On October 21, the U.S. District Court for the Northern District of California vacated and remanded the 2020 Clean Water Act (CWA) §401 Certification Rule (In re: *Clean Water Act Rulemaking*, 3:20-cv-04636, three consolidated cases). In July 2020, twenty states, including California, Colorado, Nevada, New Mexico, Oregon and Washington, filed a complaint for declaratory and injunctive relief, challenging the CWA §401 Certification Rule. The complaint alleged APA deficiencies and argued that the new rule "upends fifty years of cooperative federalism by arbitrarily re-writing EPA's existing water quality certification regulations to unlawfully curtail state authority under the [CWA]." Eight states intervened as defendants, including Montana, Texas, and Wyoming. In July 2021, under the new Biden Administration, the Environmental Protection Agency (EPA) requested that the rule be remanded without vacatur.

The court held that EPA's request for voluntary remand was not frivolous or made in bad faith, and was therefore appropriate. It then went on to consider whether the 2020 rule should remain in place while EPA considered a new §401 Certification Rule. "Leaving an agency action in place while the agency reconsiders may deny the petitioners the opportunity to vindicate their claims in federal court and would leave them subject to a rule they have asserted is invalid. On the other hand, vacatur of an action may allow an agency to abandon a legislative rule without going through the (extensive) trouble of developing a new one." The court compared vacatur in a voluntary remand to the "discretionary, equitable relief akin to an injunction." The court then analyzed the decision to vacate the rule according to two factors: (1) the deficiencies of the §401 Certification Rule, and (2) the disruptive consequences of vacatur.

Under the first factor, the court noted that the plaintiff states "asserted that the most glaring deficiency in the current certification rule is a newly-inserted subsection defining the scope of certification, which they say impinges upon the [CWA's] principles of cooperative federalism." The court cited the congressional declaration in CWA §101(b), recognizing the primary responsibilities and rights of states to "prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...."

The court also cited *PUD No. 1*, 511 U.S. 700 (1994): "[T]he Supreme Court affirmed that Section 401(d) confers on states the power to consider all state actions related to water quality in imposing conditions on Section 401 certificates. The majority recognized that Section 401(a) contemplates state certification that a discharge will comply with certain provisions of the [CWA] while subsection (d) expands the [s]tate's authority to impose conditions on the certification of a project because it refers to the compliance of the applicant, not the discharge. *PUD No. 1* concluded that Section 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied. The revised scope of certification that EPA promulgated takes an antithetical position to *PUD No. 1* without reasonably explaining the change…. The certification rule's preamble tries to address the sharp departure from *PUD No. 1* but falls back to claiming that the case was wrongly decided, and eventually sides with Justice Thomas' dissenting opinion. EPA now undermines that argument itself by declaring its intent to restore the balance of state, [t]ribal, and federal authorities consistent with the cooperative federalism principles central to CWA Section 401. The agency's recognition of its inconsistent interpretation of the scope of the certification compels the conclusion that the current rule is unreasonable…. Moreover, EPA's acknowledgment that it intends to 'restore' the principles of cooperative federalism indicates that the current scope of the certification rule is inconsistent with and contravenes the design and structure of the [CWA], and thus does not warrant deference" (internal marks and citations omitted). The court then noted the long list of substantive changes to the 2020 rule that EPA is considering, adding further support for vacatur.

Under the second factor, the court noted that the 2020 rule has only been in effect for thirteen months and has been under attack "since before day one," compared to the "dramatic" break with fifty years of precedent. In addition to the improbability of any institutional reliance on the new rule, the court noted other environmental considerations for returning to the pre-2020 rule. The court found "particularly persuasive" the State of Washington's example of pending FERC licenses for three hydropower dams on the Skagit river. "These dams will each require Section 401 certifications prior to EPA's promulgation of a replacement for the current certification rule…. [B]ecause FERC licenses…last between 30-50 years, the lack of adequate water quality conditions attached to these licenses will have adverse impacts for a generation." The court acknowledged the intervenor-defendants' arguments that certifying authorities overreached under the old rule, leading to negative economic effects, particularly with regard to energy projects. But when considering whether to vacate an EPA rule, where the CWA has the express goal to restore and maintain the chemical, physical, and biological integrity of the nation's waters, the court found that the potential environmental effects outweighed the potential economic consequences.