

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHIGAN COUNCIL OF TROUT
UNLIMITED, Inc. and CLEAN WATER ACTION COUNCIL OF
NORTHEASTERN WISCONSIN

Petitioners,

v.

Petition for Review
[Agency Docket No.
EPA-HQ-OW-2006-
0141]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and STEPHEN L.
JOHNSON, in his Official Capacity as
Administrator of the United States
Environmental Protection Agency,

Respondents.

_____ /

**PETITION FOR REVIEW OF A FINAL RULE OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

1. Petitioners, Michigan Council of Trout Unlimited, Inc. (MCTU) and Clean Water Action Council of Northeastern Wisconsin (Clean Water Action Council) bring this action pursuant to 33 U.S.C. § 1369(b)(1) and Rule 15 of the Federal Rules of Appellate Procedure seeking an order vacating a final rule promulgated by Respondent, United States Environmental Protection Agency (EPA).
2. The rule was promulgated pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342. The rule is entitled “National Pollutant Discharge Elimination

System (NPDES) Water Transfers Rule.” It was published in the Federal Register at 73 Fed. Reg. 33697 (June 13, 2008). For purposes of judicial review, the rule is considered issued as of 1:00 p.m. eastern daylight time on June 27, 2008. *Id.* A copy of the rule, which hereafter will be referred to as the Water Transfers Rule, is attached to this petition as Exhibit A.

3. The Water Transfers Rule purports to exempt transfers of water from one meaningfully distinct navigable water to another meaningfully distinct navigable water from the point source permitting requirements of section 402 of the Clean Water Act.

4. Several petitions challenging the Water Transfers Rule have been filed in the United States Courts of Appeals. On July 22, 2008, pursuant to 28 U.S.C. § 2112(a)(3), the United States Judicial Panel on Multidistrict Litigation entered an order consolidating the circuit court litigation in the Eleventh Circuit under the caption *Friends of the Everglades v. United States Environmental Protection Agency* (Case No. 08-13652-C) (the *Friends II* case).

5. Petitioners Clean Water Action Council and MCTU request that this petition be transferred to the Eleventh Circuit in accord with 28 U.S.C. § 2112(a)(5).

PARTIES

6. Trout Unlimited was incorporated in 1959, in Michigan, for the purpose of conserving, protecting and restoring coldwater fisheries and their watersheds.

Trout Unlimited quickly grew in popularity, size and distribution. It now comprises over 150,000 members and 450 local chapters nationwide. While Trout Unlimited has been alive in Michigan since its inception nearly 50 years ago, petitioner MCTU was formally incorporated in 1977. MCTU's principal place of business is _____. MCTU coordinates and represents 23 local chapters of Trout Unlimited and over 7,000 individuals in Michigan. MCTU advocates for the prudent management of coldwater fisheries and their watersheds. MCTU's activities include on-the-ground stream improvements, angler and steward education, research, partnerships and collaboration with other conservation groups and governmental agencies, policy development and legal action. MCTU members are greatly concerned about the quality of water in the Great Lakes basin, and are concerned about the growing number of invasive species. MCTU members reside in the Great Lakes basin, which is affected by the EPA's Water Transfers Rule, and the failure to regulate point sources of pollution to navigable waters. The quality of the waters affected by the Water Transfers Rule and EPA's failure to regulate point sources of pollution affects the health, economic, recreational and environmental interests of MCTU members. MCTU members enjoy fishing and recreating in or near waters affected by the Water Transfers Rule and EPA's failure to regulate point sources of water pollution.. The Water Transfers Rule and EPA's failure to regulate point sources is adversely affecting

and will continue to affect the health, economic, recreational, aesthetic and environmental interests of MCTU and its members.

7. Trout Unlimited and the Catskill Mountains Chapter of Trout Unlimited, Inc. have also filed a petition challenging the Water Transfers Rule. See *Catskill Mountains Chapter of Trout Unlimited, Inc. v United States Environmental Protection Agency*, Petition for Review, filed June 27, 2008 (2nd Cir). MCTU shares the concerns of these related organizations. However, MCTU also has concerns unique from those of these related organizations. Specifically, because its membership is based in the heart of the Great Lakes basin, MCTU is well-situated to represent the unique concerns, including the threat of invasive species, of those who use the waters of the Great Lakes basin.

8. Petitioner Clean Water Action Council brings this action on behalf of itself and its members. Clean Water Action Council is a Wisconsin non-profit corporation organized under the laws of the State of Wisconsin, with its principal office in Green Bay, Wisconsin. Clean Water Action Council is a membership organization with approximately 350 members in Northeastern Wisconsin. Clean Water Action Council works to protect and prevent degradation of fresh water, including Lake Michigan and the other great lakes. Clean Water Action Council members are greatly concerned about the quality of water in Lake Michigan and the other Great Lakes and growing numbers of invasive species. Clean Water

Action Council members reside near Lake Michigan, which is affected by the EPA's Water Transfers Rule, and the failure to regulate point sources of pollution to navigable waters. The quality of the waters affected by the Water Transfers Rule and EPA's failure to regulate point sources of pollution affects the health, economic, recreational and environmental interests of the Clean Water Action Council members. Clean Water Action Council members enjoy fishing, kayaking and recreating in or near waters affected by the Water Transfers Rule and EPA's failure to regulate point sources of water pollution.. The Water Transfers Rule and EPA's failure to regulate point sources is adversely affecting and will continue to affect the health, economic, recreational, aesthetic and environmental interests of the Clean Water Action Council and its members.

9. Respondent Environmental Protection Agency (EPA) is an agency of the United States with primary authority for implementing the Clean Water Act. EPA developed and promulgated the Water Transfers Rule.

10. EPA's exemption of transfers of water from one meaningfully distinct navigable water to another meaningfully distinct navigable water from the point source permitting requirements of section 402 of the Clean Water Act threatens the Great Lakes basin and the communities that depend on the waters of the Great Lakes basin.

BACKGROUND

11. The Clean Water Act was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).
12. Toward that end, the Clean Water Act requires NPDES point source permits for the “discharge of a pollutant” from a “point source” into “navigable waters.” 33 U.S.C. §§ 1311(a); 1342(a); 1362(6), (7), (12), (14).
13. A discharge of a pollutant occurs where there is “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362 (12).
14. The term “pollutant” is defined to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).
15. The term “point source” is defined to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).
16. The Water Transfers Rule exempts from the NPDES permitting requirements discharges of polluted water from one navigable water into another

navigable water when the water is not subject to intervening industrial, municipal, or commercial use.

17. The Water Transfers Rule codifies an interpretive memorandum published by EPA on August 5, 2005. Memorandum from Ann R. Klee & Benjamin H. Grumbles, EPA, “Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers” (August 5, 2005).

18. The Water Transfers Rule derives from EPA’s “holistic interpretation” of the Clean Water Act from which EPA concludes that Congress “generally intended” that water transfers be exempt from the permitting requirements of section 402. 73 Fed. Reg. at 33703. According to the EPA, water transfers do not constitute an “addition” to navigable waters. *Id.*

19. The EPA contends that any adverse impacts resulting from the exempted water transfers are solely the concern of the states, which have the authority to regulate the movement of waters within their borders. 73 Fed. Reg. at 33705.

20. EPA’s position, which was considered prior to the effective date of the final Water Transfers Rule, has been rejected by the federal courts. See *Catskill Mountains Chapter of Trout Unlimited, Inc v. City of New York (Catskill II)*, 451 F.3d 77 (2d Cir. 2006); *Friends of the Everglades, Inc v. South Florida Water Mgmt Dist*, No. 02-80309 Civ., 2006 WL 3635465 (S.D. Fl. Dec. 11, 2006). The

intent of the final Water Transfers Rule is to advance EPA's "holistic interpretation" in direct contradiction of these judicial decisions.

CLAIM I

THE WATER TRANSFERS RULE IS CONTRARY TO THE PLAIN LANGUAGE OF THE CLEAN WATER ACT

21. Petitioners incorporate by reference the allegations contained in paragraphs 1 through 18 of this petition.

22. The Water Transfers Rule is unlawful under 5 U.S.C. § 706(2) because it was promulgated in excess of statutory authority.

23. The plain language of the Clean Water Act requires NPDES permits for discharges that result in the addition of pollutants to navigable waters from any point source. 33 U.S.C. § 1362(12)(A).

24. While the term "addition" is not defined in the Clean Water Act, courts examining the issue have concluded that the term "means the introduction into navigable water from the 'outside world', with the outside world being defined as 'any place outside the particular water body to which pollutants are introduced.'" *Catskills II, supra*, 451 F.3d 81, 84; see also *Friends of the Everglades, Inc, supra*, 2006 WL 3635465 at 42. Plainly, an addition occurs when the source water for a transfer from one body of water to another contains pollutants that the receiving body of water would not contain but for the point source transfer.

25. In contradiction to the plain language of the Clean Water Act, the EPA relies on its “holistic approach” to contend that the state water management provisions of the Clean Water Act suggest that NPDES permits are not required for water transfers. 73 Fed. Reg. at 33701-33702.

26. The EPA’s contention that state water management limits application of the Clean Water Act has been expressly rejected by the United States Supreme Court. The Supreme Court has stated that the Clean Water Act’s state water management provisions “do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.” *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 720 (1994). Thus, the state water management provisions and the federal water quality controls of the Clean Water Act apply concurrently. The state water management provisions certainly do not trump the plain language of the NPDES permitting requirements.

27. EPA has also posited a “unitary waters” theory in support of the Water Transfers Rule. 73 Fed. Reg. at 33701. Under this theory, all navigable waters of the United States constitute a single water body. This interpretation fails to account for the water quality protection provisions of the Clean Water Act that focus on water bodies in an individualized manner. Accordingly, this interpretation has been properly rejected. *Catskills II, supra*, 451 F.3d 83.

28. The Water Transfers Rule also undermines the efforts many states have made in accord with the Clean Water Act to establish water quality criteria for each water body within their borders. The EPA and states (when delegated authority pursuant to the Clean Water Act) issue NPDES permits with limitations to ensure compliance with those water quality standards. To exempt water transfers from the permitting requirements would deprive states of a tool necessary to achieve water quality consistent with the established standards. Additionally, the Water Transfers Rule could unfairly deprive regulated point sources of the ability to obtain a permit because exempted discharges may have already resulted in a violation of state water quality standards, preventing the issuance of new NPDES permits pursuant to 40 C.F.R. § 122.4(i)(1).

29. Because the Water Transfers Rule clearly conflicts with Congressional intent as demonstrated by the plain language of the Clean Water Act, EPA's contrary position is entitled to no deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

CLAIM II

THE FINAL RULE IS UNLAWFUL BECAUSE IT FAILS TO TAKE INTO ACCOUNT THE HARMS POSED BY THE SPREAD OF INVASIVE SPECIES THROUGH WATER TRANSFERS

30. Petitioners incorporate by reference the allegations contained in paragraphs 1 through 27 of this petition.

31. The Water Transfers Rule is unlawful under 5 U.S.C. § 706(2) because the EPA arbitrarily and capriciously failed to analyze the actual and potential adverse impacts resulting from transfers of waters polluted with invasive species from one meaningfully distinct navigable water into another.

32. Congress recognized the potential adverse impacts that result from the introduction of invasive species when it enacted the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (“NANPCA”). 16 U.S.C. § 4701 *et seq.* Congress reauthorized this act with the National Invasive Species Act (“NISA”) in 1996.

33. Congress defined “aquatic nuisance species,” which are commonly referred to as invasive species, as “nonindigenous species that threaten the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural or recreational activities dependent on such waters.” 16 U.S.C. § 4702(1).

34. The NANPCA and the NISA, however, do not address the introduction of invasive species by pipeline or other point source transfer infrastructure.

35. The Clean Water Act, on the other hand, regulates the spread of invasive species by water transfers through the use of NPDES point source permits. The Clean Water Act requires NPDES point source permits for the “discharge of a

pollutant” from a “point source” into “navigable waters.” 33 U.S.C. §§ 1311(a); 1342(a); 1362(6), (7), (12), (14).

36. A discharge occurs where there is “any addition of a pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

37. Invasive species are “biological materials,” and therefore a “pollutant.” 33 U.S.C. § 1362(6); *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580, 583 (6th Cir. 1988); *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1021 (9th Cir. 2008).

38. Invasive species can be spread through water transfers. “The co-mingling of untreated water from one basin into another can result in the introduction of biota – the various life forms of a particular region or habitat – that may be invasive and dangerous to indigenous biota.” *Government of Province of Manitoba v. Norton*, 398 F.Supp.2d 41, 45 (D.D.C. 2005).

39. Invasive species are one of the most dangerous and destructive threats facing the Great Lakes, the world’s largest body of freshwater. The introduction of an invasive species from a polluted body of water to a body of water that did not previously contain that species poses an unacceptably high risk of economic and ecological damage. “The effect upon fish of ‘interbasin biota transfer,’ for example, can be devastating. The introduction of foreign biota can eliminate indigenous species, cause reduced growth and survival rates in indigenous species,

and change the trophic structure of fish communities.” *Norton, supra*, 398

F.Supp.2d 45.

40. The cost of invasive species to the Great Lakes region is staggering. The region is already spending millions of dollars to combat damage from invasive species, particularly zebra mussels. The Great Lakes’ utility and manufacturing industries both depend on water from the Great Lakes. These industries spend large amounts of money and time removing zebra mussels from intake and discharge pipes. The U.S. Fish and Wildlife Service estimates that these industries will need to spend five billion dollars over the next decade in response to the zebra mussel alone. Great Lakes Commission, *Great Lakes Aquatic Nuisance Species* <<http://www.glc.org/ans/>> (accessed September 17, 2008).

41. Invasive species also introduce new invasive diseases, like Viral Hemorrhagic Septicemia (“VHS”) that threaten to devastate Great Lakes fisheries. VHS was recently determined to be the cause of massive fish deaths in 2005 and 2006. VHS is known to kill over 25 species of fish. The Animal and Plant Health Inspection Service of the USDA recently recognized the harms of VHS. 73 Fed. Reg. 52173. The USDA has published an interim rule that restricts the interstate movement and importation of live fish that are susceptible to VHS. *Id.* The USDA describes VHS as a “highly contagious disease of certain fresh and

saltwater fish” that has “been responsible for several large-scale die-offs of wild fish in the Great Lakes region. *Id.*

42. VHS can easily be transmitted through water transfers. Fish urine, fish reproductive fluids, and larger fish eating smaller fish all spread the disease. In addition, the virus can survive without a host in the water for at least 14 days.

43. Courts have also recognized the harms of invasive species to the Great Lakes and other bodies of water. See *e.g.*, *Fednav v. Chester*, 505 F. Supp. 2d 381, 385 (E.D. Mich. 2007).

44. The Great Lakes are already host to 180 invasive species and a new one is introduced approximately every six months. By exempting water transfers from NPDES permitting requirements, EPA is encouraging the spread of invasive species. EPA’s adoption of the Water Transfers Rule in contravention of the plain language of the Clean Water Act and without adequate consideration of the adverse impacts of the rule is arbitrary and capricious.

PRAYER FOR RELIEF

Wherefore, Petitioners respectfully request that judgment be entered in their favor, that the Water Transfers Rule be vacated, that petitioners be awarded their reasonable litigation costs including attorney fees pursuant to 33 U.S.C. § 1369(b)(3), and that any other relief be granted that the Court deems just and proper.

RESPECTFULLY SUBMITTED this 21st day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that

Attorney

EXHIBIT A