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U.S. District Court for The Northern District of California Vacates EPA's Clean Water Act Section 401 Certification Rule

OCTOBER 25, 2021

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On October 21, 2021, the U.S. District Court for the Northern District of California ("District Court" or "Court") vacated the U.S. Environmental Protection Agency's ("EPA") 2020 Clean Water Act ("CWA") Section 401 "Certification Rule" ("the 2020 Rule"). *In re Clean Water Act Rulemaking,* No. 20-cv-4636, *et al.* (Oct. 21, 2021). The effect of the Court's ruling is to reinstate EPA's previous Certification Rule, which had been in effect since 1971 ("the 1971 Rule").

The 2020 Rule was promulgated by the Trump Administration to assist in expediting and streamlining the federal government's permitting process for projects that require a CWA Section 401 water quality certification. The Biden Administration sought remand without vacatur of the 2020 Rule. If the Court had agreed with the request, it would have left the 2020 Rule in effect while the Biden EPA reconsidered it. Rather than granting the Biden Administration's request, the Court vacated the Rule at the request of other parties. It is clear that the Court intends its ruling to have nationwide effect: by vacating the 2020 Rule, federally permitted projects requiring Section 401 certification throughout the nation will again be subject to the 1971 Rule. It remains to be seen whether EPA or industry intervenors supporting the 2020 Rule will appeal the decision. Federal district courts in Pennsylvania and South Carolina had previously remanded the 2020 Rule to EPA without vacatur.

Background

Under Section 401 of the CWA, a federal agency may not issue a permit or license to an applicant that seeks to conduct any activity that may result in any discharge into the navigable waters of the United States unless a state or authorized Tribe where the discharge would originate issues a water quality certification or waives that requirement. EPA is responsible for the certification by non-authorized Tribes or when a discharge would originate from lands under exclusive federal jurisdiction.

Several major federal licensing and permitting schemes are subject to Section 401 certification requirements, such as National Pollutant Discharge Elimination System permits under CWA Section 402, permits for discharge of dredged or fill material into wetlands under CWA Section 404, Federal Energy Regulatory Commission licenses for hydropower facilities and natural gas pipeline certifications, and Rivers and Harbors Act Section Nine and Section Ten permits.

In 2019, President Trump issued Executive Order 13,868 (the "Trump EO"), which was entitled "Promoting Energy Infrastructure and Economic Growth." 84 Fed. Reg. 15,495 (Apr. 10, 2019). The Trump EO stated: "The United States is blessed with plentiful energy resources, including abundant supplies of coal, oil, and natural gas," and the "Federal Government must promote efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment." To that end, the Trump EO asserted that "[o]utdated Federal guidance and regulations regarding section 401 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the development of energy infrastructure," and instructed EPA to review and issue new guidance regarding Section 401.

Pursuant to the Trump EO, EPA revised its general Section 401 guidance in June 2019. Two months later, EPA published an economic analysis of existing Section 401 processes. That same month, in a publication dated August 22, 2019, EPA proposed an updated Section 401 certification rule with extensive revisions. EPA published the final rule in the Federal Register on July 13, 2020. The rule went into effect September 11, 2020.

Almost immediately, states, Tribes, and conservation groups brought suit against EPA to set aside the 2020 Rule. Among these suits were challenges brought in the United States District Court for the Northern District of California in August 2020. Industry groups intervened on the side of EPA.

Implementation of the 2020 Rule stalled after President Biden was elected. He issued Executive Order 13,990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 20, 2021) (the "Biden EO"). In the Biden EO, the Administration listed the 2020 Rule as one that was to be reviewed by EPA. A Declaration filed for EPA later stated that the earliest EPA could complete that review would be Spring 2023. *See* 86 Fed. Reg. 29,541 (June 2, 2021).

As a result, EPA, without stating that the 2020 Rule was in error, requested that the Court remand the 2020 Rule to EPA without "vacatur," i.e., a remand that would leave the 2020 Rule in place. Plaintiff states, Tribes, and conservation groups instead sought vacatur, which industry groups supporting EPA opposed.

The District Court's Decision

As the Court saw it, the new certification rule makes a variety of substantive changes to EPA's procedures for implementing Section 401. It said:

> To state just a few examples, the new rule: (i) narrows the scope of certification to ensuring that a discharge from a point source into a water of the United States from a federally licensed or permitted activity will comply with "water quality requirements" — another defined term narrowed to mean applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act; (ii) authorizes EPA to establish the reasonable amount of time for a certifying authority to certify a request; and (iii) authorizes EPA to determine whether a certifying authority's denial has complied with the rule's procedural requirements, and to deem certifications waived if not. *See* 40 C.F.R. pt. 121.

In explaining the factors the Court would consider in determining whether to vacate the 2020 Rule without having reviewed it on the merits, the Court stated:

> The deferential standard for reviewing an agency's request for voluntary remand can raise difficult issues when vacatur comes into play. When a district court rules that an agency action is defective due to errors of fact, law, or policy, the APA explicitly instructs that the court "shall . . . hold unlawful and set aside" the agency action. "This approach enables a reviewing court to correct error but, critically, also avoids judicial encroachment on agency discretion."

The Court acknowledged that the issue of whether vacatur was appropriate without having conducted a review of agency action on the merits has not been resolved by in the Ninth Circuit: "The caselaw here is unsettled. Leaving an agency action in place while the agency reconsiders may deny the petitioners the opportunity to vindicate their claims in federal court and would leave them subject to a rule they have asserted is invalid." Nevertheless, the Court agreed with those opinions of other District Judges within the Ninth Circuit concluding that, when an agency requests voluntary remand, a district court may vacate an agency's action without first making a determination on the merits. The Court found persuasive the reasoning in *Center for Native Ecosystems*, which explains that:

> because vacatur is an equitable remedy, and because the APA does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of vacatur without a decision on the merits.

In this instance, the Court concluded that the 2020 Rule is "antithetical" to the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,* 511 U.S. 700, 710 (1994) ("*PUD No. 1*"). According to the Court, the 2020 Rule limited rather than expanded the states' control over setting and enforcing water quality standards by focusing only on the "discharge" and not also on "the compliance of the applicant." Indeed, the Court concluded that EPA's submissions to it signaled that the Biden EPA could not, or would not, adopt the same 2020 Rule itself, and that the current EPA has substantial doubts about whether the 2020 Rule complies with the statute and *PUD No. 1.*

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The Court then considered the disruptive effects of vacatur. It concluded that, because the 2020 Rule had been in effect only 13 months, and that the 1971 Rule had been in effect for almost 50 years, there was insufficient time for regulated entities to have developed any reliance interests on the new rule. Moreover, the Court found "particularly persuasive" the Plaintiffs' reference to three hydroelectric projects on the Skagit River in Washington. Plaintiffs pointed out that the re-licensing of those projects would last for 30-50 years, and that the lack of adequate water quality conditions attached to those licenses would last for a "*generation*" (emphasis the Court's). In response to industry arguments that the 1971 Rule had given insufficient consideration to economic impacts in determining appropriate conditions, the Court noted that the case law in the Ninth Circuit has given greater weight to environmental impacts in ensuring compliance with environmental statutes.

Conclusion

The District Court's decision to vacate the 2020 Certification Rule over EPA's opposition, and without having conducted a complete review the Rule on its merits, may be grounds for challenge. Other district courts in the Ninth Circuit have opined that vacatur is appropriate even in the absence of a merits review of agency action, but the Ninth Circuit itself does not appear to have so held. Nevertheless, assuming the Court's decision to vacate the 2020 Rule and reinstate the 1971 Certification Rule stands, it would appear that, at least until Spring 2023, Section 401 water quality certifications will be based on the 1971 Rule. As a result, certifications will likely be less susceptible to challenge as in excess of state authority under Section 401 of the Clean Water Act than if the 2020 Certification Rule had been allowed to remain in effect.

For More Information

If you would like more information about the district court's decision or other issues related to implementation of the Clean Water Act, please contact Mike Swiger, Jenna Mandell-Rice, Duncan Greene, Michael McBride, or any member of the firm's Hydroelectric or Environmental Practices in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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