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## The Water Transfers Rule Upheld

### Resources:

- [Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA \(Catskill III\)](#)
- [Federal Register Notice, June 9, 2008 for the Water Transfers Rule](#)

**Relevance:** EPA's decision and rule exempting water transfers from NPDES permit requirements was upheld by the Second Circuit Court of Appeals (the Court). The Court's decision does not preclude states from adopting their own regulations on water transfers.

**Facts:** To provide drinking water for its residents, the City of New York (City) operates Schoharie Dam and Reservoir in the Catskill Mountains. To get the water from Schoharie Dam and Reservoir to the City, water is diverted from Schoharie Reservoir through Shandaken Tunnel. Water then flows into Esopus Creek, which empties into the Ashokan Reservoir, the City's water source. Water from the Schoharie Reservoir would not flow into Ashokan Reservoir without the use of the Shandaken Tunnel.

The Catskill Mountains Chapter of Trout Unlimited, Inc. (Chapter) is a group of recreational users of Esopus Creek. In March 2000, the Chapter filed a complaint alleging that, by using the Shandaken Tunnel to transfer water from the Schoharie Reservoir to the Ashokan Reservoir, the City violated the Clean Water Act (CWA). The Chapter claimed the Shandaken Tunnel discharged pollutants as suspended solids, turbidity, and heat into Esopus Creek. These discharges, the Chapter alleged, cause Esopus Creek to violate state water quality standards for turbidity and temperature.

EPA passed the Water Transfers Rule in 2008, with litigation between the City and the Chapter still in progress. The Rule excluded water transfers from the NPDES permitting program. EPA passed the Rule because it believed Congress intended for state authorities, rather than federal, to regulate water transfers. The Rule defines a water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or

commercial use.” The Water Transfers Rule was adopted based on the unitary waters theory. Under the unitary waters theory, the CWA treats all waters of the United States as one body of water.

**Legal Issue:** Whether the Water Transfers Rule was a reasonable interpretation of the CWA by the EPA.

**Status:** On January 18, 2017 the Court held that the EPA reasonably interpreted the CWA when it exempted water transfers from the NPDES program. EPA’s interpretation was held reasonable because of its interpretation of CWA’s language, “the waters of the United States.” The Court agreed with the Eleventh Circuit’s approach in Friends of the Everglades v. South Florida Water Management District (570 F.3d 1210 (2009)), which held that a unitary waters theory interpretation of the CWA was reasonable with the following analogy:

Two buckets sit side by side, one with four marbles . . . and the other with none. [A] rule prohibit[s] . . . [the] addition of any marbles to buckets by any person. A person . . . picks up two marbles from the first bucket, and then drops them into the second bucket. . . . [While one] might argue [that an addition has occurred because] there are now two marbles in a bucket where there were none before . . . [another] might argue . . . [that] there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever the position we might take if we had to pick one side . . . we cannot say that either side is unreasonable.

(quotations omitted). Thus, the Court upheld Water Transfers Rule as a valid rule. The Court conceded that while the unitary waters theory is not the best interpretation in light of CWA's purpose, a unitary waters theory of interpretation was reasonable when balancing CWA's “welter of consistent and inconsistent goals.”