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Opponents warn of 'chaos' as Supreme Court revives Trump permit rule

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The Supreme Court's decision today to reinstate a controversial Trump-era Clean Water Act permitting rule is raising concerns that states' and tribes' hands could be tied in how they review — and possibly deny — permits for everything from pipelines and mines to dams.

The court, without explanation and over the objection of four justices, put back in place a rule EPA finalized under the Trump administration tied to Section 401 of the Clean Water Act that bars states and tribes from considering issues not directly related to water quality — like climate change — when denying water permits (*Greenwire*, April 6).

Today's order brings back the Trump rule, pending the outcome of litigation in the 9th U.S. Circuit Court of Appeals, and notes that the parties can bring back the matter for fuller Supreme Court review if necessary.

The rule in dispute emerged in 2020 as former President Donald Trump made moves to boost the oil and gas sector. A federal district court judge last year struck down the regulation.

A spokesperson for EPA said the agency is reviewing the court's order and moving forward with a rulemaking to "restore state and Tribal authority to protect water resources that are essential to public health, ecosystems, and economic opportunity."

While environmental groups criticized the court's decision, oil and gas, and hydropower boosters applauded it, saying that permits have been delayed and denied without the rule in place.

Moneen Nasmith, a senior attorney at Earthjustice, which is representing a number of tribes and environmental groups in the case, told E&E News that there was "chaos" when the Trump-era rule was in place and that the decision from the Supreme Court's conservative supermajority to reinstate the regulation shows "disregard for the integrity of the Clean Water Act and undermines the rights of Tribes and states to review and reject dirty fossil fuel projects that threaten their water."

The Trump rule, she said, changes the delicate balance between the federal government and states that has existed for 50 years under the Clean Water Act and attempts to limit which projects are subject to review under Section 401 of the law, language that gives states and tribes the ability to review proposed projects' effects on water quality. As an example, Nasmith said the rule tries to limit reviews to projects that are considered point sources of pollution. The rule also attempts to limit the type of information that can be asked of applicants and the basis upon which states can deny permits, as well as the conditions states can impose on permit applicants.

"There are ways that states and tribes are possibly not going to be able to protect their water quality when you don't have direct discharge," she said. "That's very contrary to how much of this law has been interpreted for decades."

But Ryan Meyers, general counsel and senior vice president of the American Petroleum Institute, cast the court's decision as sound. Meyers said Clean Water Act permits have been "needlessly delayed or denied, stalling critical energy infrastructure projects" since the Section 401 rule was vacated, but did not immediately provide examples of projects that had been nixed.

The Interstate Natural Gas Association of America also applauded the Supreme Court's decision. "The district court decision vacating the Clean Water Act Section 401 Rule in its entirety without receiving a single merits brief was plainly unlawful, and a stay pending appeal was the only effective relief under the circumstances here," the company said in a statement. "We look forward to prosecuting the appeal in the Ninth Circuit and participating fully in the administrative process on potential revisions to the Rule."

Similarly, LeRoy Coleman, a spokesperson for the National Hydropower Association, welcomed the Supreme Court's decision and said hydropower projects often languish for years awaiting a state decision on the water certification, and those certifications often contain license conditions that are completely unrelated to water quality.

"Today's decision will ensure that the Biden administration properly considers this important rule as it considers changes promulgated by the Environmental Protection Agency less than two years ago," said Coleman.

Andrew Otis, a partner with the law firm Locke Lord LLP, said the ruling reinforces what EPA already knew — that to change the rule finalized in 2020, the agency needs to propose and promulgate a new state water quality certification process under the Clean Water Act. The agency, he said, has said it intends to propose a new rule by this spring, and today's ruling will likely create more incentive for the agency to finalize and release a proposal.

"The EPA will need to take public comment on the proposed rule and ultimately issue a final rule that will very likely be challenged in court," Otis said. "Depending on the outcome of the appeal of the District Court's October 2021 decision to the 9th Circuit Court of Appeals and to the Supreme Court, the 2020 rule could stay in place until the new rule is finalized."

Practical impact

While the Supreme Court did not explain its reasoning for reviving the EPA rule, four of its justices — both liberal and conservative — criticized their colleagues in the majority for taking action based on "simple assertions" and "conjectures" by red state and industry challengers.

"[T]he applicants have not identified a single project that a State has obstructed in the five months since the District Court's decision," Justice Elena Kagan wrote in a dissent joined by Justices Sonia Sotomayor and Stephen Breyer, as well as Chief Justice John Roberts.

"Still more," Kagan continued, "they have not cited a single project that the court's ruling threatens, or is likely to threaten, in the time before the appellate process concludes."

Today's order unwinds an October 2021 ruling by the U.S. District Court for the Northern District of California that found the Trump rule violated Supreme Court precedent.

Led by Louisiana, red states and industry groups brought the case to the 9th Circuit, which rejected their request to immediately revive the rule (*Greenwire*, Feb. 25).

They then sought emergency relief from the Supreme Court, saying that states like Washington, Virginia and New York in the past had exceeded their authority in certifying now-defunct projects like the Millennium Bulk Terminals coal export project, Atlantic Coast natural gas pipeline and Constitution pipeline.

State and industry challengers said the Trump rule had offered a safe haven from "certain states' abuses."

"A stay will not impose harm on Plaintiffs, as they can always litigate the Rule's legality and cannot retain an ill-gotten vacatur of the Rule without having to do the work of proving any legal deficiency," the challengers wrote in their March 21 stay application.

The Biden administration's EPA pushed back in a March 28 response.

Last year's rejection of the Trump rule simply reinstated "until the agency issues a new rule in spring 2023, the regulations that had been in place during the 50 years before the 2020 Rule was adopted," government lawyers wrote.

'Shadow docket' takedown

Kagan's dissent also took aim at the court's use of its emergency docket — sometimes known as the "shadow docket" — for non-urgent matters.

The Supreme Court in recent years has increased its use of emergency orders, which were once reserved for mundane matters, to make major policy changes — sometimes late at night, with little explanation and over the objections of several justices (*Greenwire*, Aug. 24, 2021).

Kagan wrote in her dissent today that the conservative wing's decision to reinstate the Trump EPA permitting rule was an example of the court going "astray" from its requirement that requests for emergency relief demonstrate immediate, irreparable harm.

She said the red state and industry applicants waited a month before seeking relief from the Supreme Court and noted that the 9th Circuit case will be fully briefed next month.

The court's move "thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required," Kagan said.

"That renders the Court's emergency docket not for emergencies at all," she said. "The docket becomes only another place for merits determinations — except made without full briefing and argument. I respectfully dissent."