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EPA Seeks To Undermine High Court Precedent In Water Rule

By **Juan Carlos Rodriguez**

Law360 (August 12, 2019, 10:00 PM EDT) -- The Trump administration's deregulatory push has largely focused on rolling back Obama-era policies, but the U.S. Environmental Protection Agency's recent proposal to restrict states' and tribes' authority to block projects over water concerns takes aim at the U.S. Supreme Court's decades-old ruling granting broad leeway to those governments.

Under the EPA's proposed rule, released Friday, states' and tribes' authority to block projects like pipelines, export terminals and dams would be drastically reduced. In addition, federal agencies like the U.S. Army Corps of Engineers and the Federal Energy Regulatory Commission would get significant new authority to impose tight deadlines on states and tribes to process Clean Water Act permit applications.

But in order to do all that, the EPA has to overcome the high court's 1994 ruling in Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology, in which the court endorsed a broad view of states' permitting authority under Section 401 of the CWA.

Justice Sandra Day O'Connor wrote for the 7-2 majority that the Evergreen State's minimum stream flow requirement for a hydroelectric project, imposed to protect a river's salmon population, was a permissible condition for Section 401 certification. The EPA had also sided with Washington state.

"This particular decision, though narrow in its holding, has been read by other courts as well as the EPA and some states and tribes to significantly broaden the scope of section 401 beyond its plain language meaning," the EPA said in the preamble of its proposed Section 401 rule.

States and tribes would lose much of their flexibility to deny the key Section 401 permits to projects under the EPA's proposed rule, which would limit evaluations to pollution discharges, not other changes to water characteristics such as flow rate.

Crowell & Moring LLP partner David Chung said the EPA takes the unusual position that although the justices ruled for broad state and tribal authority in PUD, the agency isn't bound by that decision because it believes there are other reasonable interpretations. The agency cites Justice Clarence Thomas' dissent, which was joined by Justice Antonin Scalia, as support for its position.

"They're saying, 'We thought Justice Thomas' interpretation is also a reasonable one, and so we're going to adopt that [in a] rule,'" Chung said. "And because the Supreme Court hasn't said there's only one way to interpret this section, they think their interpretation is a permissible one."

Justice Thomas' dissent noted that the majority appeared to grant Chevron deference to the EPA in PUD, but never actually established that the language of the Clean Water Act is ambiguous and therefore open to a reasonable interpretation by the agency. The EPA has seized upon that in this proposed rule, saying its new interpretation is just as valid as the older, broader one and deserves deference as well.

Justice O'Connor's opinion was about as broad as it could be in its interpretation of states' and tribes' rights under Section 401, Vermont Law School professor Patrick Parenteau said. He called the EPA's position that it could bypass a Supreme Court ruling on the very subject of its rule "beyond stunning" and "unprecedented."

But he said the EPA has likely considered how its position will play in a modern context.

"They may be thinking, 'This is outrageous, but it will get to the Supreme Court, and now we have the kind of court we want and maybe they'll correct PUD,'" he said.

Chung said the EPA's interpretation is a double-edged sword, though.

"Future administrations can just flip back to the old interpretation," he said.

Aside from the general scope of state and tribal Section 401 permits, the new rule would limit states' ability to work around a statutory one-year time limit on considering permit applications. Some states and tribes have been able to extend permit application review periods by having a project developer re-apply. Those governments often say they need longer than a year because of the complexity of the proposed projects.

Section 401 says if the permitting agency has not acted within a year, the permitting authority is considered to be waived. Under the proposed rule, federal agencies like the Army Corps and FERC — if they explain why their position is "reasonable" — could impose their own time limit on a permitting agency, which could be less than a year.

"Sometimes, states have said they'll deny a permit unless the applicant resubmits their 401 certification. And if you resubmit the 401 certification, that one-year period starts again. That's a problem, frankly," said Thaddeus Lightfoot, a partner at Dorsey & Whitney LLP. "The proposed rule gives federal agencies a veto of a veto, essentially."

But there is one difference between the proposed Section 401 regime and the current one that might be more strict, Chung said. Under the current system, a state could grant a permit if there was "reasonable assurance" that there wouldn't be a violation of the applicable water quality standards. Under the proposed rule, certifying authorities must conclude that a discharge "will comply" with water quality requirements.

"It's a subtle difference, but arguably that could be more difficult for project applicants to meet," he said. "Is that going to leave the door cracked open for more states given the time pressures? Are they going to find ways to say, OK, we're coming up on our year, and either because of a lack of information or just a lack of confidence we can't assure that the discharge will comply and therefore we're going to deny?"

He said the tighter deadlines and stricter certification standard — combined with the fact that some

states like California have their own permit evaluation systems that could conflict with the EPA's rule — could effectively force the matters out of states' hands.

"Maybe all this really does is shift battles to court sooner," Chung said.

--Editing by Kelly Duncan and Emily Kokoll.