

Not an Afterthought: Remedies Receiving Their Day in Court

THERE is news in the world of remedies for agencies that violate the law. These developments could have repercussions for any incoming president seeking to roll back the prior administration's policies, as well as implication for parties seeking to avert environmental harms. The new federal court decisions span the powers of remand (sending the rule back to the agency to reconsider), vacatur (wiping the agency rule off the books), and related appeals. It is time for an update.

Two recent decisions in the Ninth Circuit have held that courts may not vacate a rule prior to issuing a decision on the merits. Both cases had to do with Trump-era rules that were still sticking around: a rule restricting state power under section 401 of the Clean Water Act and another rule restricting the scope of protections under the Endangered Species Act. The Biden administration had announced plans to rewrite those rules, but while the agencies worked to complete the legal steps, the plaintiffs were hoping to avoid the harms of the two Trump rules.

In the Section 401 case, the district court held that there was "significant doubt" about whether EPA had complied with the law, but the agency was pushing for remand and, meanwhile, the court did not have the briefing needed to make an actual decision about the case on the merits.

The court instead granted remand and also vacated the rule, after finding that there would be significant harms to plaintiffs if it left the rule in place. To come to this conclusion, the court applied a test from *Allied Signal v. Nuclear Regulatory Commission*, which sets out the factors to look at for vacatur: how serious are the

regulation's deficiencies and would it cause "disruptive consequences."

But there is little precedent about what to do with the *Allied Signal* test before a merits decision. On appeal the Ninth Circuit was faced with that question in the Section 401 case. Plaintiff states argued that EPA was seeking its own pre-merits relief: a remand without vacatur. Allowing the agency to keep the rule in place, without a decision on the merits, was essentially the same thing as ruling in EPA's favor. As plaintiffs' argument in the appeal went, the question of what to do before a merits ruling was essentially equitable. The court had a lot of latitude to decide how to handle the case under the common law, including vacating the rule—none of which was circumscribed by the Administrative Procedure Act.

The Ninth Circuit disagreed though. According to the appeals court, the "best read" of the act did not allow the district court to vacate without an actual decision on the merits—even though remanding was still allowed. It did not help plaintiffs that while the case was pending on appeal, the Supreme Court decided to intervene via the shadow docket and blocked the district court's vacatur order.

This decision also addressed another doctrine that is relevant to the appeal of an order like this. EPA had argued that the district court's decision to vacate and remand was actually not appealable, citing a case called *Alesa Valley Alliance v. Department of Commerce*. In *Alesa*, the Ninth Circuit had held that a decision vacating and remanding a rule was generally not appealable because challengers could go after any new rule finalized after remand. The Ninth Circuit did not agree that the

Plaintiffs facing ongoing harm over remanded rules still face tough challenges



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Alesa case applied to a pre-merits decision (even though the same potential to challenge the eventual rewrite existed in the Section 401 case). As a result, that Trump-era rule remains in force.

The other decision involved the Trump Endangered Species Act rules. In that case, the district court granted the Biden administration's request to remand the rules. The court then also vacated the rules after noting that the administration planned to rewrite them anyway. After the Supreme Court blocked the vacatur order in the Section 401 case, however, the Ninth Circuit blocked the vacatur order in this case too. As a result, these Trump-era rules also remain in force.

These cases highlight the limits and challenges that plaintiffs and an administration face when seeking a change in course after an inter-party transition. When a new president is hoping to rewrite a regulation, it can be helpful to avoid a merits decision on the prior president's rule (as explained recently in an article I co-authored with Richard Revesz: "Presidential Transitions: The New Rules"). And courts almost always grant motions to remand. But the propriety of that presupposes that there is no real harm to leaving the prior administration's rule in place. If there is ongoing harm and the administration is moving slowly, plaintiffs will face a tough situation under these new decisions.