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With over 20 attorneys in Alabama, Florida, Georgia and Mississippi focused exclusively on environmental law, and another dozen extensively engaged in environmental litigation, the [Environmental and Natural Resources Section](#) of **BALCH & BINGHAM** is one of the largest environmental practice groups in the country.

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## Federal Court Invalidates EPA's Clean Water Act Water Transfers Rule

On March 28, 2014, the United States District Court for the Southern District of New York (SDNY) vacated the Environmental Protection Agency's (EPA's) 2008 Water Transfers Rule (the "Rule") in a challenge by environmental groups Catskills Chapter of Trout Unlimited and a coalition of conservation groups. If left to stand, vacation of the water transfer rule will affect thousands of water supply projects. A "water transfer" conveys or connects water without intervening industrial, municipal, or commercial use and includes features which either pump or passively direct water for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. The SDNY decision would require these facilities to obtain Clean Water Act permits, associated application of water quality standards, antidegradation, and other measures intended for industrial and municipal wastewater and stormwater discharges, and could preclude water management, supply and flood control projects such as was the case in *South Florida Water Management District v. Miccosukee*, 124 S.Ct. 1537(2004).

The Rule, now vacated, excluded water transfers from the permitting requirements of the National Pollutant Discharge Elimination System (NPDES) program. EPA's rationale for excluding water transfers is the "unitary waters" interpretation accepted by the United States Supreme Court, under which NPDES permits are not required when water from one navigable waterbody is discharged, unaltered, into another navigable waterbody. Such water transfers do not result in the "addition" of a pollutant from the "outside world"—meaning, "from outside the waters being transferred." The coalition of conservation groups argued certain water transfers introduced pollutants into drinking water reservoirs or waters used for crop irrigation.

The Court found EPA's interpretation, which was supported by state and local governments, water supply entities, flood control entities, and others, contravened the Supreme Court's plurality decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The SDNY found that under *Rapanos*, water transfers contemplated by the Rule would involve "navigable waters" under any of the three interpretations of CWA jurisdiction espoused in *Rapanos*. Accordingly, the Court vacated the Rule to the extent it is inconsistent with the Clean Water Act and, in particular, the phrase "navigable waters" as interpreted in *Rapanos*; and remanded the Rule to EPA for additional investigation or explanation as to its interpretation.

Although appeal is likely, the ruling is being viewed as a victory for conservationists and a blow to those dependent on water transfers, because water management projects may now come with the costly—and possibly preclusive—price tag associated with procuring and complying with NPDES permits. The case is *Catskill Mountains Chapter of Trout Unlimited Inc., et al. v. U.S. Environmental Protection Agency, et al.*, consolidated case Nos. 08-cv-0560 and 08-cv-9430.