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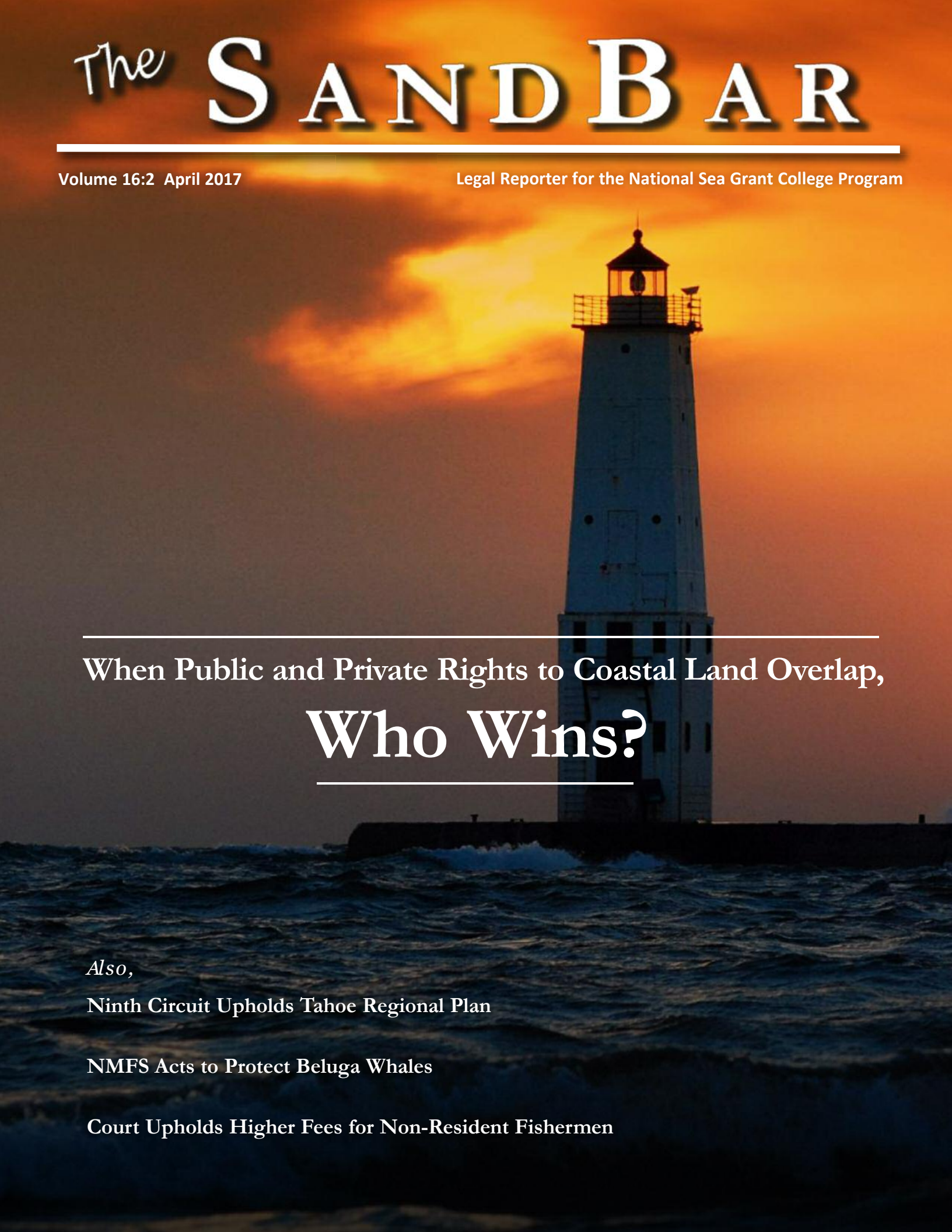

When Public and Private Rights to Coastal Land Overlap, Who Wins?

Also,

Ninth Circuit Upholds Tahoe Regional Plan

NMFS Acts to Protect Beluga Whales

Court Upholds Higher Fees for Non-Resident Fishermen

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Cover page photograph of a lighthouse on Lake Michigan courtesy of Tina Smile.

Contents page photograph of a road-view of Lake Michigan courtesy of Julie Falk.

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When Public and Private Rights to Coastal Land Overlap, Who Wins?

Victoria Taravella[1]

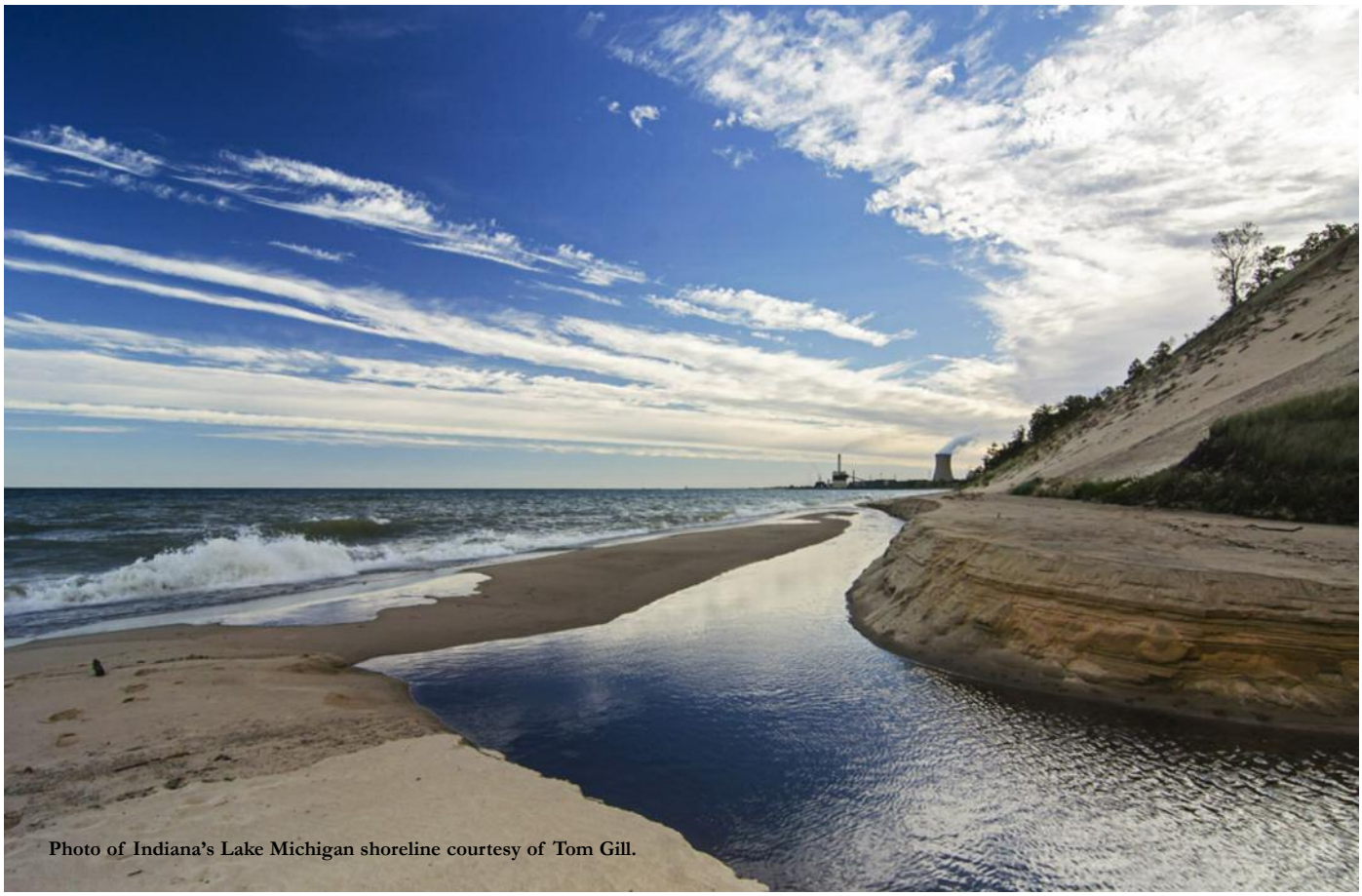


Photo of Indiana's Lake Michigan shoreline courtesy of Tom Gill.

For many years, private property owners along Indiana's Lake Michigan shoreline have tried to prohibit the public from accessing land above the waters edge.[2] In December 2016, the Indiana Court of Appeals issued a decision addressing the scope of public rights to access the Lake Michigan shoreline. The court determined that the state holds land below the ordinary high water mark (OHWM) in trust for the public. The public, therefore, has the right to access and use those lands along the Lake Michigan shoreline.

Background

The present case arose when Don and Bobbie Gunderson sought a declaratory judgment against the state of Indiana stating that their property in Long Beach, Indiana, extended to the water's edge. The Gundersons' deed referenced a 1984 survey that simply stated that the northern boundary of the property was the lake edge. Since the lake edge was the property boundary set forth in the deed, the Gundersons argued that they should have the right to exclude the public

from use of the land above the water's edge. Two groups intervened in the action on behalf of the state: the Alliance for the Great Lakes and Save the Dunes (Alliance-Dunes) and the Long Beach Community Alliance (LBCA). The trial court ruled that although the Gundersons did own the land to the water's edge, it was subject to the public trust rights to the OHWM under the public trust doctrine. The trial court also ruled that the OHWM is at a fixed elevation determined by the Indiana Department of Natural Resources (DNR).

Public Trust Doctrine

The public trust doctrine is a concept originating from Roman law and further developed in England stating that lands below navigable waters are held in trust for the public. After the American Revolution, the original 13 U.S. colonies became trustees of these navigable waters and lands within their boundaries. Under the Equal Footing Doctrine, states that later entered the union also hold the lands below navigable waters in trust for the public.[3] States have the power to determine the scope of the doctrine, and the application of the public trust doctrine has developed differently in each state.

The appellate court first looked at whether the public trust doctrine applied to Indiana's Lake Michigan shoreline. In 1995, Indiana adopted Ind. Code § 14-26-2-5, which stated that the public trust doctrine applied to land beneath the state's freshwater lakes; however, Ind. Code § 14-26-2-1 stated that the chapter did not apply to Lake Michigan. The Gundersons argued that this law was the state's codification of the public trust doctrine, and Lake Michigan was therefore excluded.

The trial court disagreed. The court concluded that the purpose of § 14-26-2 was to clarify the application of the public trust doctrine to smaller lakes in the state. The court rejected the notion that the Legislature intended to surrender the public trust property around and under Lake Michigan through its exclusion from this provision. The court did not think the state would knowingly restrict public use of Indiana's Lake Michigan shoreline. The appellate court agreed. Without express language changing the common law with respect to the public trust doctrine, the court concluded that the legislature must have simply assumed it needed no clarification.

After determining that the public trust doctrine did apply to the Lake Michigan shoreline, the court next turned to the scope of the doctrine. In reaching its decision, the court relied heavily on a Michigan case, *Glass v. Goeckel*.[4] In *Glass*, the Michigan Supreme Court stated that the public must have a right of passage over land below the OHWM in order to engage in the activities specifically protected by the public trust doctrine. It also acknowledged that the rights of the private property owner do not necessarily end where the public trust property begins. The Indiana Court of Appeals followed the Michigan Supreme Court's reasoning to hold that the land below the OHWM in Indiana is similarly open to limited public use, such as walking along the shore and gaining access to the water.[5]

The appellate court reversed the trial court's finding that the OHWM is at a fixed elevation determined by the DNR. In 1995, the DNR adopted an administrative OHWM at a fixed elevation of 581.5 feet. Alliance-Dunes argued that DNR was without authority to set the high water mark, since regulations set forth by administrative boards "must be reasonable and reasonably adapted to carry out the purpose or object for which these boards were created." The appellate court noted that an earlier court decision established that the state is without the power to add to or take away the people's right to the bed of Lake Michigan, so the OHWM established by the DNR was invalid. The appellate court reversed the fixed elevation measurement of the OHWM, reestablishing the original standard for determining the OHWM, which is established "by the fluctuations of water and indicated by physical characteristics."[6]

Conclusion

The appellate court established that the public trust doctrine applies to Indiana's Lake Michigan shoreline. The court found that the trial court had been correct about the nature of the public trust doctrine and the public's allowed land use. They court reversed the measurement for the OHWM and set it back to the common law standard while clarifying that the private landowner and public trust property rights can overlap. This has firmly established the rights of the public to walk along the shoreline of Lake Michigan no matter where the private property owner's land may end. The land up to the OHWM is reserved for the public's use and enjoyment.

Endnotes

1 2018 J.D. Candidate, University of Mississippi School of Law.

2 Gunderson v. State, 67 N.E.3d 1050, 1051 (Ind. Ct. App. 2016).

3 Shively v. Bowlby, 152 U.S. 1 (1894).

4 Glass v. Gloeckel, 703 N.W.2d 58 (2005).

5 Potts v. Review Bd. of Indiana Emp't Sec. Div., 438 N.E.2d 1012, 1015 (Ind. Ct. App. 1982).

6 312 IND. ADMIN. CODE r. 1-1-26.

Ninth Circuit Upholds Tahoe Regional Plan

Morgan L. Stringer[1]

Photo of Lake Tahoe courtesy of Pam Falcioni.

Last fall, the U.S. Court of Appeals for the Ninth Circuit affirmed the Tahoe Regional Planning Agency's 2012 Regional Plan Update (RPU) for the Lake Tahoe region.[2] One component of the plan concentrates development in already densely developed areas of the Tahoe Basin, while allowing other currently developed areas to return to open space. The goal of the plan is to control development and reduce the amount of runoff into Lake Tahoe. While many supported the plan, an environmental group and homeowners' group objected, fearing that the RPU did not adequately address the localized effects of the runoff created by the areas of intense development.

Background

In 1968, California and Nevada, where Lake Tahoe is located, entered into the Lake Tahoe Regional Compact (Compact) to address environmental concerns in the region. This Compact created the Tahoe Regional Planning Agency (TRPA), whose duties include creating and implementing Regional Plans for environmental resources and development. The first regional plan was adopted in 1984, but due to litigation between TRPA and the State of California, the plan was updated and reissued in 1987. The goal of the 2012 RPU is to adequately solve problems that were not addressed by the 1987 Regional Plan.

Development that had occurred in the Tahoe region prior to 1987 continued to cause environmental problems. TRPA sought to address these issues through the 2012 RPU, which took nearly ten years to finalize. The RPU seeks to focus redevelopment in "community centers" through more localized "Area Plans," implemented by either TRPA or local governments to "raise density, height, and coverage limits in community centers."[3] These Area Plans have to conform to the RPU and the RPU maintained existing restrictions for development on vacant lands.

From April to June, 2012, TRPA opened the RPU and the corresponding Environmental Impact Statement (EIS) to the public for comment. The California Attorney General submitted concerns about the plan, as did the Sierra Club and Friends of the West Shore. Following the comment period, TRPA concluded that overall the EIS was sufficient but needed to be updated in response to several comments.[4] The final RPU took effect on February 9, 2013.

The Sierra Club and Friends of the West Shore sued TRPA two days later. The groups alleged that the RPU and the corresponding EIS failed to adequately assess environmental impacts of the RPU on water quality, soil conservation, and biological resources in concentrated areas of development. The plaintiffs also claimed that TRPA improperly relied on Best Management Practices (BMPs) to implement the RPU due to TRPA's "bad track record" of implementing and maintaining BMPs. The district court granted summary judgment in favor of TRPA, and the plaintiffs appealed.

Localized Effects

The plaintiffs claimed that TRPA's EIS violated the law, because it failed to sufficiently examine the water quality, soil conservation, and biological resources that would be impacted by the RPU. They argued that the EIS addressed only general region-wide impacts of coverage changes and failed to examine concentrated effects on local watersheds and community centers with existing high coverage. This violated TRPA's legal duty to adequately address significant environmental concerns, according to the plaintiffs.

TRPA responded that the region-wide analysis was sufficient, and the more localized requirement proposed by the plaintiffs would force TRPA to "speculate where specific future projects would be proposed and where coverage would be removed."[5] Rather, the RPU calls for more localized analysis on environmental impact under the Area Plan process before development occurs. Furthermore, the final EIS included a PLRM (Pollutant Load Reduction Model). The PLRM utilized a multitude of data to study the possible effects that pollutant loading changes could have on community centers' water quality and addressed soil conservation. The final EIS concluded that implementation of the RPU would not result in more concentrated runoff. The EIS also concluded that biological resources would be improved by the RPU.

THE PLAINTIFFS CLAIMED THAT TRPA'S EIS VIOLATED THE LAW, BECAUSE IT FAILED TO SUFFICIENTLY EXAMINE THE WATER QUALITY, SOIL CONSERVATION, AND BIOLOGICAL RESOURCES THAT WOULD BE IMPACTED BY THE RPU.

The Ninth Circuit found that TRPA was not required to conduct more localized studies on soil conservation. Additionally, the court determined that TRPA acted within its discretion to use its choice of scientific methods for the EIS, so the studies were adequate in addressing significant environmental concerns. Therefore, the appellate court held that TRPA acted within its discretion in addressing issues regarding the effects of concentrating development in community centers. The court concluded that the EIS was not arbitrary or capricious and TRPA did not fail to adequately address significant environmental concerns.

Best Management Practices

The plaintiffs' second claim alleged that the EIS improperly relied on Best Management Practices (BMPs) to reduce the impacts of concentrated development to water quality. The plaintiffs based this reasoning on TRPA's "poor track record of enforcing BMPs."[6] TRPA argued that the EIS properly relied on BMPs because it outlined vast improvements and implementations to ensure the BMPs' future success. For instance, the final EIS cited to a 2012 Handbook and a contractor's manual that included curriculum for an annual BMP contractors workshop conducted by TRPA. This Handbook acknowledged past failures to implement and maintain BMPs and addressed those failures through new guidelines. Furthermore, the final EIS listed grants TRPA received and pending grants for BMP instruction and maintenance. Additionally, transfer from the past retrofit program into the mandatory permitting program for new development required BMP maintenance and logs under the incentives to transfer development.

Photo of Lake Tahoe courtesy of Dawn Hopkins.

Therefore, the appellate court held that TRPA reasonably relied on data from the record to conclude that, despite past failures to implement and maintain BMPs, this updated plan would have less than significant impact on water quality. The court held that since TRPA provided substantial assurance on future enforcement of BMPs, then TRPA's reliance on BMPs was valid and entitled to deference.

Conclusion

Strong enforcement and proper implementation are necessary for the Regional Plan's success, according to Darcie Goodman Collins, executive director for the League to Save Lake Tahoe.[7] Strong enforcement and proper implementation are not the only factors that determine the RPU's success. The RPU "is based on sound science, planning, and analysis.[8] The RPU addresses current issues with sound policy, but the Regional Plan can also be constantly updated. These updates will be able to address emerging environmental issues and new developments in science.[9]

This adaptability will enable TRPA to solve issues affecting Lake Tahoe's water quality more efficiently. Constant updates will help avoid the issues that faced the implementation of the RPU. Rather than developing a plan over more than a decade, changes can be added over time as they become necessary. This will allow for quick implementation and improvements to Lake Tahoe's water quality. Updating the Regional Plan constantly in accordance with new science will also enable TRPA to use the most efficient methodology for improving water quality. The combination of a sound plan, strong enforcement, and adaptability are the keys to ensuring TRPA's success.

Endnotes

[1] 2018 J.D. candidate, University of Mississippi School of Law.

[2] Sierra Club v. Tahoe Reg'l Planning Agency, 840 F.3d 1106 (9th Cir. 2016).

[3] *Id.*

[4] *Id.* at 1113.

[5] *Id.*

[6] *Id.* at 1117.

[7] Sierra Sun, *Appeals Court Upholds Lake Tahoe Regional Plan Update*, (Nov. 2, 2016).

[8] *Id.*

[9] Kathryn Reed, *TRPA Wins Court Challenge Over Regional Plan*, Lake Tahoe News (Nov. 2, 2016).

NMFS Acts to Protect Beluga Whales

Ashley Stilson[1]

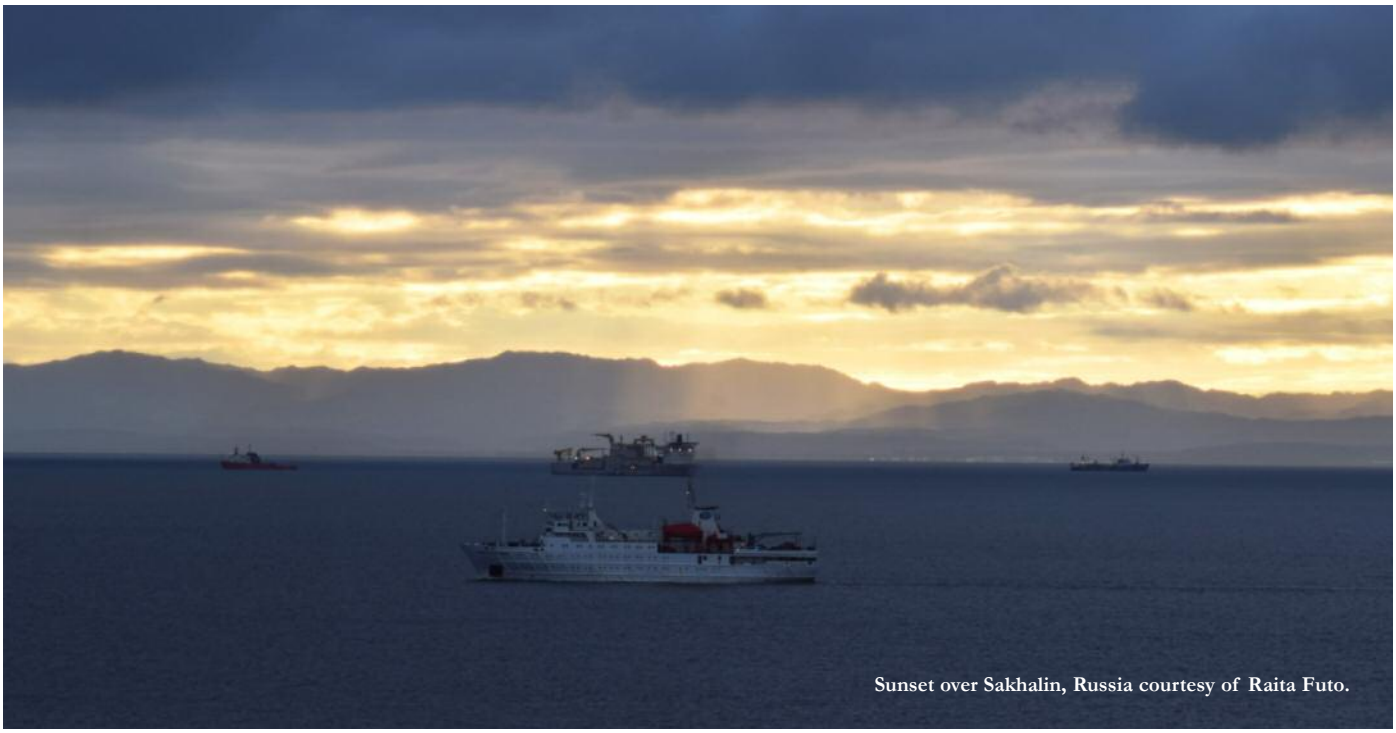
Beluga whale at the Georgia Aquarium courtesy of Mike Johnston.

Traditionally, the main threat to beluga whales was human harvesting for food and leather.[2] Today, however, belugas face a wide range of threats, including live capture for public display, subsistence hunting, noise pollution, oil spills, and habitat loss. The populations of some beluga stocks are declining as a result. The National Marine Fisheries Service (NMFS) recently took several actions to protect stocks and address population declines. In late 2016, the agency designated the Sakhalin Bay-Nikolaya Bay-Amur River beluga whales as depleted under the Marine Mammal Protection Act (MMPA). And, earlier this year, NMFS issued the Final Recovery Plan for the Cook Inlet beluga whales under the Endangered Species Act (ESA).

Protecting Sakhalin Bay-Nikolaya Bay-Amur River Beluga Whales

In 2012, NMFS denied the Georgia Aquarium's permit application to import eighteen Russian Sakhalin Bay-Nikolaya Bay-Amur River beluga whales. In 2015, a U.S. district court upheld NMFS' denial, finding that the permit would not be consistent with the MMPA.[3] NMFS then took an additional step to protect the species, proposing a rule to designate the whales as depleted.

Under the MMPA, it is unlawful to import a marine mammal from a depleted population stock into the United States.[4] A population stock is "a group of marine mammals of the same species … in a common spatial arrangement, that interbreed when mature."[5] Using genetic



Sunset over Sakhalin, Russia courtesy of Raita Futo.

comparisons, movement data, and geographical and ecological separation, NMFS determined that the Sakhalin Bay-Amur River beluga whales are a population stock.[6] Evidence is divided on whether the Nikolaya Bay beluga group is independent from other beluga populations. NMFS, taking a conservative approach, decided to include the Nikolaya Bay group as part of the Sakhalin Bay-Amur River population stock.[7]

A "depleted" population stock under the MMPA and its implementing regulations is a population below an ecosystem's largest supportable population, taking into account a habitat's carrying capacity and ecosystem health.[8] Using the best available Sakhalin Bay-Nikolaya Bay-Amur River stock abundance estimates, NMFS determined the population stock is between 25.5% and 35% of the ecosystem's carrying capacity and thus depleted.[9] While Sakhalin Bay-Nikolaya Bay-Amur River beluga whales are only found in Russian waters, NMFS designated the group as a depleted stock under the MMPA, providing the stock with import protection.[10]

Protecting Cook Inlet Beluga Whales

In the mid-1990s, the Cook Inlet beluga population declined nearly 50% to only 347 individuals due to substantial unregulated subsistence hunting. In October 2008, NMFS listed the Cook Inlet beluga whales as an endangered species under the ESA. The ESA requires NMFS to develop and implement a recovery plan for endangered species. In early 2017, NMFS issued the Final Recovery Plan for Cook Inlet beluga whales.[11]

Because the Cook Inlet beluga population is still declining, the Final Recovery Plan's strategy focuses on threats of high relative concern (catastrophic events, noise, cumulative impacts) and medium relative concern (disease agents, habitat loss or degradation, prey reduction, unauthorized impacts). The Plan identifies threat management actions, including: assessing whether a threat is limiting beluga recovery, improving understanding and ability to manage threats, and eliminating or mitigating threats. Additionally, the plan includes criteria, which will hopefully lead to reclassifying Cook Inlet belugas from endangered to threatened, and ultimately, to delisting.

Endnotes

1 2017 J.D. Candidate, Elisabeth Haub School of Law at Pace University.

2 *Beluga Whale (Delphinapterus leucas)* (Jan. 5, 2017), Nat'l Marine Fisheries Serv.

3 Ga. Aquarium, Inc. v. Pritzker, 2015 WL 5730661 (N.D. Ga. Sept. 28, 2015).

4 16 U.S.C. § 1372(b)(3).

5 *Id.* § 13762(11).

6 Designating the Sakhalin Bay-Nikolaya Bay-Amur River Stock of Beluga Whales as a Depleted Stock, 81 Fed. Reg. 74,711, 74,712 (Oct. 27, 2016) [hereinafter Depleted Stock Designation].

7 *Id.* at 74,713.

8 16 U.S.C. § 1362(1)(A), (9); 50 C.F.R. § 216.3.

9 Depleted Stock Designation, *supra* note 6, at 74,713.

10 *Id.* at 74,711.

11 Nat'l Marine Fisheries Serv., *Final Recovery Plan for the Cook Inlet Beluga Whale* (Jan. 5, 2017); 16 U.S.C. § 1533(f).

Court Upholds Higher Fees for Non-Resident Fishermen

Kimberly Russell[1]

Captured dungeness crabs courtesy of the California Department of Fish and Wildlife.

In 2011, a group of non-resident commercial fishermen sued the California Department of Fish and Wildlife (CDFW). The fishermen claimed the CDFW's practice of charging higher fees for non-resident commercial fishing permits, registrations, and licenses discriminated against out-of-state citizens and violated the U.S. Constitution. A federal district court and a three-judge panel of the Ninth Circuit Court of Appeals agreed with the fishermen. Their litigation success was short-lived, however. Following a rehearing en banc (i.e., by the full circuit of judges), the Ninth Circuit held that California's price differential between resident and non-resident commercial fishing licenses was constitutional.

Background

All commercial fishermen operating in California waters must obtain multiple licenses and permits before they can fish and sell their catch. In 1986, California began charging nonresident commercial fishermen higher fees for certain licenses than resident commercial fishermen. By 2010, California imposed higher nonresidential fees for: commercial fishing vessel registration, commercial fishing licenses, Dungeness crab vessel permits, and herring gill net permits. That same fiscal year, CDFW's expenses for its commercial fishing programs exceeded the revenue generated from licensing and permitting fees by approximately $14 million. California's general tax revenues covered the shortfall.

In their lawsuit, the nonresident commercial fishermen alleged that the fee differentials violated three provisions of the U.S. Constitution: the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause. The district court ruled in favor of the nonresident commercial fishermen, finding that the CDFW failed to show that the differential fees were closely related to a substantial state interest.[2] The CDFW appealed. On appeal, a divided three-judge panel of the Ninth Circuit affirmed.[3] The Ninth Circuit Court of Appeals granted a rehearing en banc.

Privileges and Immunities Clause

The Privileges and Immunities Clause of the U.S. Constitution states, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[4] The clause protects U.S. citizens from discrimination in states in which they do not reside. Its primary purpose is to inspire a sense of unity across the nation despite each state's independence and sovereignty.[5]

Courts use a two-step test to evaluate whether a state law violates the Privileges and Immunities Clause. First, the court must determine whether the challenged law "falls within the purview" of the Clause. To do so, a state law must treat out-of-state residents differently than in-state residents and infringe upon a "fundamental" privilege or immunity protected by the Clause. The Ninth Circuit determined that CDFW's commercial fishing licenses fees meet the first prong of the test. First, the law clearly treats out-of-state residents differently than in-state residents by charging different fees for the same licenses. Further, because the law impacts commercial fishing, it implicates the right to earn a living – a fundamental privilege protected by the clause.

As to the second step, the court examines whether the challenged law is "closely related to the advancement of a substantial state interest." The CDFW argued that the fee differential was closely related to the state's interest in requiring nonresidents to pay their share of the costs of enforcing, managing, and conserving its fisheries.[6] The court found that the argument failed, because resident and nonresident commercial fishermen were not treated equally. "[F]rom a comparative perspective, non-resident commercial fishermen pay more than double of what their resident competitors pay toward covering their share of the shortfall in the state's investment."[7]

The full panel of the Ninth Circuit disagreed. The court found that the fee differential is permissible under the clause, because it is closely related to a substantial state interest of recovering the state's expenditures in managing its commercial fishery. In reaching this conclusion, the court relied on U.S. Supreme Court precedent upholding the imposition of higher fees on nonresidents under the Privileges and Immunities Clause when such fees are designed to recover expenditures for enforcement and conservation measures made on behalf of nonresidents.[8] In this case, the Ninth Circuit determined that the nonresident fishermen actually paid less than their proportionate share of the benefit provided by CDFW with respect to management of the commercial fisheries in the state.

Equal Protection Clause

The Equal Protection Clause provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[9] Courts must give a higher level of scrutiny to laws that classify groups of people based on race, gender, national origin, or if the laws impinge on a "fundamental right."

Since the fishermen were not a protected class and the law did not affect a fundamental right, the court used a "rational basis" standard to review whether the law violated the Equal Protection Clause. Under this standard, a plaintiff must prove that there is no basis that might support treating one group differently from another. As with the Privileges and Immunities Clause, the Ninth Circuit decided that California's interest in receiving compensation for the benefits it provided to nonresidents met the "rational basis" standard.

Conclusion

The Ninth Circuit concluded that CDFW's differential pricing scheme did not violate the constitutional rights of nonresident commercial fishermen. In a dissenting opinion, two justices disagreed with the majority opinion. The dissent argued that many nonresident fishermen paid California various taxes, including state income taxes; therefore, these residents already helped cover the shortfall and should not be charged a higher rate. According to the dissent, "California, like the majority, overlooks how nonresident taxes defray the costs of any subsidy for conservation, and thereby fails to meet its burden to show its discrimination is "closely drawn" to the achievement of a substantial state objective."[10]

Endnotes

1 2019 J.D. candidate, University of Mississippi School of Law.

2 Marilley v. Bonham, 844 F.3d 841 (9th Cir. 2016).

3 Marilley v. Bonham, 802 F.3d 958 (9th Cir. 2015).

4 U.S. Const. Art. IV, § 2, Cl. 1.

5 *Id.*

6 Marilley v. Bonham, 2013 WL 5745342 (N.D. Cal. Oct. 16, 2013).

7 *Id.* at *14.

8 Toomer v. Witsell, 344 U.S. 385 (1948); Mullaney v. Anderson, 342 U.S. 415 (1952).

9 U.S. Const. amend. XIV, § 1.

10 *Marilley*, 844 F.3d at 855.

The Second Circuit's Water Transfers Ruling: Victory for New York City's Drinking Water Provider or a Threat to the Nation's Water Quality?

Catherine Janasie[1]

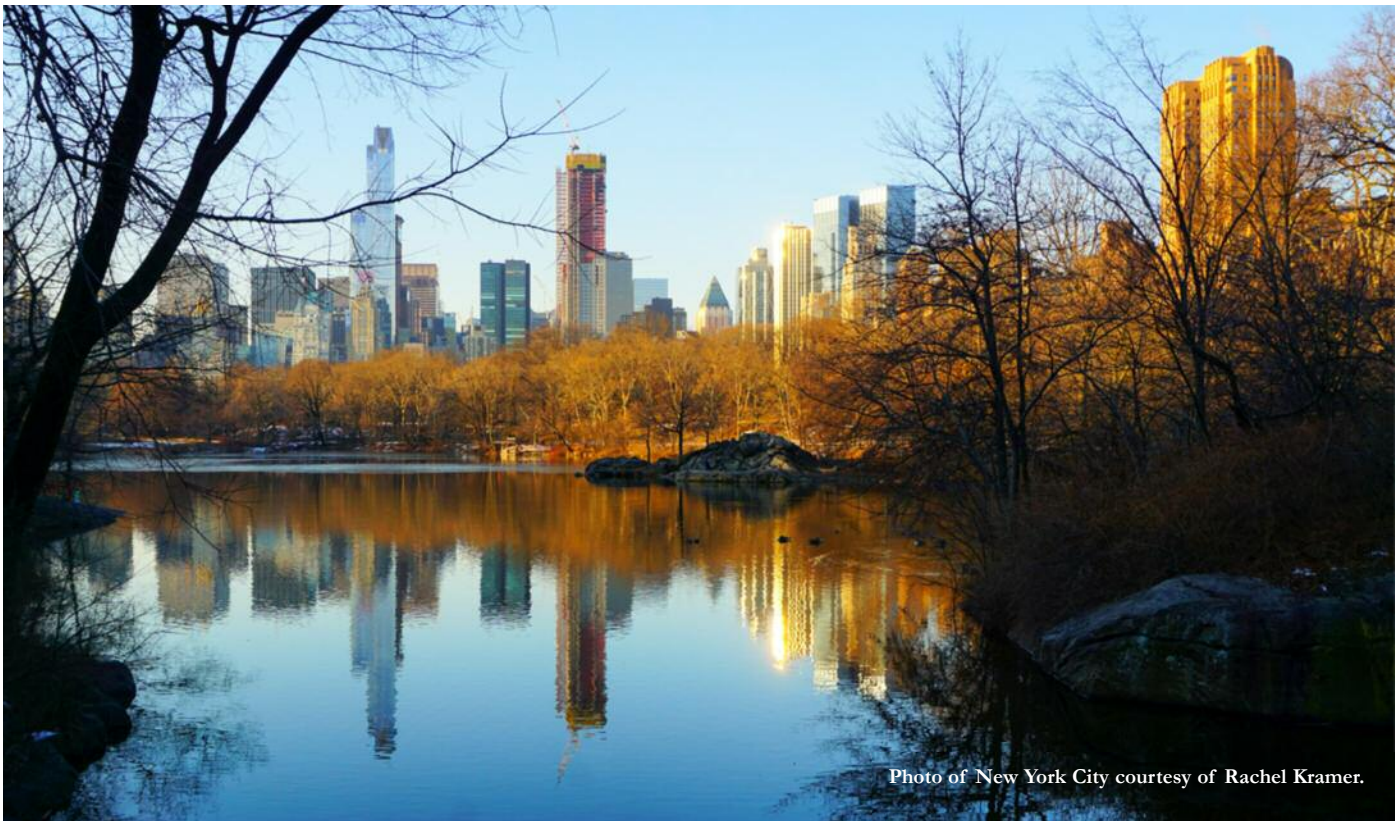


Photo of New York City courtesy of Rachel Kramer.

New York City's water supply has been called "the champagne of drinking water." As the United States' biggest unfiltered water supply, the City's tap water is often credited for New York's delicious bagels and pizza crust (it's because the water is low in calcium, which has a bitter taste). What many do not know, and what many of the City's residents take for granted, is that over 90% of the tap water used comes from watersheds north of the City, some about 125 miles away.[2] It can take anywhere from a few months to a year for water to get from its source to New York City's taps.[3]

The water makes it to a resident's tap by traveling through an engineering marvel of various reservoirs, creeks, tunnels, and aqueducts.[4] The system supplies over 1.2 billion gallons of water to 9 million customers.[5] As the City moves the water from water body to water body, a legal question arises of whether these transfers are covered by the Clean Water Act. The U.S. Court of Appeals for the Second Circuit recently ruled in a case that impacts not only the movement of water in New York City's water supply, but other transfers of water in the region as well.

Photo of the Schoharie Reservoir in Conesville, New York courtesy of Mitchell Joyce.

The Clean Water Act

Under the Clean Water Act, a party cannot discharge a pollutant into the nation's navigable waters without obtaining a permit. The National Pollutant Discharge Elimination System (NPDES) permit program allows parties who have obtained permits to discharge pollutants from point sources, which are discrete conveyances like pipes, ditches or tunnels, into navigable waters, also called "waters of the United States." Thus, under the Act's terms, a NPDES permit is required if a party's discharge will result in "any addition of a pollutant to navigable waters."[6] What type of activities actually fit within this phrase has troubled parties and courts since the passing of the Act.

As stated above, as New York City's drinking water supply makes its way to the City's taps, it moves between reservoirs and creeks through tunnels and aqueducts. For instance, at one point water goes from the Schoharie Reservoir, which contains pollutants like sediment, through the Shandaken Tunnel into the less polluted Esopus Creek. Does this movement of water from waterbody to waterbody count as an addition of a pollutant to navigable waters, and thus, require a NPDES permit? The U.S. Environmental Protection Agency (EPA), the agency charged with implementing the Clean Water Act, has issued the Water Transfers Rule, which does not require a NPDES permit in these situations. However, this Rule has been the basis of a recent challenge in the Second Circuit.

The Water Transfers Rule

The EPA issued the Water Transfers Rule to exempt from the NDPES permitting program what are known as water transfers. The EPA has defined 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."[7] The movement of water from the reservoirs north of the City to New York's taps fit within the definition of "water transfers" under the EPA's regulation.

EPA justifies the exemption based on the agency's unitary waters theory. Under this theory, the EPA views the nation's navigable waters as one singular whole, not as individual navigable waterways. Therefore, once a pollutant is in one of the nation's navigable waterways, simply moving that water to another navigable water without any "intervening industrial, municipal, or commercial use" does not result in the addition of a pollutant because the pollutant was already present in the nation's navigable waters. A NPDES permit is not required.[8]

While helpful to New York City's movement of drinking water, the Water Transfers Rule has the potential to allow water to be moved from a very polluted waterway to one that is less polluted, thus degrading the latter's water quality. Opponents to the Rule argue that each navigable waterway should be treated separately, and that the EPA's interpretation

frustrates the Act's purpose to protect and restore the quality of the nation's navigable waters. Those opponents believe that "water transfers can move harmful pollutants from one body of water to another, potentially putting local ecosystems, economies, and public health at risk."[9]

Proponents of the Rule point to the innumerable water transfers that occur in the United States every day, and thus, argue that the Water Transfers Rule is necessary. For instance, drinking water suppliers and agricultural users throughout the country rely on water transfers heavily as they move water to meet their needs. Those proponents argue that obtaining a NPDES permit would be burdensome and not required by the Act.[10]

Second Circuit Ruling

When statutes contain ambiguous language, the agencies charged with implementing the law get deference in how they interpret it. How much deference the agency receives depends on the manner in which the agency has expressed its interpretation. If the agency adopts a formal regulation, the regulation receives a higher form of deference known as *Chevron* deference. Under *Chevron*, a court will first determine whether a statute contains ambiguous terms. If the court believes the statute's terms are not clear, making them susceptible to more than one interpretation, an agency's interpretation of those terms in a regulation will be upheld if it is a permissible interpretation. Thus, the agency does not have to choose the best interpretation, only one that is reasonable.[11]

Since the Water Transfers Rule is the EPA's attempt to interpret the terms of the Clean Water Act in a regulation, *Chevron* deference applied in this case. Thus, the Second Circuit first determined that what constitutes an addition of a pollutant to navigable waters was ambiguous under the Act. Since the court found the terms to be subject to more to one interpretation, it next considered whether the EPA's interpretation of the terms was reasonable. The Second Circuit found that the EPA had "provided a sufficiently reasoned explanation for its interpretation of the Clean Water Act in the Water Transfer Rule."[12] The court reiterated that the EPA's interpretation of the Act did not have to be the best interpretation, but only reasonable, a standard that the court believed the EPA met. In deferring to the agency, the court stated that "in light of the potentially serious and disruptive practical consequences of requiring NPDES permits for water transfers," the agency was in a better position to make the tough policy choice of what was covered by the Act.[13]

Since the Water Transfers Rule is the EPA's attempt to interpret the terms of the Clean Water Act in a regulation, Chevron deference applied to this case.

Looking Forward

The Second Circuit's decision only applies to water transfers in New York, Connecticut and Vermont, not water transfers throughout the country, and in early March, multiple parties petitioned the Second Circuit to review *en banc* the 3-judge panel's 2-1 decision upholding the rule. For now, drinking water suppliers who rely on the NPDES permit exemption in the region can continue to do so. As the Rule's opponents point out, though, the Rule also has the potential to move water from a polluted waterway to a pristine, or at least lesser polluted, one. It seems as though drinking water suppliers and agricultural interests have won this battle for the time being, as least in the Second Circuit.

Endnotes

1 Senior Research Counsel, National Sea Grant Law Center.

2 *Drinking Water*, NYC Environmental Protection.

3 Emily S. Rueb, *How New York Gets Its Water*, N.Y. Times, Mar. 30, 2016.

4 Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. Envtl. Prot. Agency, 846 F.3d 492, 499 (2d Cir. 2017).

5 *Facts About the NYC Watershed,* New York Department of Environmental Conservation.

6 33 U.S.C. § 1362(7).

7 National Pollution Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)).

8 Catskill Mountains Chapter of Trout Unlimited, Inc., 846 F.3d 492 at 505 (*quoting* National Pollution Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. at 33,701).

9 *Id.* at 500.

10 *Id.* at 500-01.

11 *Id.* at 507.

12 *Id.* at 524-25.

13 *Id.* at 533.

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