The future of *Chevron*? Second Circuit water transfer decision opens door to review

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On January 17, 2017, the Second Circuit issued its opinion in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2nd Cir. 2017), reinstating the U.S. Environmental Protection Agency's (EPA's) 2008 Water Transfer Rule (Water Transfer Rule) and also clarifying the *Chevron* doctrine. The case arose after environmental groups challenged the Water Transfer Rule as an impermissible interpretation of the Clean Water Act (CWA).

Background

Since the CWA's passage in 1972, EPA had taken the position that water transfers, defined by EPA regulations as activities that "convey[ ] or connect[ ] waters of the U.S. without subjecting the transferred water to intervening industrial, municipal, or commercial use," were exempt from National Pollutant Discharge Elimination System (NPDES) requirements; however, EPA never formalized its position. After several successful challenges to their informal position on water transfers, EPA formalized its longstanding position in 2008 by promulgating the Water Transfer Rule, specifically exempting water transfers from NPDES requirements.

District court challenge

Environmental groups promptly filed suit in 2008, challenging the Water Transfer Rule as an impermissible exemption to the CWA's prohibition against the "discharge of any pollutant" without a NPDES permit. Several states, municipalities, and agricultural groups intervened, arguing that requiring NPDES permits for water transfers essential for maintaining their water supplies would be disruptive and impose enormous costs. EPA defended its interpretation of the CWA under the "unitary-waters" theory, under which all the nation's "navigable waters" constitute a single water for purposes of the CWA's permitting requirements.

The U.S. District Court for the Southern District of New York granted summary judgment in favor of the plaintiffs, applying *Chevron's* two-step analysis. At step one of *Chevron*, the district court found that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers. At step two of its *Chevron* analysis, the district court found EPA's

Water Transfer Rule to be an unreasonable interpretation of the CWA. In doing so, the district court also applied the standard from *Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) to determine the Water Transfer Rule to be unreasonable.

A complicated relationship

On appeal, the Second Circuit addressed what it concluded to be the district court's error in incorporating the stricter *State Farm* standard in its *Chevron* step two analysis. The Second Circuit noted that much confusion exists about the relationship of *Chevron* to *State Farm*, seemingly because both standards seek to determine whether an agency action is arbitrary or capricious. The Second Circuit then proceeded to provide some clarity as to the two standards' complicated relationship.

"*State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decision making process." On the other hand, "*Chevron* is generally used to evaluate whether the conclusion reached as result of that process—an agency's interpretation of a statutory provision it administers—is reasonable."

The Second Circuit determined that the case law "to stand for the proposition that where a litigant brings both a *State Farm* challenge and a *Chevron* challenge to a rule, and the *State Farm* challenge is successful, there is no need for the reviewing court to engage in *Chevron* analysis," or, in other words, the question of reasonableness is taken off the table when an interpretative rule is promulgated in a procedurally defective manner. Additionally, the court determined that when an agency is interpreting a statutory provision for the first time, *State Farm* does not apply to a subsequent review of the agency's interpretation.

Unwise, maybe. Reasonable, yes.

Removing *State Farm* from the analysis, the court then addressed what it considered to be the singular question at issue: whether EPA's Water Transfer Rule was a reasonable interpretation of the CWA.

To start, the Second Circuit decisively affirmed the principle that while a court may find an agency's interpretation to be unwise, such a finding "emphatically does not matter," as under *Chevron* the *only* relevant question is whether the agency's interpretation is reasonable.

It's all marbles

In analyzing the reasonableness of the rule, the Second Circuit adopted the reasoning of the Eleventh Circuit in *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), in which the court employed the following analogy to illustrate the

reasonableness of the Water Transfer Rule:

> Consider the issue this way...there are two buckets, one with four marbles and another with no marbles." And suppose "there is a rule prohibiting 'any addition of any marbles to buckets by any person.' A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"?

The Second Circuit recognized that one could argue that the movement of the two marbles constitutes an addition of marbles, but also recognized that one could as easily argue that there were four marbles in buckets before and after the movement and therefore no addition occurred. In either case, the Eleventh Circuit, and by adoption the Second Circuit, found that either view was reasonable and, since EPA adopted the latter, its interpretation was reasonable and thus entitled to deference under *Chevron.*

Because the Second Circuit ultimately found EPA's interpretation of the CWA to be reasonable, it reversed the district court decision and reinstated the Water Transfers Rule, thereby allowing municipalities, states, and others to continue using water transfers without a NPDES permit.

Looking ahead

In what would be an ironic turn-of-the-tables given environmental groups' usual reliance on *Chevron*, should plaintiff environmental groups seek the Supreme Court's review of the Second Circuit's tightened reading of the doctrine, the Supreme Court may be more inclined to review the Water Transfer Rule this time around. The Supreme Court declined review of *Friends of the Everglades v. South Florida Water Management District* in 2010, which presented similar issues; but, with *Chevron* undergoing increasingly more scrutiny of late, the Second Circuit's lengthy discussion of *Chevron* may make it more attractive to the justices, particularly in light of newly confirmed Supreme Court Justice Neil Gorsuch's past concerns with *Chevron*. On April 18, 2017, the Second Circuit denied petitions filed by environmentalists and some states for *en banc* rehearing of the decision.