14-1823-cv(L)

14-1909 (CON); 14-1991 (CON); 14-1997 (CON); 14-2003 (CON)

United States Court of Appeals
for the Second Circuit

Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Deleware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., Riverkeeper, Inc., Waterkeeper Alliance, Inc., Trout Unlimited, Inc., National Wildlife Federation, Environment America, Environment New Hampshire, Environment Rhode Island, Environment Florida, State of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington,

Plaintiffs-Appellees,

(For Continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF INTERVENOR DEFENDANT-APPELLANT-CROSS-APPELLEE CITY OF NEW YORK

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January 26, 2015

(Caption Continued)

Government of the Province of Manitoba, Canada,

Consolidated Plaintiff - Appellee,

Miccosukee Tribe Of Indians Of Florida, Friends of the Everglades, Florida Wildlife Federation, SierraClub,

Intevenor Plaintiffs - Appellees,

v.

United States Environmental Protection Agency, Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendants - Appellants - Cross Appellees,

States of Colorado, State of New Mexico, State of Alaska, Arizona Department of Water Resources, State of Idaho, State of Nebraska, State of North Dakota, State of Nevada, State of Texas, State of Utah, State of Wyoming, Central Arizona Water Conservation District, Central Utah Water Conservancy District, City and County of Denver, by and through its Board of Water Commissioners, City and County of San Francisco Public Utilities Commission, City of Boulder [Colorado], City of Aurora [Colorado], El Dorado Irrigation District, Idaho Water Users Association, Imperial Irrigation District, Kane County [Utah] Water Conservancy District, Las Vegas Valley Water District, Lower Arkansas Valley Water Conservancy District, Metropolitan Water District of Southern California, National Water Resources Association, Salt Lake & Sandy [Utah] Metropolitan Water District, Salt River Project, San Diego County Water Authority, Southeastern Colorado Water Conservancy District, The City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities, Washington County [Utah] Water District, Western Urban Water Coalition, [California] State Water Contractors,
City of New York,

Intervenor Defendants - Appellants - Cross Appellees,

(For Continuation of Caption, See Next Page)

(Caption Continued)

Northern Colorado Water Conservancy District,

Intervenor Defendant,

v.

South Florida Water Management District,

Intervenor Defendant - Appellant - Cross Appellant.

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ARGUMENT

THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER, BECAUSE THE WATER TRANSFERS RULE IS A REASONABLE INTERPRETATION OF THE CLEAN WATER ACT

The City, as intervenor-defendant-appellant, submits this brief in response to the separately-filed briefs of plaintiffs and intervenor-plaintiffs—environmental organizations, recreational fishing groups, and several states and the Province of Manitoba, Canada, led by the State of New York—all of whom challenge the Water Transfers Rule.

This Court should reverse the District Court's order that denied the City's motion for summary judgment, vacated the Water Transfers Rule to the extent it found it to be inconsistent with the Clean Water Act and remanded the Rule. To avoid unnecessary repetition, we respectfully refer this Court to the comprehensive arguments we presented in our main brief (City App. Br., at pp. 34-56). We add only the following to highlight a few key points in response to the opposition briefs.

(a)

As we pointed out in our main brief (City App. Br., at pp. 18-20; 40), and as the State and Trout plaintiffs fail to understand, the United States Supreme Court in *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004), did not resolve the question of whether water transfers

require an NPDES permit and, in remanding the matter for further factual development, allowed the "unitary waters" theory, as one available interpretation of the "discharge of a pollutant" and "waters of the United States" language, to be explored on remand.

The Supreme Court specifically held that, 541 U.S. at 112:

> We find that further development of the record is necessary to resolve the dispute over the validity of the distinction between C-11 [a canal] and WCA-3 [a reservoir]. After reviewing the full record, it is possible the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit. In addition, the Government's broader 'unitary waters' argument is open to the District Court on remand.

In other words, the Supreme Court's only definitive determination was that, *if* the canal and reservoir were not meaningfully distinct water bodies, then the pump station would not need an NPDES permit. 541 U.S. at 112. That is, conversely, a permit might be required *only if* the water bodies were meaningfully distinct. However, the Court declined to determine whether a permit would necessarily be required for transfers if the water bodies were meaningfully distinct, leaving "open" the unitary waters theory to be explored on remand. *Id.*

This language is consistent with the Supreme Court's recent dicta in *L.A. County Flood Control Dist. v. NRDC, Inc.*, 133 S.Ct. 710 (2013). There, in discussing *Miccosukee*, the Supreme Court noted that the water transfer there—

polluted water transported through a pump station and then deposited into a nearby reservoir—"would count as a discharge of pollutants under the CWA *only if* the canal and the reservoir were 'meaningfully distinct water bodies.'" (emphasis added). The Supreme Court's precise choice of words in *L.A. County* —"only if"— highlighted that, in *Miccosukee*, the Court had determined that a transfer between "meaningfully distinct" water bodies was a necessary condition for the transfer being subject to the NPDES program. Under well-understood principles of logic, the phrase "only if" indisputably suggests that the "meaningfully distinct" determination is only a necessary, and not a sufficient, condition, in and of itself, for requiring an NPDES permit. *See California v. Hodari D.*, 499 U.S. 621, 627 (1991) ("only if" language states a necessary, but not a sufficient, condition); *Township of Tinicum v. United States Dept. of Transp*., 582 F.3d 482, 488-489 (3d Cir. 2009) ("only if" describes a necessary condition, which is a prerequisite, but not a sufficient condition, which is a guarantee); *Carver v. Lehman*, 558 F.3d 869, 876, n.12 (9th Cir.), *cert. denied*, 558 U.S. 973 (2009) ("[t]he distinction between 'if' and 'only if' . . . is not a mere quibble over vocabulary—it goes right to the heart of whether . . . criteria . . . are necessary or sufficient conditions. . . .").

In this regard, the State and Trout plaintiffs incorrectly interpret *L.A. County* as if the Supreme Court had suggested that a water transfer would count as a discharge of pollutants, and, thus, that a permit would be required under the

Clean Water Act, "if," rather than "only if," the canal and reservoir were meaningfully distinct (State Appellee Br., at pp. 31-32; Trout Appellee Br., at pp. 21-22). Indeed, the State plaintiffs actually misrepresent the language of *L.A. County* by substituting the word "if" for "only if" in their discussion of the decision (State Appellee Br., at p. 32). Had the Supreme Court stated "a transfer would count as a discharge of pollutants *if* the canal and reservoir were meaningful distinct," the State and Trout plaintiffs would be correct that this language would indicate the requirement of being meaningful distinct was both a necessary and sufficient condition for an NPDES permit. However, that is not what the Supreme Court said in either *Miccosukee* or *L.A. County*. The Supreme Court's choice of language is absolutely critical here. The Trout plaintiffs' misinterpretation of *L.A. County* is, therefore, the root of their misunderstanding as to why the City would cite that case as providing support for its argument (Trout Appellee Br., at p. 22, n10). *L.A. County* indeed supports the City's argument in no uncertain terms.

Contrary to the State and Trout plaintiffs, more than a determination of whether water bodies are meaningfully distinct is necessary to ascertain whether a NPDES permit is required. Once a determination is made that water bodies are meaningfully distinct, the analysis does not simply end. If it did, the Supreme Court could not have left that question unresolved in *Miccosukee*. Once again, the State and Trout plaintiffs fail to recognize that the Supreme Court has never ruled

that meaningfully distinct water bodies always require a permit but has, instead, explicitly reserved judgment on this question.

In that regard, and, as explained in our main brief (City App. Br., at pp. 43-51), EPA's determination that water transfers between meaningfully distinct water bodies do not require permits is a reasonable interpretation of the Clean Water Act's language, structure and history, just as its interpretation of the Act was found to be reasonable in the analogous "dam cases," despite the potential for negative impacts to downstream water. *See National Wildlife Fed'n. v. Consumers Power Co.*, 862 F.2d 580, 589 (6th Cir. 1988) (release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water does not constitute a "discharge of pollutants," since water at issue "never loses its status as water of the United States"); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 183 (D.C. Cir. 1982) (dam-induced water quality changes where no pollutants are physically introduced "into water from the outside world" are not "additions" requiring NPDES permits).

Unlike in the dam cases, however, in the City's example, there is no similar negative downstream effect. As we have pointed out in our main brief (City App. Br., at pp. 9-12), the Shandaken Tunnel has absolutely no negative impact on drinking water quality or the overall ecological health of the receiving

water body and, in fact, improves the receiving water's suitability as a trout habitat.

Indeed, the State classifies bodies of water in accordance with their best use and adopts and enforces water quality standards for specific water bodies based on those classifications. *See* ECL §15-0313(2); *see also* ECL §17-0301; 6 NYCRR §700 *et seq*. The Esopus Creek downstream from the Shandaken Tunnel has been designated a class A stream, the best uses of which are as a water supply for "drinking, culinary or food processing purposes, primary and secondary contact recreation, and fishing." 6 NYCRR §701.6 and §862.6, Item 555. Upstream of the Shandaken Tunnel, the waters of the Esopus Creek, prior to mixture with water from the Tunnel, have been designated a class C stream, the best use of which is fishing. *See* 6 NYCRR §701.8 and §862.6, Item 556.

Moreover, and quite significantly, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), the District Court made several key evidentiary findings highlighting the lack of any negative downstream effect. In determining the seriousness of the City's violations in operating the Shandaken Tunnel without a permit in order to assess civil penalties, the District Court found that several factors mitigated in favor of the City—the fact that "the turbidity and suspended solids which [the City] discharged through the Shandaken Tunnel were not toxic and, at least, in part, were

the result of the natural conditions of the water that flowed through the Tunnel;" that, "although there was some evidence at trial that the trout below the Shandaken Tunnel were smaller than the trout above the Shandaken Tunnel, there was no evidence of a significant decrease in the number of trout or of any trout kill as a result of the discharges;" and the fact that "there was evidence that without the discharge of the water through the Shandaken Tunnel, there would [be] less habitat for trout because of low water levels." *Id.* at 50. These evidentiary findings were left undisturbed by this Court in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 88 (2006) ("*Catskill II*"); *see also* NYSDEC, Shandaken Water Tunnel Hearing Decision on the City's Application for a SPDES Permit (July 27, 2006), *available at* http://www.dec.ny.gov/hearings/11594.html#N_2 (noting that cold water diversions through the Shandaken Tunnel are important to maintaining trout habitat in the Esopus Creek, especially during the summer when temperatures in the Creek rise and the Creek's flow, absent the Tunnel's contribution, is diminished).

There can be no question that, contrary to the State plaintiffs' contention (App. Br., at p. 30), the NPDES program does not establish an "all-encompassing" scheme to address all sources of pollution, since, as shown in *Gorsuch* and *Consumers Power*, dams can contribute pollution, and yet those intra-basin transfers do not require NPDES permits.

In sum, EPA's interpretation of the Clean Water Act as not requiring permits for inter-basin water transfers is a reasonable interpretation of the Act.

(b)

Finally, the State and Trout plaintiffs are simply wrong that the City's experience with permitting is "irrelevant" to the analysis (State Appellee Br., at p. 76, n15; Trout Appellee Br., at p. 56).

Indeed, in 2010, following the Appellate Division, Third Department's affirmance on the permit issue, the City applied for the ordered variances, but, to date, no determination has yet been made. The State plaintiffs claim that "variances are available when appropriate to control permitting costs" and that "permitting need not be unduly burdensome" (State Appellee Br., at p. 76, n15). However, the City's permit and variance application has not been acted upon by New York State—the very regulator claiming that obtaining a permit with variances is not cumbersome—for five years. The City remains in a regulatory limbo through no fault of its own.

Moreover, when and if the variances are approved, they must, under New York State law, require that "reasonable progress be made toward achieving the effluent limitation." 6 NYCRR §702.17(e)(2). However, the City's investigation has determined that only an exorbitantly expensive treatment plant would consistently achieve State turbidity standards and would otherwise not

provide any water quality benefit. *See Catskill Mountains*, 244 F. Supp. 2d at 41 (discussing testimony on potential costs of treatment plant); *see also* United States EPA, New York City Filtration Avoidance Determination, July 2007, *available at* http://www.epa.gov/region2/water/nycshed/2007finalfad.pdf (discussing the City's extensive analysis of engineering and structural alternatives for turbidity control at the Schoharie Reservoir and placing the focus of the Catskill turbidity control program on evaluation of alternatives for controlling turbidity leaving Ashokan reservoir).

The City has been unable to find a reasonable method to ensure that the diversions through the Shandaken Tunnel consistently comply with the State's water quality standard for turbidity—nor, it appears, have the State or Trout plaintiffs identified any suitable measures. As such, the Shandaken Tunnel example highlights the difficulty, and perhaps the impossibility, of effectively regulating water transfers under the NPDES program, in sharp contrast to this Court's optimistic predictions in *Catskill II* regarding the feasibility of regulating the Tunnel. In *Catskill II*, this Court previously opined that, "[b]ecause the City is investigating means of reducing the turbidity of the Tunnel's discharge pursuant to state requirements, a temporary variance might well provide the time necessary to implement any reasonable and feasible solutions to the turbidity problem." 451 F.3d at 86. However, given that only an excessively expensive treatment system

could consistently achieve State turbidity standards, variances will provide only temporary respite to the City and do not offer a "reasonable and feasible solution[]."

It bears repeating that the State has been unable to craft a permit for the Shandaken Tunnel that provides for consistent compliance with State water quality standards for turbidity while also allowing the City to effectively operate the Tunnel as part of its drinking water supply system and also providing habitat protection as required under State law. No party has ever endorsed a treatment plant nor ever proposed any other more feasible alternatives to ensure consistent compliance with State turbidity standards.

In light of the foregoing and our arguments presented in our main brief, EPA's Water Transfers Rule should be upheld as a reasonable interpretation of the Clean Water Act's permitting requirement.

CONCLUSION

THE ORDERS AND JUDGMENTS APPEALED FROM SHOULD BE REVERSED, THE COMPLAINTS DISMISSED AND THE WATER TRANSFERS RULE REINSTATED, WITH COSTS

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,316 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: New York, New York
January 26, 2015

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