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SECOND CIRCUIT REVIEW

Expert Analysis

Recent Decision Clarifies The 'Chevron' Doctrine

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New York City lays claim to the champagne of tap water. Considered the secret behind the world's finest bagels and pizzas, New York City's water is supplied by the largest unfiltered system in the United States. This system relies almost entirely on gravity to transport water over 100 miles from the Catskill Mountains to the five boroughs. But in spite of its reputation as a natural and architectural wonder, the water system has been the subject of a series of lawsuits over the past two decades brought by environmental organizations that fear pollution in New York's waters.

The Second Circuit's recent decision in *Catskill Mountains Chapter of Trout Unlimited v. Envtl. Prot. Agency*, in a decision written by Second Circuit Judges Robert Sack, Denny Chin and Susan Carney, likely puts to rest this protracted legal battle. No. 14-1823, 2017 WL 192707 (2d Cir. Jan. 18, 2017) (*Catskill II*). It also clarifies the circuit's jurisprudence on *Chevron* deference.

Background

In industry parlance, New York's system of aqueducts and tunnels is known as a "water transfer" because it conveys waters without subjecting them to any intervening industrial use. Water transfers are used throughout the United States, especially in western states like California, where usable bodies of water can be scarce.

Since the 1970s, the EPA has taken a "hands off" approach to water transfers, declining to subject them to a permitting program under the Clean Water Act called the National Pollutant Discharge Elimination System (NPDES). The EPA maintains that imposing a permitting plan on water transfers will be costly for local communities, and that other federal and state regulatory authorities provide sufficient oversight. Critics, however, contend that water transfers require federal regulation. Like industrial methods of transporting water, water transfers can endanger local ecosystems and public health by channeling polluted waters into clean ones.

Prior Second Circuit Litigation

The Second Circuit first waded into the water transfer debate 15 years ago, in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001) (*Catskill I*). There, environmental organizations sued New York City under the Clean Water Act's citizen-suit provision. Plaintiffs claimed that because New York's water transfer did not comply with NPDES, New York City had violated the Act's prohibition on "the discharge of any pollutant by any person," notwithstanding the EPA's policy regarding the applicability of NPDES.

The case turned on the interpretation of §402 of the Clean Water Act, which defines a discharge of a pollutant 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." New York City relied on EPA opinion letters to argue that §402 should be read to treat all waters of the United States as a single unit. Under this construction, often known as the "unitary-waters" reading, water transfers do not need NPDES permits because they are merely conveyances between bodies of water within that one unit. While a water transfer may spread a pollutant, it cannot "add" a pollutant to the "waters of the United States" as a whole.

Plaintiffs advanced a different interpretation of §402, arguing that individual bodies of water within the United States should be treated as separate units. Thus, according to plaintiffs, when a water transfer connects a dirty body of water with a

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clean one, this results in an "addition"—even though the water transfer was not itself the source of the original pollutant.

The Second Circuit ruled against New York City in *Catskill I*, rejecting the EPA's unitary waters reading of §402. *Catskill I*; see also *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 451 F.3d 77 (2d Cir. 2006). The court first held that §402 was ambiguous. But though courts typically defer to an agency's interpretation of its authorizing statute, the EPA had only articulated its interpretation of the Clean Water Act in "informal policy statements." Such statements, under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), merely receive deference according to their "power to persuade," and the court did not find the EPA's statements persuasive. Yet, in a signal to the EPA, the court speculated that its decision might have gone another way. Had the EPA's position instead "been adopted in a rulemaking," a more deferential reading "might be appropriate."

'Catskill II'

In *Catskill II*, the Second Circuit reconsidered §402 of the Clean Water Act under new circumstances. Following the Second Circuit's cue, the EPA had taken steps to formalize its unitary-waters reading in an official interpretive rule excluding water transfers from NPDES permitting requirements. Environmental organizations, along with several states, brought suit once again, now challenging the EPA's water transfer policy in the form of the new rule.

This time, the Second Circuit accepted the EPA's interpretation of §402. Whereas the EPA's informal opinion letters had only qualified for mild *Skidmore* deference, its formal interpretive rule commanded weighty deference under the two-step framework for judicial review established in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under that framework, courts first determine whether a statute speaks directly to the precise question at issue. If the statute is silent or ambiguous, courts ask only if the agency's interpretation of the statute is reasonable. Here, the court found that §402 was ambiguous and that the EPA's interpretation was reasonable. While the Second Circuit panel conceded that it "might prefer an interpretation more consistent" with "the most prominent goals of the Clean Water Act," its preferences were "irrelevant" so long as the EPA's interpretation was reasonable.

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In reaching its decision, the Second Circuit reversed the district court's judgment striking down the EPA's rule. Although the district court had also found that §402 was ambiguous, the district court then incorporated into its *Chevron* analysis a more exacting standard for evaluating agency action. This stricter standard, set forth in *Motor Vehicles Manufacturer Association v. State Farm*, empowers courts to set aside agency actions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 463 U.S. 29 (1983). The Second Circuit rejected the district court's hybrid approach as a common confusion about the relationship between *State Farm* and *Chevron*. The two decisions set forth review frameworks that at times may overlap, but serve different functions. *State Farm* is used to determine whether an interpretive rule was promulgated in a procedurally defective manner. *Chevron*, by contrast, is used to evaluate whether the conclusion reached as a result of that process is reasonable. Since the present case concerned the validity of the EPA's interpretive rule—and not the EPA's rulemaking process—the court ruled that the district court should only have applied *Chevron*.

Conclusion

Fifteen years passed between the Second Circuit's decisions in *Catskill I* and *Catskill II*. In that time, the language of §402 of the Clean Water Act did not change. But as a result of *Chevron* deference, the court swallowed its misgivings about the unitary-waters theory and upheld the EPA's formal interpretive rule. By declining the district court's invitation to subject agency rulemaking to a tougher standard of review, the Second Circuit sent a clear signal that it will continue to respect agency rulemaking for the foreseeable future.