reasonable, the court cited several reasons justifying their determination.[57] The court noted

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45 *Id*. at 515.

46 *Id*. at 520 (quoting Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 53 (2011)).

47 *Id*.

48 *Id.*

49 *State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decision-making process and is appropriate when an agency has changed its interpretation of a statute. *Id.* at 520 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983)).

50 *Trout Unlimited*, 846 F.3d at 521.

51 *Id*. at 523.

52 *Id.* at 524.

53 *Id.*

54 *Id*.

55 *Id*. at 525.

56 *Id.*

57 *Id.* at 525-31.

Congress's silent acquiescence to unpermitted water transfers, and interpreted its silence as a reflection of intent not to require the imposition of NPDES permitting in every possible application.[58] The court also analyzed the unitary waters theory.[59] While not overtly ascribing to the theory, the court concluded that the language of the CWA was ambiguous, and therefore the EPA's reading of "navigable waters" in § 402 was reasonable enough to be afforded deference.[60]

Shifting from its evaluation of the Rule's reasonableness to its economic impacts, the court reasoned that the existence of available regulatory alternatives provided different, yet potentially effective, options to the NPDES permitting program.[61] These state-driven alternatives would allow the goals of the CWA to be achieved outside of NPDES permitting.[62] The court concluded that while it is not up to the judiciary to determine the effectiveness of those means, their existence is sufficient to deem the EPA's interpretation of the statute reasonable.[63]

V. CONCLUSION

In applying the *Chevron* Two Step analysis, the court acknowledged the validity of the counterarguments to the Rule, but ultimately was bound to defer to agency decisionmaking so long as it was not arbitrary, capricious, or unreasonable. While the Rule may seem at odds with the overall goal of the CWA, the EPA's determination not to require NPDES permits for water transfers was not without reason, and it was therefore upheld.

Landing on the side of practicality over environmental concern, this case serves as a stark reminder that *Chevron* deference does not always tilt in favor of politically liberal positions. While often criticized by more politically conservative representatives, in practice, the deference granted is dependent upon the reasoning of the agency, whose makeup is determined by the party in the White House. The life of *Chevron* deference may be waning; however, it is likely that without *Chevron*, leaving determinations of the validity of agency interpretations of statutory provisions to judicial analysis rather than agency deference will be comparatively neutral from a political perspective.

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58 *Id*. at 525.

59 The unitary waters theory refers to *all* navigable waters as a singular whole. The word "waters" could be interpreted as several different bodies of water collectively or as a single body of water; it is the former which the unitary waters theory espouses. *Id.* at 533.

60 *Id*. at 527-28.

61 *Id.* at 529-31.

62 *Id*. at 531.

63 *Id*.