



Information Alert

State-Federal Relations Division

Supreme Court Reinstates Rule Restricting State Authority to Implement Clean Water Act

April 13, 2022

On April 6, the U.S. Supreme Court [reinstated](#) a 2020 rule from the Environmental Protection Agency (EPA) concerning implementation of the [Clean Water Action \(CWA\) Section 401 Certification Rule](#). [The rule](#) significantly limits state authority and autonomy to certify, condition or deny any required federal permits and licenses for projects that would result in the discharge of pollutants into waters of the United States. The court's ruling overturns decisions by both a federal district court and the [9th U.S. Circuit Court of Appeals](#), which had previously vacated the 2020 rule.

The 2020 rulemaking limited state authorities by including reductions in state timelines for review and certification, restrictions on the scope of certification reviews and conditions, and modifications of other related requirements and procedures. Specifically, the 2020 rule not only barred states from considering factors not directly related to water quality in reaching their own determinations on a project, but also limited review to those water quality impacts from point source discharges only—previously, all potential sources of pollution from a project were reviewable. Additionally, the 2020 rule placed a restriction on the length of time it could take a state to review to a “reasonable period of time (which shall not exceed one year,)” despite counting the receipt of a certification request, not a complete application or complete request, as the start of that countdown.

Though the ruling by SCOTUS overturns the district court and 9th circuit rulings, the EPA is currently in the process of finalizing its revision of the 2020 rule, having [sent the rulemaking](#) to the Office of Management and Budget, but it is unlikely to finish before 2023. Further, the EPA has indicated that it will continue to “[move] forward with rulemaking to restore state and tribal authority to protect water resources that are essential to public health, ecosystems and economic opportunity.”

During the promulgation of the 2020 rule, NCSL raised concerns that the agency had not consulted with states, or their intergovernmental organizations, in a meaningful or timely manner and urged that any regulatory change to the Section 401 certification process be developed through genuine consultation with state and local governments and that it must not come at the

expense of state authority. You can find the letters NCSL sent to the administration [here](#). The EPA responded to state and local government concerns in its final rulemaking, stating the agency had concluded that “the final rule does not infringe upon the roles of states as coregulators, nor does it undermine cooperative federalism”—a statement that has been challenged. NCSL has remained [active](#), urging EPA Administrator Michael Regan to work in consultation with states during its revision of the 2020 rule, and to recognize states’ well-established authority under CWA Section 401.

For more information on the Trump administration’s rulemaking read NCSL’s Info Alert [here](#), and for information on the Supreme Court’s decision read a blog by the State and Local Legal Center [here](#).