

# CWA 401 RULE LITIGATION

Internal deliberative pre-decisional - FOR USE BY 2024 PRESIDENT-ELECT TRANSITION TEAM MEMBERS ONLY

## ISSUE SUMMARY:

American Petroleum Institute, the Interstate Natural Gas Association, the National Hydropower Association, and the states of Alaska, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, West Virginia, and Wyoming (collectively, “Plaintiffs”) filed suit challenging the Clean Water Act Section 401 Water Quality Certification Improvement Rule (the “2023 Rule”) in the District Court for the Western District of Louisiana (Lake Charles Division) on December 4, 2023. Subsequently, the National Wildlife Federation, American Whitewater, the California Water Resources Control Board, the District of Columbia, and the states of California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington (collectively, “Defendant-Intervenors”) intervened to defend the 2023 Rule. The parties are currently in the process of briefing summary judgment motions before Judge James D. Cain, Jr.

## KEY POINTS:

- Under CWA section 401, Congress provides Tribes, states, and territories with a tool to protect their waters from adverse impacts that could result from federally licensed or permitted projects. As required by CWA section 401, an applicant for a federal license or permit that may result in a discharge into waters of the United States must obtain a water quality certification or waiver from the certifying authority. Certifying authorities are typically a Tribe with treatment in a similar manner as a state (TAS) or a state (which includes territories). The EPA acts as the certifying authority where a Tribe or state does not have authority to issue certifications.
- On September 27, 2023, the EPA promulgated new regulations implementing section 401 in the 2023 Rule, which took effect on November 27, 2023. The 2023 Rule replaced regulations implementing section 401 that were promulgated by the EPA in 2020 (the “2020 Rule”). The 2023 Rule was promulgated following the Agency’s review of the 2020 Rule in accordance with Executive Order 13,990 and the Agency’s subsequent notice of its intent to reconsider and revise the 2020 Rule.
- The 2020 Rule was subject to litigation in several cases, until the final case was dismissed without prejudice for mootness following the 2023 Rule taking effect.
- Plaintiffs in the current litigation on the 2023 Rule raise several claims under the CWA and APA, including challenging the scope of certification in the 2023 Rule, alleging that the 2023 Rule is impermissibly retroactive, and alleging that the 2023 Rule is arbitrary and capricious because the EPA failed to sufficiently explain its change in course or respond meaningfully to comments from Plaintiffs.
- Plaintiffs sought a partial preliminary injunction against the 2023 Rule, but the court denied this motion. As a result, the 2023 Rule remains in effect nationwide.

## ONGOING/UPCOMING REVIEWS:

- 10/30/24: EPA’s Reply Brief due

## KEY EXTERNAL STAKEHOLDERS:

☒ Congress      ☒ Industry      ☒ States      ☒ Tribes      ☒ Media      ☒ Other Federal Agency  
☒ NGO      ☒ Local Governments      ☒ Public

#### MOVING FORWARD:

- EPA OGC is coordinating with DOJ on the litigation.
- EPA OW is providing implementation support to EPA regional offices, as well as to stakeholders, including Tribes, states, territories, federal agencies, and project proponents.