

Section 401/Clean Water Act: Federal Court Addresses EPA Dismissal Motion Related to Challenge to Certification Rule



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The United States District Court (Eastern District of Pennsylvania) (“Court”) addressed in a December 18th Opinion and Order (collectively “Order”) the United States Environmental Protection Agency’s (“EPA”) Motion to Dismiss a Complaint filed by the Delaware Riverkeeper Network (“Riverkeeper”). See *Delaware Riverkeeper Network, et al. v. United States Environmental Protection Agency, et al.* Civil Action No. 20-3412.

The Motion responded to Riverkeeper’s challenging EPA’s issuance of a rule it recently promulgated addressing Clean Water Act Section 401 certification procedures.

The State of Arkansas is one of several states that moved to intervene in the litigation.

EPA had issued what it denominates as the Clean Water Act Section 401 Certification Rule (“Rule”) on June 1st. (See previous post [here.](#))

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of water quality standards, or other applicable authorities, of the state. This provision of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license.

If a state fails or refuses to act on a request for certification in a timely manner, the certification requirements are waived with respect to such federal application.

EPA described the final Rule as establishing procedures that promote:

- Consistent implementation of Section 401 of the Clean Water Act
- Regulatory certainty in the federal licensing and permitting process

The Riverkeeper Complaint argued that the Rule:

- Fails to provide an analysis of how the rule will impact water quality
- Illegally narrows a certifying authority’s review to the effects of a point source discharge only (i.e., excluding nonpoint sources)
- Narrows the scope of Section 401 certification to make it duplicative of Section 402
- Deprives certifying authorities of the ability to determine when an application is complete for review

- Limits the legal authorities that can be used by a certifying authority to approve, deny, or condition a certification
- Vests the power of enforcement with the federal agency

EPA argued in a Motion to Dismiss the Riverkeeper Complaint that:

- The case is not ripe for a review
- Riverkeeper lacks standing

The Court also addressed pending Motions to Intervene.

EPA argued that the Rule was not ripe for review until there was a concrete application of the Rule which harms or threatens plaintiffs. It further argued that if Riverkeeper could not identify harm to its interests, such claims were not ripe.

As to standing, EPA argued there was no standing because of an absence of injury in fact. Similarly, the agency argued that because the Rule had not yet been applied, alleged harms are highly speculative and not imminent or concrete.

Riverkeeper responded that a project-specific review was not necessary. They based this argument on their view that the claims present pure legal issues and are based entirely on the text of the Rule, administrative record and existing law. In other words, the challenge was to the rule-making process as opposed to its application in a specific instance.

In summarizing Riverkeeper's argument, the Court notes:

. . . First, the fundamental changes to the rule which apply to every certification request as of September 11, 2020 "immediately creates a substantial risk that Federally licensed and permitted projects will degrade the resources of the Delaware River watershed." . . . Second, the Rule "curtails Plaintiffs' ability to advocate for greater environmental protections in the Section 401 certification process." . . .

The Court addresses what it states are the elements of the ripeness doctrine, which include:

- Adverse interests
- Conclusiveness
- Practical utility

The Court in holding for Riverkeeper states:

Plaintiffs' alleged harm here occurs as a result of the implementation of the Certification Rule. If the Court were to make a judgment in Plaintiffs' favor, and the previous certification program were reinstated, the harm against Plaintiffs would be resolved in its entirety. Therefore, this result would be "of some practical help" to Plaintiffs.

The Court also lists the elements to prove Article III standing, which include:

- An injury in fact;
- A sufficient causal connection between the injury and the conduct complained of; and
- A likelihood that the injury will be redressed by a favorable decision

EPA cites the United States Supreme Decision in *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). The Court rejects the application of the *Summers* decision to the Riverkeeper litigation, stating:

Plaintiffs distinguish this case from *Summers* on the basis that the Certification Rule is both a substantive and procedural rule which applies to all projects going forward. (Opp'n 18.) Their allegations of harm are more specific in terms of which potential projects the Certification Rule applies to (all of them), as well as the physical location that is of concern (the Delaware River watershed). Further, because the Certification Rule alters the substantive requirements of the certification process for every project that will occur in the future, the likelihood of harm is more significant here than in *Summers*.

The Court also grants unopposed Motions to Intervene by the states of Arkansas, Louisiana, Montana, Mississippi, Missouri, Texas, West Virginia, and Wyoming, along with the American Petroleum Institute, Interstate Natural Gas Association of America, and the National Hydropower Association.

A copy of the Opinion can be downloaded [here](#) and the Order [here](#).