

SUPREME COURT

Eyes on EPA after justices reject water permitting case

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PacifiCorp's Iron Gate Dam on the Klamath River in Northern California. Jeremy P. Jacobs/E&E News

Supreme Court justices said today that they will not take up a case concerning state water quality certifications for pipelines, dams and other federally permitted projects.

Their decision means that the Trump administration's rulemaking on Section 401 of the Clean Water Act is even more critical, said Brian Johnson, California director of Trout Unlimited, one of the groups that filed the [petition](#).

"The current draft is largely unconstitutional, not to mention deeply wrong," he said, referring to a proposal by EPA to limit states' role in permitting ([Greenwire](#), Aug. 9). "But done correctly, a rulemaking could restore common sense. The answer will determine whether we have clean water in rivers across the country, so none of us are giving up."

Conservation groups had asked the justices to take a second look at a finding by the U.S. Court of Appeals for the District of Columbia Circuit that two states "far exceeded" their authority when they struck a deal to take additional time to review a hydroelectric project.

The Supreme Court declined to take up the question. Justice Brett Kavanaugh, who was sitting on the D.C. Circuit when an earlier iteration of the case arrived at the court, did not weigh in on today's decision.

The petition dealt with Section 401 of the Clean Water Act, which allows states to certify that federally approved projects adhere to water quality standards with their borders. States generally have a year to act before the federal government can find that they have missed their opportunity for review.

California and Oregon reached a decommissioning agreement with a dam builder under which PacifiCorp repeatedly pulled and refiled water quality permit requests, effectively blocking the Federal Energy Regulatory Commission from stepping in to relicense a set of dams along the Klamath River that have affected salmon runs in the waterway and produced little electricity for the region.

The D.C. Circuit found that the states' "withdraw-and-replace" scheme, which can also be used to block gas pipelines and coal export facilities, "usurped" federal authority.

Oregon, California and a list of states led by both Republican and Democratic attorneys general [told](#) the Supreme Court that the D.C. Circuit's decision "thwarts" states' power to control water pollution.

Attorneys for the federal government [urged](#) the court not to take up the issue, citing EPA's work on new regulations to curb state powers in Section 401 permitting.

PacifiCorp said it was not surprised that the Supreme Court rejected the petition but said that it remains "fully committed" to implementing the Klamath Hydroelectric Settlement Agreement, under which the company agreed to remove the dams.

The petition the justices rejected today posed one of at least three Clean Water Act questions that loom over the nation's highest court.

Last month, the justices heard arguments in *County of Maui v. Hawai'i Wildlife Fund*, which examined whether federal permits are required for pollution that travels through groundwater before reaching waters of the United States ([Greenwire](#), Nov. 6).

The Supreme Court is also widely expected to receive requests to consider the Trump administration's pending effort to redefine which waterways and wetlands are covered under the Clean Water Act.

The court, which agrees to hear about 1% of the cases it receives, also denied a long list of other petitions this morning. It takes the vote of four justices to accept a petition.

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