

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

CLEAN WATER ACT
RULEMAKING.

No. C 20-04636 WHA
No. C 20-04869 WHA
No. C 20-06137 WHA

This Document Relates to:

(Consolidated)

ALL ACTIONS.

**ORDER RE MOTION FOR
REMAND WITHOUT VACATUR**

INTRODUCTION

Plaintiff states, tribes, and non-profit conservation groups have challenged EPA’s Clean Water Act certification rule, and now EPA moves to remand the proceedings without vacatur. For the reasons stated, the rule is remanded to the agency with vacatur.

STATEMENT

The Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, is the primary federal statute regulating water pollution. Congress enacted the Clean Water Act in 1972 — over then-President Nixon’s veto — but the roots of the Act extend much farther back to 1899 and the Rivers and Harbors Act. That statute, often referred to as the Refuse Act, primarily ensured free and open navigability of the waters of the United States, but also prohibited the discharge of “refuse matter of any kind or description whatever

1 navigable water of the United States,” and authorized the Secretary of the Army to permit such
 2 discharges under certain conditions. *See* 33 U.S.C. §§ 407 *et seq.* In 1948, following an
 3 increase in industrialization throughout the country, Congress passed the Federal Water
 4 Pollution Control Act (FWPCA). *See generally* Joel Gross & Kerri Stelcen, *Clean Water Act*
 5 2–7 (2d ed. 2012).

6 In 1969, two events would help foster a new environmental awareness in the United
 7 States and prompt the promulgation of amendments to the FWPCA: A catastrophic oil spill of
 8 three million gallons of crude off the coast of Santa Barbara (creating a thirty-five-mile slick);
 9 and a fire on the surface of the Cuyahoga River in northeast Ohio. A 1968 Kent State
 10 University symposium on the state of the Cuyahoga River is worth briefly quoting:

11 The surface is covered with brown oily film observed upstream as
 12 far as the Southerly Plant effluent. In addition, large quantities of
 13 black heavy oil floating in slicks, sometimes several inches thick,
 14 are observed frequently. Debris and trash are commonly caught up
 15 in these slicks forming an unsightly floating mess. Anaerobic
 16 action is common as the dissolved oxygen is seldom above a
 fraction of a part per million. The discharge of cooling water
 increases the temperature by 10 to 15° F. The velocity is
 negligible, and sludge accumulates on the bottom. Animal life
 does not exist.

17 The Cuyahoga River Watershed: Proceedings of a Symposium Held at Kent State University
 18 104 (George D. Cooke, ed., 1969); Gross & Stelcen, *supra*, at 7; Christine Mai-Duc, The 1969
 19 Santa Barbara oil spill that changed oil and gas exploration forever, *L.A. Times*, May 20, 2015,
 20 [https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-
 htmlstory.html](https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-

 21 htmlstory.html).

22 Three years after these events, Congress passed the Clean Water Act. Section 101 of the
 23 act expressed Congress’ goal “to restore and maintain the chemical, physical, and biological
 24 integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The congressional declaration in
 25 Section 101(b) recited:

26 It is the policy of the Congress to recognize, preserve, and protect
 27 the primary responsibilities and rights of States to prevent, reduce,
 and eliminate pollution, to plan the development and use
 (including restoration, preservation, and enhancement) of land and

exercise of his authority under this chapter.

Section 101(d) charged EPA to administer the act while Section 101(e) explicitly enshrined public participation into the statutory scheme:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.

Under Section 401 of the Clean Water Act, 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 the requirement. EPA is responsible for the certification by non-authorized tribes or when a discharge would originate from lands under exclusive federal jurisdiction. Importantly, “No [federal] license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.” 33 U.S.C. § 1341; *see also* Overview of CWA Section 401 Certification, [epa.gov/cwa-401/overview-cwa-section-401-certification](https://www.epa.gov/cwa-401/overview-cwa-section-401-certification) (last visited Oct. 21, 2021). Several major federal licensing and permitting schemes are subject to Section 401, such as National Pollutant Discharge Elimination System (NPDES) permits under Section 402, permits for discharge of dredged or fill material into wetlands under Section 404, Federal Energy Regulatory Commission (FERC) licenses for hydropower facilities and natural gas pipelines, and Rivers and Harbors Act Section Nine and Section Ten permits.

While EPA has promulgated myriad rules to administer the Clean Water Act, iterations of the administrative rule implementing Section 401 had remained, until recently, singular. EPA originally promulgated 40 C.F.R. Part 121 to implement water quality certifications for Section 21(b) of the FWPCA as it existed in 1971 — a year before the Clean Water Act amendments to the FWPCA. *See* 36 Fed. Reg. 22,487 (Nov. 25, 1971), redesignated at 37 Fed. Reg. 21,441 (Oct. 11, 1972), further redesignated at 44 Fed. Reg. 32,899 (June 7, 1979). EPA would continue to use this rule for the Section 401 licensing scheme. In brief, 40 C.F.R. Part

1 EPA's administrative processes; (ii) the procedures for determining the effects of a license
 2 upon other, non-certifying states; (iii) the procedures the EPA Administrator employs to certify
 3 an application for a project under exclusive federal jurisdiction; and (iv) the procedures for
 4 EPA consultations on obtaining a license or permit. EPA employed this procedure for
 5 certifications as-is for half a century.

6 * * *

7 On April 10, 2019, President Trump issued Executive Order 13,868, entitled *Promoting*
 8 *Energy Infrastructure and Economic Growth*. 84 Fed. Reg. 15,495 (Apr. 10, 2019). The order
 9 stated: "The United States is blessed with plentiful energy resources, including abundant
 10 supplies of coal, oil, and natural gas," and, the "Federal Government must promote efficient
 11 permitting processes and reduce regulatory uncertainties that currently make energy
 12 infrastructure projects expensive and that discourage new investment." To that end, Executive
 13 Order 13,868 asserted that "[o]utdated Federal guidance and regulations regarding section 401
 14 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the
 15 development of energy infrastructure," and instructed EPA to review and issue new guidance
 16 regarding Section 401. *Id.* at 15,496.

17 Pursuant to the executive order, EPA revised its general Section 401 guidance in June
 18 2019. Two months later, EPA published an economic analysis of existing Section 401
 19 processes. That same month, in a publication dated August 22, 2019, EPA proposed an
 20 updated Section 401 certification rule with extensive revisions. After a very active public
 21 comment phase, EPA published the final rule in the Federal Register on July 13, 2020. The
 22 rule went into effect September 11, 2020. *See* Economic Analysis for the Proposed Clean
 23 Water Act Section 401 Rulemaking, NEPIS 810R19001A (Aug. 2019); Clean Water Act
 24 Section 401 Guidance for Federal Agencies, States and Authorized Tribes,
 25 www.epa.gov/sites/default/files/2019-06/documents/cwa_section_401_guidance.pdf (June 7,
 26 2019); 84 Fed. Reg. 44,080 (Aug. 22, 2019); 85 Fed. Reg. 42,210 (July 13, 2020).

27 The new certification rule makes a variety of substantive changes to EPA's procedures
 28 for implementing Section 401. To state just a few examples, the new rule: (i) narrows the

1 scope of certification to ensuring that a discharge from a point source into a water of the
 2 United States from a federally licensed or permitted activity will comply with “water quality
 3 requirements” — another defined term narrowed to mean applicable provisions of Sections
 4 301, 302, 303, 306, and 307 of the Clean Water Act; (ii) authorizes EPA to establish the
 5 reasonable amount of time for a certifying authority to certify a request; and (iii) authorizes
 6 EPA to determine whether a certifying authority’s denial has complied with the rule’s
 7 procedural requirements, and to deem certifications waived if not. *See* 40 C.F.R. pt. 121.

8 Plaintiff states, tribes, and non-profit conservation groups, many of which had
 9 strenuously objected to these and other changes to the certification rule, began suing, many the
 10 same day EPA published the final rule. Three cases eventually arrived before the undersigned
 11 by August 2020. The new certification rule became effective in September, and by October,
 12 eight states and three industry groups intervened as defendants. Then, in November,
 13 administrative momentum for the revised certification rule stalled after the election of
 14 President Biden, who declared his administration’s policy:

15 to listen to the science; to improve public health and protect our
 16 environment; to ensure access to clean air and water; to limit
 17 exposure to dangerous chemicals and pesticides; to hold polluters
 18 accountable, including those who disproportionately harm
 19 communities of color and low-income communities; to reduce
 20 greenhouse gas emissions; to bolster resilience to the impacts of
 climate change; to restore and expand our national treasures and
 monuments; and to prioritize both environmental justice and the
 creation of the well-paying union jobs necessary to deliver on these
 goals.

21 *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate*
 22 *Crisis*, Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). The administration
 23 specifically listed the certification rule as one agency action set to be reviewed, and EPA stated
 24 its intent to promulgate a new certification rule in a notice published on June 6, 2021. The
 25 earliest EPA will be able to promulgate a revised rule is Spring 2023 (Goodin Decl. ¶ 27). *See*
 26 86 Fed. Reg. 29,541 (June 2, 2021); Fact Sheet: List of Agency Actions for Review,
 27 www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-

28 actions for review (Jan. 20, 2021).

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