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Regulating Water Transfers in the Wake of *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA: Examining Alternatives to NPDES Permits*

INTRODUCTION

In January 2017, the Second Circuit upheld the U.S. Environmental Protection Agency's (EPA) Water Transfers Rule (Rule), reversing a decision by the Southern District of New York to vacate the Rule and remand the matter to the EPA.¹ The decision in *Catskill IV* was greeted as a victory by many western states and water management districts, but was a disappointment for environmental organizations and downstream states that had intervened as plaintiffs. As the second federal circuit affirming the validity of the Rule, the *Catskill IV* court further cemented the EPA's decision to formalize the practice of exempting water transfers from the Clean Water Act's (CWA) permitting system.² Although the Second Circuit cited numerous alternative mechanisms for resolving pollution disputes outside of the CWA permitting system, these mechanisms are infrequently used, unpredictable, and in some cases unavailable to the states. As a result, the holding in *Catskill IV* leaves the regulation of water transfers almost exclusively in the hands of individual states where water transfers occur and leaves downstream states without effective mechanisms for protecting their waterways from unwanted pollution.

I. BACKGROUND

A. *Water Pollution Control under the CWA*

After several highly publicized incidents of environmental destruction, Congress passed the CWA in 1972 "to restore and maintain the chemical,

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1. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. E.P.A. (Catskill IV)*, 846 F.3d 492, 500 (2d Cir. 2017).

2. *Id.*

physical, and biological integrity of the Nation's waters."³ To achieve this goal, the CWA created the National Pollutant Discharge Elimination System (NPDES), a permitting scheme that regulates the discharge of pollutants from point sources.⁴ A point source is any "discernible, confined and discrete conveyance."⁵ Although the EPA did not adopt the Rule until 2008, it had consistently treated water transfers as exempt from NPDES permitting requirements.⁶

Beyond NPDES permitting, the CWA requires states to regulate nonpoint source pollution, but does not provide clear guidelines for how this statutory mandate should be implemented.⁷ Nonpoint source pollution is an umbrella term for water pollution that does not come from a discernable, single point source; it includes runoff from cities and agriculture, as well as deposition from the atmosphere.⁸ Although the CWA directed states to submit plans to control nonpoint source pollution, there was "essentially no sanction" for states that failed to comply with this requirement.⁹ A 1987 attempt to overhaul nonpoint source pollution was not effective, because it did not provide the EPA with power to design or implement nonpoint source control programs in states with inadequate or nonexistent programs.¹⁰ Nonpoint source pollution is still "virtually uncontrolled" at the federal level and in many states.¹¹

B. The CWA and Water Transfers

Although water transfers were not traditionally regulated under point source programs,¹² in 2004 the Supreme Court decided an existing water transfer designed to prevent flooding in Florida might require an NPDES permit if it moved water between two distinct water bodies.¹³ After this decision, the EPA adopted the Rule, formalizing the informal EPA practice of exempting water transfers from NPDES permitting requirements.¹⁴

3. 33 U.S.C. § 1251(a) (2012).

4. 33 U.S.C. § 1342 (2012); DOREMUS ET AL., ENVTL. POLICY LAW 767–68 (6th ed. 2012).

5. A point source is defined as "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" with some specified exceptions for agricultural return flows and storm water. 33 U.S.C. § 1362(14) (2012).

6. See DOREMUS ET AL., *supra* note 4, at 768; see also *Catskill IV*, 846 F.3d at 504 (explaining that the EPA's decision to formalize the Water Transfers Rule was prompted by courts' refusal to give deference to the EPA's informal stance in several successful lawsuits by environmental advocacy groups).

7. DOREMUS ET AL., *supra* note 4, at 816.

8. *Id.*

9. *Id.* at 816–17.

10. *Id.*

11. *Id.*

12. A water transfer is "an activity that conveys or connects waters of the United States without subjecting those waters to any intervening industrial, municipal, or commercial use." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. E.P.A. (Catskill IV)*, 846 F.3d 492, 500 (2d Cir. 2017).

13. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–10 (2004).

14. *Catskill IV*, 846 F.3d at 504.

In 2009, the Eleventh Circuit upheld the Rule as a reasonable interpretation of the CWA.¹⁵ Applying *Chevron* deference,¹⁶ the court found that the Rule was “a reasonable construction” of an ambiguous statute, citing to the many limitations on the reach of the NPDES permitting system and accepting the unitary waters theory,¹⁷ which the EPA used in constructing the Rule.¹⁸

In 2014, however, the Southern District of New York held that EPA’s reasoning in promulgating the Rule was arbitrary and capricious, failing at *Chevron* step two, because deregulating water transfers was inconsistent with the goals of the CWA.¹⁹ On appeal, the Second Circuit reversed the district court’s decision in an opinion focused on the “interpretive, theoretical, and practical” arguments for the Rule.²⁰ The Second Circuit emphasized that the CWA does not prioritize its goal of restoring the biological integrity of the nation’s waters at *all costs* and strives to maintain a healthy level of state control through “cooperative federalism,” which the court worried invalidating the Rule could compromise.²¹

Moreover, the Second Circuit was persuaded by several practical arguments, including the potential disruption for states and water management districts due to the high costs of permit compliance and the potential alternative mechanisms for regulating water transfer pollution.²² The court’s concern about disrupting water transfers focused on their importance for major cities, particularly in the western United States.²³ The mechanisms the Second Circuit considered included nonpoint source pollution programs, filing common law nuisance suits to enjoin out-of-state pollution, and interstate compacts.²⁴ Despite

15. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009).

16. *Chevron v. NRDC*, 467 U.S. 837, 839 (1984).

17. “The unitary waters theory holds that it is not an ‘addition. . . to navigable waters’ to move existing pollutants from one navigable water to another. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source.” Although the court notes that the unitary waters theory has previously been rejected by all other courts and the Supreme Court in dicta has suggested it is inconsistent with the broader purpose of the CWA, the court argues the issuance of the Water Transfers Rule, which occurred after these decisions, means the application of this theory for this rule is a novel question. *Friends of the Everglades*, 570 F.3d at 1217–18.

18. *Id.* at 1227–28.

19. *Catskill Mountains Chapter Of Trout Unlimited v. E.P.A. (Catskill III)*, 8 F. Supp. 3d 500, 553, 558–59 (S.D.N.Y. 2014), *rev’d* 846 F.3d 492, 504. The Second Circuit later overturned this decision in *Catskill IV*, 846 F.3d 492, 522 (2d Cir. 2017), where the court found that the Southern District of New York’s decision had incorrectly applied a much stricter standard of review than appropriate at *Chevron* Step Two.

20. *Catskill IV*, 846 F.3d at 520.

21. *Id.* at 502.

22. *Id.* at 529.

23. *Id.* at 503–04.

24. *Id.* at 530–33. The court also considered states setting higher water quality standards and obtaining specific authority “to address particular pollution” when required. Although the court contends that there are very limited instances where water transfers have cross-border impacts, the plaintiffs contend that water transfers have significant pollutant influences across state and national on several of North America’s fresh water bodies, including the Great Lakes and Lake Winnipeg. Complaint at ¶ 30–32,

strong suggestions that these alternatives are inadequate substitutes for NPDES permitting, the Second Circuit ultimately upheld the Rule, noting that although it may not be the “most reasonable” interpretation of the CWA, it was nonetheless a reasonable interpretation.²⁵ The Supreme Court declined to review *Catskill IV*.²⁶

II. DISCUSSION

The Second Circuit leaned heavily on the availability of alternative pollution control mechanisms in its decision to uphold the Water Transfer Rule, however, these alternatives fail to provide adequate pollution management tools for impacted states.²⁷ The alternatives discussed in *Catskill IV* were nonpoint source pollution programs, common law nuisance suits, and interstate compacts.²⁸ As the dissent in *Catskill IV* highlights, these alternative solutions present practical challenges and likely leave downstream states with no preventative measures to deal with upstream states wishing to conduct water transfers that impact their water quality. Unless upstream states are willing to compromise independent of any legal requirements, the patchwork of alternative remedies provides states with insufficient means for addressing pollution carried in water transfers.²⁹ *Catskill IV* leaves states with a limited array of ineffective tools for addressing the pollution challenges posed by water transfers.

A. Nonpoint Source Regulation for Water Transfers

Regulating water transfers under the nonpoint source pollution regulation scheme will likely be ineffective because of noncompliance with CWA nonpoint source pollution management requirements.³⁰ Many states continue to not comply with nonpoint source pollution requirements because the CWA lacks clear statutory requirements for nonpoint source pollution management, and does not give the EPA authority to intervene when states fail to implement nonpoint source pollution plans.³¹ Indicative of the failure of nonpoint source management requirements under the CWA, nonpoint source pollution is considered the most significant obstacle to achieving established water quality goals.³² Nonpoint

Catskill Mountains Chapter of Trout Unlimited v. E.P.A. (*Catskill IV*), 846 F.3d 492 (2d Cir. 2017) (No. 08 CV 830), 2008 WL 5367877.

25. *Catskill IV*, 846 F.3d at 533 (internal italicization removed).

26. See Petition for Writ of Certiorari at *1, *Riverkeeper, Inc. v. E.P.A.*, 2017 U.S. S. Ct. Briefs LEXIS 3666; Lawrence Hurley, *U.S. Supreme Court Rejects Challenge to EPA Water Regulation*, REUTERS (Feb 26, 2018, 6:40 AM), <https://www.reuters.com/article/us-usa-court-water/u-s-supreme-court-rejects-challenge-to-epa-water-regulation-idUSKCN1GAIV4>.

27. See *Catskill IV*, 846 F.3d at 529–31.

28. *Id.* at 530–31.

29. *Catskill IV*, 846 F.3d. at 539 (Chin, J., dissenting).

30. DOREMUS ET AL., *supra* note 4, at 817.

31. *Id.*

32. William L. Andreen, *Water Quality Today – Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 592 (2004).

source pollution is responsible for 82 percent of rivers and streams, and 77 percent of impaired lakes that fail to meet water quality standards.³³

Water transfers could potentially be more easily regulated than other types of nonpoint source pollution because they occur through discrete conveyances.³⁴ Unlike water transfers, nonpoint source pollution is characteristically “diffuse in terms of its origin and the way in which it enters surface water,” and typically results from storm water, seepage, or deposition of airborne pollution.³⁵ Seriously addressing nonpoint source pollution would require states to overhaul local land use regulations, which many states have been unwilling to undertake without federal incentives.³⁶ The difficult-to-pinpoint origins of nonpoint source pollution are closely tied to the continued failure to regulate it.³⁷ The same regulatory challenges are absent in the regulation of water transfers, where the source of pollution should be fairly easy to identify.³⁸

However, the failure of nonpoint source programs is a product of the significant lack of incentives for their implementation, not just technical challenges. The lack of federal involvement, clear direction, and incentives are all significant sources of the failure to manage nonpoint source pollution.³⁹ The states have proven unlikely to take up the mantle of management under nonpoint source programs even where technology has made regulation of nonpoint source pollution more feasible and inexpensive.⁴⁰ Political will to regulate, not technical ease, seems to be the key factor in the failure to regulate nonpoint source pollution.⁴¹ The states are unlikely to use a federal program to voluntarily regulate water transfers without a clear mandate, particularly when they have opposed federal regulation of transfers under the NPDES as they did in *Catskill IV* and it is not clear that nonpoint source regulation would be any less costly.⁴² The regulations for nonpoint source pollution are unlikely to serve as a useful tool for addressing the distinct set of issues presented by water transfers.

B. Common Law Nuisance Suits

The Second Circuit concedes that common law nuisance suits would provide a significantly lower level of protection than NPDES permitting.⁴³

33. *Id.* at 593.

34. *See Catskill IV*, 846 F.3d at 492; *see also* *Friends of the Everglades v. South Florida. Water Mgmt. Dist.*, 570 F.3d 1210, 1214 (11th Cir. 2009) (listing examples of discrete water transfers occurring via the Shandaken Tunnel and pumps moving water from canals outside of the Hoover Dike).

35. *Andreen*, *supra* note 32, at 562.

36. *Id.* at 564–65.

37. *Id.*

38. *See Catskill IV*, 846 F.3d at 492; *see also Friends of the Everglades*, 570 F.3d at 1214 (listing examples of both sources of water pollution and water transfers).

39. *Andreen*, *supra* note 32, at 593.

40. *Id.* at 562–63.

41. *Id.*

42. *See Catskill IV*, 846 F.3d at 492.

43. *See id.* at 517.

Common law nuisance suits, however, provide an even more limited solution to interstate pollutions than the court suggests. The *Catskill III* opinion asserts nuisance suits would be available, but admittedly inefficient, however, the court, even in its cautious approach, underestimated the limits of nuisance suits as a regulatory tool.⁴⁴ Federal common law nuisance suits for water pollution are displaced by the CWA.⁴⁵ The majority in *Milwaukee* clearly held that federal common law nuisance suits have been displaced because of the “comprehensive” nature of the CWA.⁴⁶ Even though potential pollutant discharges created by water transfers are not subject to the same permitting at issue in *Milwaukee*, the *Milwaukee* Court’s finding that Congress did not leave room for courts to “formulat[e] . . . standards . . . through the application of vague and indeterminate nuisance concepts . . .” would nonetheless create a clear basis for displacement.⁴⁷ This view was confirmed by the Court when it later asserted “federal legislation now occupied the field [of interstate water pollution], preempting all federal common law.”⁴⁸ The Supreme Court has made clear that the CWA displaces federal nuisance suits.

Further, state common law nuisance suits are unlikely to provide a practical solution to interstate pollution disputes, because of the controlling state law in these disputes.⁴⁹ The holding in *Ouellette* makes clear that in an interstate pollution dispute, the polluting source’s state law should be applied in deciding nuisance claims and the affected state’s law does not bind an out-of-state source.⁵⁰ While a common law right of action still exists, it is limited to what is available under the laws of the state where pollution originated.⁵¹ Although it may be available in some cases, state law nuisance suits are unlikely to be successful, particularly if the water transfers creating pollution are specifically allowed or permitted under state programs.⁵²

Finally, even if relief is available through a nuisance lawsuit, it would only provide a solution after years of litigation and provide relief only in the case at hand because of the fact-specific inquiry required.⁵³ Notably, counsel from Colorado conceded at oral arguments that common law nuisance suits could likely last years without resolution and could leave states with no other option

44. *See id.*

45. *See Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981); *see also City of Milwaukee v. Ill.*, 451 U.S. 304, 319 (1981).

46. *Milwaukee*, 451 U.S. at 318–20 (describing broad-based support and authority for the comprehensive nature of the CWA).

47. *Id.* at 311, 317.

48. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987).

49. *See Catskill Mountains Chapter of Trout Unlimited v. E.P.A. (Catskill IV)*, 846 F.3d 492, 539 n.4 (2d Cir. 2017) (Chin, J., dissenting).

50. *Ouellette*, 479 U.S. at 495–97.

51. *See id.*

52. *See North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 309 (4th Cir. 2010).

53. *See Catskill IV*, 846 F.3d at 539 (Chin, J., dissenting); *DOREMUS ET AL.*, *supra* note 4, at 41–42.

than to “drink . . . dirty water until [the] case makes its way up to the courts.”⁵⁴ Further, nuisance is a flexible doctrine likely to produce inconsistent results, because it demands case-specific analysis.⁵⁵

These limitations on nuisance suits make them a remedy with limited utility for issues as broad and variable as those presented by water transfers carrying pollution across state lines.

C. Interstate Water Compacts

While regulating water transfers through nonpoint source programs and nuisance lawsuits provide little promise, state regulation has more serious potential to provide a solution, because states retain significant capacity to establish pollution control standards. While bound by the floor set by the CWA, states are able to set higher standards for polluters: endowing them with the capacity to regulate water transfers.⁵⁶ The discrete nature of water transfers makes them amendable to regulation, and several states where water transfers play a significant role in transporting water from isolated mountain snowpack to cities have provided their governments with regulatory authority over water transfers.⁵⁷ Specifically, Colorado, California, New Mexico, and New York have all provided various state agencies with oversight and enforcement power in the area of water transfers.⁵⁸ Despite the potential for states to lead in the regulation of water transfers, the number of states intervening as plaintiffs in *Catskill IV* suggests many states are not satisfied with the protection provided by current state management.⁵⁹

Most western states to join the litigation (other than Washington),⁶⁰ joined as defendants or *amici* supporting the Rule.⁶¹ Five of the defendant states are members of the Colorado River Compact.⁶² Here, in particular, the success of the Rule in the eyes of defendant states is likely derived in part from satisfaction with existing compacts, which provide assurances about the quality of water

54. See *Catskill IV*, 846 F.3d at 539 n.4 (Chin, J., dissenting).

55. See *id.*; DOREMUS ET AL., *supra* note 4, at 41–42.

56. See *Int'l Paper Co. v. Ouellette* at 495–97.

57. See *Catskill IV*, 846 F.3d at 530.

58. See *id.* at 530 n.37.

59. See Complaint at ¶ 2, *Catskill IV*, 846 F.3d. 492 (No. 08 CV 830), 2008 WL 5367877.

60. Washington intervened as a plaintiff in *Catskill III*. See *Catskill IV*, 846 F.3d at 505.

61. Joint Reply Brief of Intervenor Defendants-Appellants-Cross Appellees, *Catskill IV*, 846 F.3d 492 (2d Cir 2017) (Nos. 14–1823), 2015 WL 401258; see also Letter from James D. Ogsbury, Exec. Dir., W. Governors' Ass'n & Tony Willardson, Exec. Dir., W. States Water Council, to Gina McCarthy, Administrator, E.P.A. (May 12, 2014), http://westgov.org/images/editor/LTR_Water_Transfers_Appeal_FINAL.pdf (urging the EPA to appeal *Catskill III*).

62. Joint Reply Brief of Intervenor Defendants-Appellants-Cross Appellees, *Catskill IV*, 846 F.3d 492 (2d Cir 2017) (Nos. 14–1823), 2015 WL 401258 (Colorado, New Mexico, Utah, Wyoming, and Nevada all intervened as defendants. The two other states in the Colorado River Compact, California and Arizona, submitted an amicus brief in favor of defendants and were represented by a state water agency that joined as an intervenor-defendant respectively).

originating from upstream states to the recipients.⁶³ The defendant states' support for the Rule suggests that the state regulation of water transfers is at least perceived by some state governments as a success (or at least preferable to federal oversight).

Despite the support from defendant states, nine states and the Canadian province of Manitoba joined *Catskill III* as plaintiffs.⁶⁴ The plaintiff states are primarily downstream states located adjacent to large bodies of water.⁶⁵ These states emphasized in their brief that the failure to subject water transfers to NPDES permits has had downstream effects on the quality of their local drinking water, creating environmental, economic, and human health harms.⁶⁶

The uneven support for the Rule suggests that inconsistency in regulation is producing disparate outcomes for plaintiff and defendant states.⁶⁷ Comparative studies of state water regulation suggest the plaintiff states' concerns about the ecological shortcomings of state regulation have empirical support.⁶⁸ In fact, the western states that joined in the Colorado River Compact gave no consideration to diversions' ecological impact on the mouth of the Colorado River, which is located in Mexico, outside of their state lines.⁶⁹ The impact of this oversight was to transform the 1.9 million acres of wetlands in the Colorado River delta in Mexico almost entirely into mudflats, which now are only beginning to be restored by reintroduction of some return flows.⁷⁰ Notably, the return flows that have been reintroduced have been extremely high in salinity and pollutants, further indicating the failure of the states in the Colorado River Compact to limit pollution in the water that is making its way to the delta.⁷¹ This experience suggests state compacts are not well-designed to manage ecological impacts of water transfers.

The plaintiff states point to specific examples of how deregulating water transfers has led to pollution across state and international borders.⁷² The examples cited suggest upstream states have not used their regulatory discretion to prevent pollution beyond what is required by the CWA.⁷³ The intervenor plaintiffs cite examples of water transfers introducing giardia, turbid water, and

63. *Id.* at *18 (listing the compact members as including Arizona, Colorado, California, Nevada, New Mexico, Utah, and Wyoming).

64. Complaint at ¶ 2, *Catskill III V*, 846 F.3d. 492 (No. 08 CV 830), 2008 WL 5367877 (stating that the states of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, and Manitoba (Canada) all opposed the rule).

65. *Id.*

66. *Id.* ¶ 27–28.

67. *Id.*

68. Haripriya Gundimeda & Charles W. Howe, *Interstate River Conflicts: Lessons from India and the U.S.*, 33 WATER INT. 395, 401 (2008).

69. *See id.*

70. MARK BRIGGS ET AL., ENVTL. DEFENSE FUND, A DELTA ONCE MORE: RESTORING RIPARIAN AND WETLAND HABITAT IN THE COLORADO RIVER DELTA (1999).

71. *See* Complaint at ¶ 30–31, *Catskill IV*, 846 F.3d. 492 (No. 08 CV 830), 2008 WL 5367877.

72. *See Catskill IV*, 846 F.3d at 529–30.

73. *See id.*

other pollutants into local water bodies.⁷⁴ Specifically, the plaintiffs argue unregulated water transfers from the Ohio and Erie Canal exacerbate high levels of pollution in Lake Erie,⁷⁵ which is already an impaired water body.⁷⁶ Further, Minnesota and Manitoba note unregulated water transfers have allowed North Dakota to transfer pollutants via a manmade conduit to the Red River, which eventually reaches Lake Winnipeg.⁷⁷ While the manmade transfer takes place in North Dakota, it deposits water into the river on the Minnesota border and has pollutant effects as far as Canada.⁷⁸ The failure to mitigate pollutant effects of transfers demonstrates the limits on states' willingness and capacity to independently reduce pollution.⁷⁹

Assessing the validity of the plaintiff states' concerns as expressed in their pleading is difficult. However, the EPA's contrary position in promulgating the Rule that "most of the thousands of water transfers in the United States do not result in any substantial impairment" is not supported by scientific, technical, or legal analysis.⁸⁰ While the lack of scientific evidence on this topic may not be dispositive when determining if the Rule is a legitimate use of agency rulemaking power, the lack of empirical evidence required for courts to uphold the Rule calls into question the broader strength of the CWA and its capacity to achieve Congress's goal of restoring the nation's waters.⁸¹

Management under state law and interstate compacts has not prevented pollution from being carried across state lines and has led to the disregard for external ecological impacts. In particular, the uneven success of the Rule in appeasing downstream states near large water bodies is a sign that the alternatives named by the Second Circuit in *Catskill IV* are an insufficient solution to the problems created by pollution in water transfers.⁸²

CONCLUSION

Under the Water Transfer Rule, downstream states can only manage pollution carried via water transfers with ineffective solutions, such as nonpoint source pollution management programs, nuisance lawsuits, and patchwork state

74. See Complaint at ¶ 30, *Catskill IV*, 846 F.3d. 492 (No. 08 CV 830), 2008 WL 5367877.

75. Lake Erie and the other Great Lakes hold 20 percent of the world's fresh water and border eight U.S. states and the Canadian province of Ontario. See *id.* ¶ 31.

76. See *id.*

77. Lake Winnipeg is the world's tenth largest freshwater lake. *Id.*

78. *Id.*

79. *Id.*

80. See *Catskill Mountains Chapter of Trout Unlimited v. E.P.A. (Catskill III)*, 8 F. Supp. 3d. 500, 550 n.26 (S.D.N.Y. 2014).

81. See *id.* at 549.

82. See *id.* at 528–30.

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regulations. Without federal intervention, states will be required to act on their own to protect the quality of water bodies and the CWA's goal of restoring the nation's waters will remain seriously impaired.

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