No. _____

In the Supreme Court of the United States

STATE OF LOUISIANA; STATE OF ARKANSAS; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; STATE OF TEXAS; AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *and* NATIONAL HYDROPOWER ASSOCIATION,
APPLICANTS,
v.
AMERICAN RIVERS; MICHAEL S. REGAN; *and* U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.
RESPONDENTS.

APPENDIX TO APPLICATION FOR STAY PENDING APPEAL
VOLUME II OF IV

On Application For Stay, Or, In The Alternative, On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Ninth Circuit

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

GEORGE P. SIBLEY, III
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8262
(804) 788-8218 (fax)
gsibley@huntonak.com

DEIDRE G. DUNCAN
ERICA N. PETERSON
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

TIMOTHY L. MCHUGH
TROUTMAN PEPPER
HAMILTON SANDERS LLP
1001 Haxall Point,
15th Floor
Richmond, VA 23219

Attorneys for Applicants

[Additional counsel on following page.]

CLARE ELLIS
HUNTON ANDREWS KURTH LLP
50 California Street
Suite 1700
San Francisco, CA 94111

Attorneys for Applicants American Petroleum Institute and Interstate Natural Gas Association of America

ELIZABETH B. MURRILL,
SOLICITOR GENERAL
JOSEPH S. ST. JOHN,
DEPUTY SOLICITOR
LOUISIANA DEPARTMENT
OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
(225) 326-6739
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Attorneys for Applicant State of Louisiana

CHARLES SENSIBA
TROUTMAN PEPPER
HAMILTON SANDERS LLP
401 9th Street NW
Suite 1000
Washington, DC 20004-2146

ELIZABETH HOLT ANDREWS
TROUTMAN PEPPER
HAMILTON SANDERS LLP
Three Embarcadero Center
Suite 800
San Francisco, CA 94111-4057

Attorneys for Applicant National Hydropower Association

JAMES KASTE
DEPUTY ATTORNEY GENERAL
WYOMING ATTORNEY GENERAL'S OFFICE
109 State Capitol
Cheyenne, WY 82002

Additional Counsel:

AUSTIN KNUDSEN
Attorney General of Montana

KEN PAXTON
Attorney General of Texas

PATRICK MORRISEY
Attorney General of West Virginia

LESLIE RUTLEDGE
Attorney General of Arkansas

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

Attorneys for Applicants

TABLE OF CONTENTS

Volume I

Order Regarding Motion to Relate, ECF No. 23, *In re Clean Water Act Rulemaking*, No.3:20-cv-04636-WHA (N.D. Cal. Aug. 08, 2020) ..... App. 1

Motion to Intervene by the states of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, Wyoming, ECF No. 27, *In re Clean Water Act Rulemaking*, No. 3:20-cv-4636-JSC (N.D. Cal. Aug. 28, 2020) ..... App. 2

Order Relating to Case No.20-04869, ECF No. 41, *In re Clean Water Act Rulemaking*, No. 3:20-cv-4636-WHA (N.D. Cal. Sept. 02, 2020) ..... App. 95

Declaration of Robin Rorick for the American Petroleum Institute In Support of the Coalition's Motion to Intervene in Support of Defendants, ECF No.56-1, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA; 3:20-cv-04869-WHA (N.D. Cal. Sept. 04, 2020) ..... App. 96

Declaration of Joan Dreskin for the Interstate Natural Gas Association of America In Support of the Coalition's Motion to Intervene in Support of Defendants, ECF No. 56-2, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA; 3:20-cv-04869-WHA (N.D. Cal. September 04, 2020) ..... App. 105

Order Granting Motion to Intervene, ECF No. 62, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA; 3:20-cv-04869-WHA (N.D. Cal. Sept. 17, 2020)..... App. 115

First Amended Complaint, ECF No. 75, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Sept. 29, 2020) ..... App. 116

Joint Case Management Statement, ECF No. 84, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA; 3:20-cv-04869-WHA; 3:20-cv-06137 (N.D. Cal. Oct. 15, 2020) ..... App. 148

Complaint for Declaratory and Injunctive Relief, ECF No. 96, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04869-WHA (N.D. Cal. Oct. 30, 2020) ..... App. 165

Complaint for Declaratory and Injunctive Relief, ECF No. 98, *In re Clean Water Act Rulemaking*, No. 3:20-cv-06137-WHA (N.D. Cal. Nov. 02, 2020) ..... App. 197

Order Regarding Proposed Timeline For Administrative Record Completion, ECF No. 116, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Nov. 30, 2020) ..... App. 224

Order Regarding Joint Motion to Hold Proceedings in Abeyance, ECF No. 132, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Feb. 22, 2021) ..... App. 225

EPA'S Motion for Remand Without Vacatur, ECF No. 143, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. July 01, 2021) ..... App. 226

Volume II

Plaintiff's Opposition to EPA's Motion for Remand Without Vacatur, ECF No. 145, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. July 26, 2021) ..... App. 244

Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur, ECF No. 146, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. July 26, 2021) ..... App. 267

Declaration of Eileen Sobeck in Support of Plaintiffs' Opposition to Motion for Remand, ECF No. 146-1, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. July 26, 2021) ..... App. 299

American Rivers' Opposition to EPA's Motion for Remand Without Vacatur, ECF No. 147, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. July 26, 2021) ..... App. 424

EPA's Reply In Support Of Motion For Remand Without Vacatur, ECF No. 153, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Aug. 12, 2021) ..... App. 450

Intervenor Defendants' Reply In Support Of Motion To Strike, ECF No. 155, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. August 19, 2021) ..... App. 473

Volume III

Intervenor Defendants' Supplemental Brief On *Allied-Signal* Factors, ECF No. 172, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636 (N.D. Cal. Oct. 4, 2021)..... App. 478

August 2, 2021, Letter Comments From American Fuel & Petrochemical Manufacturers, et al., Regarding Section 401 Rule, ECF No. 172-1, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Oct. 04, 2021) ..... App. 497

Declaration Of David M.S. Dewhirst, ECF No. 172-2, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Oct. 04, 2021) ..... App. 549

Order Regarding Motion to Remand Without Vacatur, ECF No. 173, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Oct. 21, 2021) ..... App. 552

Final Judgment, ECF No. 176, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Nov. 17, 2021) ..... App. 570

Intervenor Defendants' Motion for Stay Pending Appeal, ECF No. 179, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Nov. 17, 2021) ..... App. 571

Order Denying Motion for Stay Pending Appeal, ECF No. 191, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal. Dec. 07, 2021)..... App. 612

Intervenor National Hydropower Association's Notice of Motion & Motion to Intervene, ECF No. 75, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04869-WHA (N.D. Cal. Sept. 04, 2020) ..... App. 626

American Petroleum Institute and Interstate Natural Gas of America's Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof, ECF No. 84, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04869-WHA (N.D. Cal. Sept. 04, 2020) ..... App. 638

Order Granting Intervention, ECF No. 113, *In re Clean Water Act Rulemaking*, No. 3:20-cv-04869-WHA (N.D. Cal. October 09, 2020)..... App. 666

Volume IV

Intervenor-Defendants-Appellants' and Intervenors-Appellants' Motion for Stay Pending Appeal, ECF No. 20, *In re Clean Water Act Rulemaking*, No. 21-16958 (9th Cir. December 15, 2021)..... App. 667

Federal Defendants' Response in Opposition to Intervenor Defendants/ Appellants' Motion for Stay Pending Appeal, ECF No. 26, *In re Clean Water Act Rulemaking*, No. 21-16958 (9th Cir. January 11, 2022) ..... App. 757

Federal Defendants' Motion to Dismiss Appeal for Lack of Appellate Jurisdiction, ECF No. 33, *In re Clean Water Act Rulemaking*, No. 21-16958 (9th Cir. January 19, 2022) ..... App. 783

Order Denying Stay, ECF No. 41, *In re Clean Water Act Rulemaking*, No. 21-16958 (9th Cir. February 24, 2022)..... App. 799

MONEEN NASMITH (NY Bar # 4427704)
[Admitted Pro Hac Vice]
MICHAEL YOUHANA (NY Bar # 5819032)
[Admitted Pro Hac Vice]
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
(212) 845-7384 / (212) 284-8033
mnasmith@earthjustice.org
myouhana@earthjustice.org

KRISTEN L. BOYLES (CA Bar # 158450)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
(206) 343-7340
kboyles@earthjustice.org

GUSSIE LORD (DC Bar # 1009826)
[Admitted Pro Hac Vice]
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(720) 402-3764
glord@earthjustice.org

THOMAS S. WALDO (AK Bar # 9007047)
[Admitted Pro Hac Vice]
OLIVIA GLASSCOCK (AK Bar # 1809072)
[Admitted Pro Hac Vice]
Earthjustice
325 4th Street
Juneau, AK 99801
(907) 500-7123 / (907) 500-7134
twaldo@earthjustice.org
oglasscock@earthjustice.org

Attorneys for Plaintiffs

NATHAN MATTHEWS (CA Bar # 264248)
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5695
nathan.matthews@sierraclub.org

Local Counsel and Attorney for Sierra Club

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re:

CLEAN WATER ACT RULEMAKING

This document relates to:

ALL ACTIONS

Case No. 3:20-cv-04636-WHA
Case No. 3:20-cv-04869-WHA
Case No. 3:20-cv-06137-WHA

(Consolidated)

Plaintiffs' Opposition to EPA's Motion for Remand Without Vacatur

Hearing: Aug. 26, 2021 at 12 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BACKGROUND 1

ARGUMENT 5

I. THE COURT SHOULD DENY EPA'S REQUEST FOR VOLUNTARY REMAND WITHOUT VACATUR 5

A. The Court Should Deny Remand Without Vacatur Because the CWA Requires that EPA Revise the Certification Rule. 5

B. Remand Without Vacatur Is Not in the Interests of Judicial and Administrative Economy. 7

C. Remand Will Unduly Prejudice Plaintiffs. 9

II. THE COURT SHOULD VACATE THE RULE UPON REMAND. 11

A. Serious Legal Errors Mar the Certification Rule. 11

B. Vacatur of the Certification Rule Is the Less Disruptive Option. 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Page number(s)

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987) 15

Cal. Cmties. Against Toxics v. EPA,
688 F.3d 989 (9th Cir. 2012) 11, 12, 13, 15

Chlorine Chemistry Council v. EPA,
206 F.3d 1286 (D.C. Cir. 2000) 9

City of Tacoma v. FERC,
460 F. 3d 53 (D.C. Cir. 2006) 12

Idaho Farm Bureau Fed'n v. Babbitt,
58 F.3d 1392 (9th Cir. 1995) 11

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 12

Nat'l Family Farm Coal. v. EPA,
960 F.3d 1120 (9th Cir. 2020) 14

N. Coast Rivers All. v. U.S. Dep't of the Interior,
No. 16-CV-00307, 2016 WL 8673038 (E.D. Cal. Dec. 16, 2016) 6

N. Coast Rivers All. v. U.S. Dep't of the Interior,
No. 16-CV-00307, 2016 WL 11372492 (E.D. Cal. Sept. 23, 2016) 7

Pollinator Stewardship Council v. EPA,
806 F.3d 520 (9th Cir. 2015) 11, 13, 14, 15

PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology,
511 U.S. 700 (1994) 6, 12

S.D. Warren Co. v. Me. Bd. of Env't Prot.,
547 U.S. 370 (2006) 3, 12

Se. Alaska Conservation Council v. U.S. Forest Serv.,
468 F. Supp. 3d 1148 (D. Alaska 2020) 14

SKF USA Inc. v. United States,
254 F.3d 1022 (Fed. Cir. 2001) 6, 7

U.S. Dep't of Energy v. Ohio,
503 U.S. 607 (1992) 12

Util. Solid Waste Activities Grp. v. EPA,
901 F.3d 414 (D.C. Cir. 2018) 7

STATUTES

33 U.S.C. § 1251 ..... 2, 7, 12
33 U.S.C. § 1341 1

REGULATIONS

40 C.F.R. § 121.1 ..... 6, 12
40 C.F.R. § 121.2 12
40 C.F.R. § 121.3 ..... 6, 12
40 C.F.R. § 121.4 10
40 C.F.R. § 121.6 12
40 C.F.R. § 121.7 12
40 C.F.R. § 121.8 12
40 C.F.R. § 121.9 ..... 6, 12

FEDERAL REGISTER & DOCKET MATERIALS

Clean Water Act Section 401 Certification Rule,
85 Fed. Reg. 42,210 (July 13, 2020) (to be codified at 40 C.F.R. pt. 121) 1

Exec. Order No. 13,868, Promoting Energy Infrastructure and Energy Growth,
84 Fed. Reg. 15,495 (Apr. 10, 2019) 2, 6

Exec. Order No. 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 20, 2021) 3, 6, 7, 13

Notice of Intention to Reconsider and Review the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 2, 2021) 3, 4, 12, 13

Am. Fisheries Soc'y et al., Comments on Proposed Rule (Oct. 21, 2019),
https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0784 2

Att'ys Gen. of States of Wash., N.Y., Cal., et al., Comments on Proposed Rule (Oct. 21, 2019),
https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0556 ..... 1, 2

EPA, Economic Analysis for the Clean Water Act Section 401 Certification Rule,
Docket ID No. EPA-HQ-OW-2019-0405-1125 (May 2020) 14

EPA, EPA ICR No. 2603.02, ICR Supporting Statement, Information Collection Request for Updating Regulations on Water Quality Certification Proposed Rule,
Docket ID No. EPA-HQ-OW-2019-0405-0070 (Aug. 2019) 14

Nat'l Wildlife Fed'n, et al., Comments on Proposed Rule (Oct. 21, 2019),
https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0911 2

Nez Perce Tribe, Comments on Proposed Rule (Oct. 21, 2019),
https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0908 1

Pyramid Lake Paiute Tribe, Comments on Proposed Rule (Oct. 21, 2019),
https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0547 1

Sierra Club et al., Comments on Proposed Rule (Oct. 21, 2019),
https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0903 2

OTHER AUTHORITIES

Fact Sheet: List of Agency Actions for Review, White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ 3

Press Release, EPA, EPA Administrator Wheeler New York Post Op-Ed: Here's How Team Trump Will Bust Cuomo's Gas Blockade (Aug. 16, 2019), https://www.epa.gov/newsreleases/epa-administrator-wheeler-new-york-post-op-ed-heres-how-team-trump-will-bust-cuomos-0 .....2, 6

Press Release, EPA, EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act (June 1, 2020), https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0. 2

MEMORANDUM AND POINTS OF AUTHORITIES

Suquamish Tribe, Pyramid Lake Paiute Tribe, Orutsararmiut Native Council, Columbia Riverkeeper, and Sierra Club, (collectively, "Plaintiffs") by and through their counsel, respectfully request that the Court deny the motion for remand without vacatur filed by the United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA" or the "Agency"), on July 1, 2021, in the matter of EPA's Clean Water Act ("CWA") Section 401 Certification Rule.

Remand without vacatur is inappropriate in this case because it would leave a legally deficient regulation in effect until the spring of 2023 and perhaps longer, while EPA engages in a rulemaking to revise the rule. A failure to vacate would have real, negative consequences for Plaintiffs and the environment. Chiefly, this failure would result in certifications of projects in a manner that runs counter to Section 401's core purposes, including maintaining a system of cooperative federalism and safeguarding state and tribal water quality.

BACKGROUND

On July 13, 2020, EPA published the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (to be codified at 40 C.F.R. pt. 121) ("Certification Rule"), upending a half century of regulatory practice under CWA Section 401, 33 U.S.C. § 1341. EPA promulgated the Certification Rule over the objections of myriad commenters, including Plaintiffs. Dozens of states and tribes across the country had argued that the proposed regulation upset the cooperative federalist principles at the heart of the CWA. *See, e.g.*, Att'ys Gen. of States of Wash., N.Y., Cal., et al., Comments on Proposed Rule 23–25 (Oct. 21, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0556 ("State AG Comments"); Pyramid Lake Paiute Tribe, Comments on Proposed Rule 3 (Oct. 21, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0547; Nez Perce Tribe, Comments on Proposed Rule 9 (Oct. 21, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0908. These certifying authorities were joined by citizens, nonprofit organizations, and other concerned parties who pointed to the tremendous harm the Certification Rule was likely to have on the public and the environment. *See, e.g.*, Sierra Club et al.,

Comments on Proposed Rule 1–2 (Oct. 21, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0903 ("Sierra Club Comments"); Am. Fisheries Soc'y et al., Comments on Proposed Rule 1–2 (Oct. 21, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0784; Nat'l Wildlife Fed'n, et al., Comments on Proposed Rule 6–8 (Oct. 21, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0911.

Many commenters objected to EPA's promulgation of the proposed rule on the grounds that the regulation would be contrary to the CWA's mandate to restore and protect the physical, chemical, and biological integrity of the Nation's waters and to do so as broadly as possible. *See, e.g.*, State AG Comments at 33; Sierra Club Comments at 2; *see also* 33 U.S.C. § 1251. Specifically, EPA engaged in the rulemaking pursuant to Executive Order ("EO") 13,868, titled *Promoting Energy Infrastructure and Energy Growth*, 84 Fed. Reg. 15,495, issued by former President Trump on April 10, 2019. *See* 84 Fed. Reg. at 44,081–82. That EO asserted that it was "the policy of the United States to promote private investment in the Nation's energy infrastructure" and instructed EPA to facilitate the construction of infrastructure to transport "supplies of coal, oil, and natural gas" to market. 84 Fed. Reg. at 15,495. Dispensing with any ambiguity about the intent underlying the rulemaking, former EPA Administrator Andrew Wheeler stated that "[b]y reining in states, the updated regulations in our proposal will streamline the approval for and construction of energy infrastructure projects."[1] He later complained that certifying authorities "have held our nation's energy infrastructure projects hostage."[2]

Plaintiffs filed their complaint against EPA requesting vacatur of the Certification Rule on September 1, 2020. Plaintiffs maintain that EPA's rulemaking was arbitrary, capricious, an abuse of discretion, and contrary to law because the Certification Rule violated the CWA, was promulgated without a satisfactory explanation for upending decades of policy and practice, was promulgated in

[1] Press Release, EPA, EPA Administrator Wheeler New York Post Op-Ed: Here's How Team Trump Will Bust Cuomo's Gas Blockade (Aug. 16, 2019), https://www.epa.gov/newsreleases/epa-administrator-wheeler-new-york-post-op-ed-heres-how-team-trump-will-bust-cuomos-0.

[2] Press Release, EPA, EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act (June 1, 2020), https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0.

violation of EPA's own policies and procedures related to the Agency's responsibilities to tribes, and was promulgated without adequately analyzing how the rule would affect tribes and environmental justice communities. Suquamish Compl. ¶¶ 77–89. Across the country, various additional parties filed lawsuits challenging the Certification Rule. This Court consolidated Plaintiffs' case with others previously filed by several states and three additional environmental organizations ("Co-Plaintiffs").

On January 20, 2021, President Biden issued EO 13,990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, which instructed agencies to review all existing regulations "that are or may be inconsistent with, or present obstacles to" enumerated environmental policies such as the promotion of "access to clean air and water." 86 Fed. Reg. 7037, 7037. President Biden used the opportunity to revoke EO 13,868, removing one of the primary justifications for the Certification Rule—an action that implied that the Trump administration's order to promote the construction of energy infrastructure was itself at odds with federal environmental policy. *See id*. at 7042. And in a press statement issued on the same day, the Biden administration specified that the Certification Rule would be reviewed in accordance with the new President's order. *Fact Sheet: List of Agency Actions for Review*, White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

After the issuance of EO 13,990, the cases against the Certification Rule were stayed. During this stay, EPA formally announced that it intended to redo the Certification Rule. In its Notice of Intention to Reconsider and Review the Clean Water Act Section 401 Certification Rule ("NIRR"), EPA itself pointed to multiple potential errors and deficiencies within the Certification Rule and stated that the agency intended to revise the regulation to address problems with the Certification Rule. *See* 86 Fed. Reg. 29,541 (June 2, 2021).

In the NIRR, EPA admitted the possibility that "portions of the rule impinge on" cooperative federalism principles that Congress envisioned as core to CWA Section 401. *Id.* at 29,542; *see also S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 380 (2006) ("Section 401 recast pre-existing law and was meant to 'continu[e] the authority of the State . . . .'" (alterations in original) (quoting S. Rep. No. 92-414, at 69 (1971))). The Agency admitted to several ways in which the rule

as written could chip away at the powers Congress reserved for states and tribes. For example, EPA conceded that the Certification Rule may prevent states and tribes from gaining access to information necessary for Section 401 review before the certification process begins by "constrain[ing] what states and tribes can require in certification requests." 86 Fed. Reg. at 29,543. EPA also admitted that the Certification Rule may "not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests" and "that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality." *Id*. The Agency also pointed to potentially serious problems with the Certification Rule's provision of excessive authority to federal agencies to permanently waive certification conditions based on "nonsubstantive and easily fixed procedural" grounds, as well as the prohibition on modifications of certifications. *Id*. at 29,543–44.

The NIRR further requested input on ten different topics: (1) pre-filing meeting requests, (2) certification requests, (3) the definition of a "reasonable period of time," (4) the scope of certification, (5) certification actions and federal agency review, (6) enforcement, (7) modifications to certifications, (8) the neighboring jurisdiction process, (9) impacts of the Certification Rule on the Section 401 process, and (10) implementation coordination, further noting EPA's concerns with many aspects of the Certification Rule. *Id.* at 29,541–44.

EPA expects to publish a proposed rule containing revisions in spring of 2022, but does not expect a final rule to go into effect until the spring of 2023. Goodin Decl., ECF No. 143-1, at ¶¶ 23, 27. In the meantime, to the detriment of Plaintiffs and in spite of EPA's manifold concerns with the Certification Rule as written, the Agency plans to keep the legally deficient regulation in effect. To this end, on July 1, 2021, EPA filed a Motion for Remand Without Vacatur, ECF No. 143 ("EPA Motion"), in this Court. If granted, any applications under Section 401 that have been submitted since the Certification Rule came into effect and any applications that are submitted before EPA finalizes a revised rule would be subject to the Certification Rule's invalid provisions, including those that EPA has noted may prevent state and tribal authorities from protecting water resources.

ARGUMENT

The Court should deny EPA's request for voluntary remand and allow this case to proceed to the merits, as doing so is in the interests of judicial economy and would avoid undue prejudice to the Plaintiffs. In the alternative, the Court should remand to EPA and also vacate the legally invalid Certification Rule.

I. The Court Should Deny EPA's Request for Voluntary Remand Without Vacatur.

This Court should deny EPA's request for voluntary remand without vacatur because 1) EPA is compelled by the CWA to revise the Certification Rule; 2) remand without vacatur would not be in the interests of judicial and administrative economy; and 3) remand without vacatur would be unduly prejudicial to Plaintiffs. The Certification Rule is arbitrary, capricious, an abuse of discretion, and contrary to the CWA. EPA's proposal to delay a ruling on the merits will allow unknown numbers of certification applications to be reviewed and decided under a rule that EPA itself admits may have major deficiencies and run contrary to the CWA. Failure to resolve the question of the Certification Rule's validity for 18 months or more will allow disagreements between certifying authorities, federal agencies, and project proponents about the precise scope and meaning of CWA Section 401 and the validity of the Certification Rule to persist for years. These ongoing disputes over statutory meaning and regulatory validity will pave the way for more lawsuits as states and tribes attempt to assert their authority during certification processes and federal licensing agencies or applicants challenge their right to do so. The net result will be a waste of judicial resources and an issuance of certifications with insufficient conditions to protect water quality.

Furthermore, keeping this deeply flawed regulation on the books for a prolonged period prejudices the parties to this case who are navigating or will navigate Section 401 Certification processes under the framework of the Certification Rule for the better part of the next two years. Plaintiffs ask the Court to deny voluntary remand without vacatur.

A. The Court Should Deny Remand Without Vacatur Because the CWA Requires that EPA Revise the Certification Rule.

Remand without vacatur is not appropriate here because EPA's request for remand arises out of a change in agency policy or interpretation where there is "an issue as to whether the agency is

either compelled or forbidden by the governing statute to reach a different result." *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).[3]

There is no question that EPA's decision to revise the Certification Rule is "associated with a change in agency policy or interpretation." *See id.* The Biden Administration rescinded the Trump administration EO 13,868, through which the Trump Administration directed EPA to promulgate a construction of CWA Section 401 that would facilitate the construction of infrastructure to transport "supplies of coal, oil, and natural gas" to market. *See* 84 Fed. Reg. at 15,495; 84 Fed. Reg. at 44,081–82.[4] EPA now interprets Section 401 under the Biden administration's environmental policies enshrined in EO 13,990, which order the agency to promote access to clean water. EPA Motion at 2, 10; Goodin Decl. ¶¶ 8, 9; *see also* 86 Fed. Reg. 7037.

The heart of this case is whether the Certification Rule is contrary to the CWA. Among the numerous provisions of the Certification Rule that are violative of the text of Section 401 are the provisions limiting the scope of an agency's review of applicants' activities, *see* 40 C.F.R. §§ 121.1(f), (n); 121.3; *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S.700, 707–13 (1994), and provisions that grant federal agencies authority to ignore state and tribal decisions to deny or condition certifications based on the failure to comply with newly created requirements found in the Certification Rule, *see* 40 C.F.R. § 121.9.

The Biden administration and EPA have raised questions akin to those raised by the Plaintiffs[5] as to whether the CWA forbids provisions of the Certification Rule. President Biden

[3] Courts in the 9th Circuit "generally look to the Federal Circuit's decision in *SKF USA* for guidance when reviewing requests for voluntary remand." Order Granting Req. for Voluntary Remand Without Vacatur, *N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 16-CV-00307, 2016 WL 8673038, at *3 (E.D. Cal. Dec. 16, 2016).

[4] *See also* Press Release, EPA, *supra* note 1.

[5] Plaintiffs raise statutory arguments against the rule in their complaint pointing out that the text and purpose of CWA Section 401 compels EPA to rescind the Certification Rule. Suquamish Compl. ¶¶ 77–81. Several of Plaintiffs' comments on the proposed version of the Certification Rule argue multiple points of statutory construction, including that EPA's narrowing of the scope of Section 401 review of applicant activities is not permitted by the CWA. Sierra Club Comments at 8–10 ("*PUD No. 1* . . . was plainly a *Chevron* step 1 decision, resting on the conclusion that the statutory text was unambiguous."); Suquamish Tribe, Comments on Proposed Rule 5–6 (Oct. 21, 2019), https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0926.

ordered EPA to reconsider the Certification Rule in part out of concern that the previous administration's regulations were inconsistent with the policy goal of "access to clean … water," a primary objective of the CWA. 86 Fed. Reg. 7037; *see* 33 U.S.C. § 1251(a) (stating that the objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Likewise, EPA has stated that it intends to propose revisions to the Certification Rule to make the regulation "consistent with the cooperative federalism principles central to CWA section 401" and to "ensur[e] that states are empowered to protect their water quality." Goodin Decl. ¶¶ 9, 11, 12, 14.

This case, therefore, clearly presents "an issue as to whether the agency is either compelled or forbidden by the [CWA] to reach a different" interpretation of Section 401 than the one contained in the Certification Rule, which provides this Court with good reason and authority to deny remand in order "to decide the statutory issue." *See SKF USA*, 254 F.3d at 1029; *see also Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436–37 (D.C. Cir. 2018) (declining to remand a claim that "involve[d] a question—the scope of the EPA's statutory authority—that [was] intertwined with any exercise of agency discretion going forward").

B. Remand Without Vacatur Is Not in the Interests of Judicial and Administrative Economy.

The interest of judicial economy weighs against remanding this proceeding without vacatur.[6] Indeed, granting EPA's motion would likely lead to more litigation and administrative burdens, not fewer.

If the Certification Rule is remanded without vacatur, several Plaintiffs expect that they could be or will be forced to engage in additional litigation that would not occur if the instant proceeding were decided on the merits. At least one Plaintiff—a tribe with authority to adopt its own water quality standards and issue Section 401 certifications—has expressed concerns that allowing the

[6] Even if remand without vacatur *would* promote judicial economy, that would not be sufficient reason for granting EPA's request. *See* Order for Supp. Briefing re Req. for Voluntary Remand, *N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 16-CV-00307, 2016 WL 11372492, at *3 (E.D. Cal. Sept. 23, 2016) (noting that, even if remand was in the interest of judicial economy, the "Court can identify no case among those cited by the parties or elsewhere that finds judicial and party efficiency to be sufficient standing alone").

Certification Rule to remain on the books between now and 2023 could force it to engage in litigation over the validity of conditions or denials on Section 401 certifications for specific projects. Morgan Decl. ¶¶ 19, 24, 25, 27. Should it occur, such litigation could take the form of a challenge to federal agency attempts to use the Certification Rule to oppose certification decisions, or, more likely, to defend against industry applicants that attempt to use the Certification Rule to invalidate conditions or denials or to challenge a certifying agency's ability to exercise its Section 401 authority over a project. At least one additional Plaintiff will likely need to challenge state certifications that rely on the illegal provisions in the Certification Rule as a basis for granting certifications that will not fulfill the CWA's purpose of protecting water quality. Goldberg Decl. ¶¶ 9, 17. EPA itself appears to be cognizant that such litigation may be forthcoming, noting that Plaintiffs will "continue to have the option to challenge individual 401 certifications or federal actions taken pursuant to the Certification Rule as they arise" in the prolonged period before the Certification Rule is revised. EPA Motion at 12.

In addition, the continuation of this case is unlikely to have a substantial impact on EPA's resources. The bulk of the responsibility for litigating this case (and therefore the bulk of the expenditure of resources associated with the litigation) will fall on the Department of Justice, not EPA. By contrast, as described further below, the administrative costs associated with Certification Rule itself are quite high. *See infra* at I.C.

A decision on the merits in this case will help avoid a waste of administrative resources and judicial resources over the longer term. The Court likely would issue its decision long before EPA's 2023 date for publishing a final rule and would provide greater clarity for ongoing and future litigation where any party seeks to rely on the construction of Section 401 adopted in the Certification Rule. The Court also has an opportunity to provide clarification and guidance to both Plaintiffs and EPA regarding the meaning of Section 401, and whether or not the terms of the provision are ambiguous, which will give EPA more direction in its reinterpretation of Section 401 during its forthcoming rulemaking. Alternatively, should the Court decide that the statute is ambiguous and that the agency is owed deference, clarification regarding the statutory meaning of Section 401 in this case may persuade the Plaintiffs to avoid re-litigating questions of statutory

construction in future cases. The best way to preserve judicial and administrative resources in both the short and long term is to decide this case on the merits expeditiously.

C. Remand Will Unduly Prejudice Plaintiffs.

Astonishingly, EPA acknowledges the problems that leaving the Certification Rule on the books for such a lengthy period of time will present to Plaintiffs, yet has offered nothing concrete to demonstrate that those likely and ongoing harms can or will be eliminated. Goodin Decl. ¶¶ 28–30 (stating that EPA "will *do what it can*" to address the adverse effects of leaving the Certification Rule on the books for a prolonged period and that "EPA's efforts *may mitigate* … potential harms" caused by agency partners and other stakeholders in their implementation of the Certification Rule) (emphasis added); *see Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000) (indicating that EPA's motion for voluntary remand to reconsider a rule was denied because "EPA made no offer to vacate the rule; thus EPA's proposal would have left petitioners subject to a rule they claimed was invalid").

Far from being "abstract" harms, Plaintiffs and Co-Plaintiffs have already incurred costs from the Certification Rule and face the prospect of even greater imminent or concrete injuries in the months to come. For example, among various other potential sources of injury caused by the Certification Rule, Plaintiff Pyramid Lake Paiute Tribe points to two specific projects for which certification is likely to be required before the spring of 2023. Morgan Decl. ¶¶ 21, 22, 27. There are specific conditions it would like to impose on potential grants of certification for these projects that might be invalid under the Certification Rule. *Id.* ¶¶ 21, 23–25, 27. For Pyramid Lake Paiute Tribe, the stakes of an inability to impose these conditions on certification are high.

The first project, the CEMEX Paiute Pit, is a mine that proposes to discharge pollutants into the Truckee River, which feeds into Pyramid Lake, a precious cultural resource for the Tribe. *Id.* ¶¶ 1, 9, 10, 12, 22, 24. The second project involves sediment removal from a sediment island formed on the Truckee River behind a federal dam that runs the risk of contaminating Pyramid Lake Paiute Tribe's waters with mercury and further sediment deposition. *Id.* ¶¶ 26, 27. In both cases, the Tribe is concerned that the Certification Rule's limitations on the scope of its review will prevent Tribal

administrators from addressing features of these projects that present risks to either the safety of Tribal members or the quality of the waters within the Reservation boundaries. *Id.* ¶¶ 23–25, 27.

Threats to the Tribe's water quality in turn place endangered and threatened wildlife within the Reservation in peril and risk revenue expenditures for the Tribal government. *Id.* ¶¶ 10, 11, 20, 23, 26, 27. For example, the Tribe states that, if the Certification Rule remains in force, it may be unable to stop contamination from projects requiring Construction General Permits which run the risk of depositing sediment "in the Truckee River delta and impair[ing] the spawning of the Lahontan Cutthroat Trout and cui-ui." *Id.* ¶¶ 18–20. Furthermore, the rule will result in administrative inefficiencies for Pyramid Lake Paiute Tribe, such as forcing administrative staff to divert more resources towards information gathering in order to ensure that administrative agencies have a complete application to review. *Id.* ¶¶ 14–17.

Plaintiff Columbia Riverkeeper has also identified two specific, environmentally harmful projects that are far more likely to be certified under Section 401 if the Certification Rule remains unaltered over the next two years. Goldberg Decl. ¶¶ 2, 7, 8, 16, 17. The first of these projects is the Middle Fork Irrigation District Project in Oregon, which would negatively impact the quality of Hood River Basin water and have ruinous consequences for the native bull trout population. *Id.* ¶¶ 3–9. The second project is the Goldendale Energy Storage Hydroelectric Project, which would permanently destroy sizeable portions of unique waterbodies, place wildlife in peril, and pose serious risks to sites of cultural significance to tribes. *Id.* ¶¶ 10–17. Riverkeeper stresses that "[i]f the Certification Rule is not overturned or revised as soon as possible the damage and disruptions that result to the waters, land, wildlife, and people along the Columbia River will be long lasting and in many cases irreversible." *Id.* ¶ 18.

Co-Plaintiffs also have attested to a number of ways that the rule will prejudice states across the country. For example, the pre-filing meeting request requirement is another example of an unnecessary administrative burden baked into the rule. *See* 40 C.F.R. § 121.4. That requirement will lead to inefficiencies by adding thirty days to the certification review process, even in cases where a more expeditious review would be in the interests of both the applicant and the certifying authority. States' Opp'n at II.A.3. Further, Co-Plaintiff States have also described how federal agencies'

exercise of newly claimed authority under the Certification Rule to veto and otherwise undermine state certifications has resulted in a flood of individual 401 certification requests, putting tremendous strain on administrative agencies at both the state and federal level. *Id.* at II.A.2.

EPA's proposes that Plaintiffs can mitigate this prejudice through piecemeal litigation against individual certifications. EPA Motion at 12. But this proposed remedy is completely inadequate. First, this proposal will likely force Plaintiffs to engage in more litigation, not less, which in turn will waste more of Plaintiffs' resources, prejudicing them further. *See supra* at I.B. Second, lawsuits against individual 401 certifications would run into challenges because those certifications are issued by states or tribes. Litigation against these certifications would normally have to occur in state or tribal court. Those courts would not have the authority to remedy the unlawful constraints of the Certification Rule. Furthermore, challenging the federal action authorizing the project would not suffice, because the federal agency authorizing the disputed project would likely argue that it is bound to honor the state's or tribe's certification and that plaintiffs cannot collaterally attack the Section 401 certification through a federal challenge to the federal permit. By contrast, this Court has the expertise and authority to grant an adequate remedy for the problems with the Certification Rule.

II. The Court Should Vacate the Rule Upon Remand.

If the Court decides to remand the Certification Rule, it must vacate the rule. This is, in part, because EPA has made no showing that "equity demands" remand without vacatur. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)). To the contrary, rather than being one of the "limited circumstances" when remand without vacatur is permissible, *see Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012), here, the Certification Rule is marred by serious legal errors and the consequences of vacatur would be less disruptive than the consequences of leaving the rule unaltered. *See Pollinator Stewardship Council*, 806 F.3d at 532.

A. Serious Legal Errors Mar the Certification Rule.

EPA's certification rule contains both substantive and procedural errors, either of which provide sufficient grounds for vacatur. *See Cal. Cmties. Against Toxics*, 688 F.3d at 992–93. EPA's

Certification Rule runs afoul of the text of the CWA and its purpose to restore and protect the physical, chemical, and biological integrity of the Nation's waters, 33 U.S.C. § 1251, as well as the cooperative federalist framework that structures the Act, *see U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 633 (1992) (White, Blackmun, & Stevens, concurring in part), and Section 401, *see also S.D. Warren Co.*, 547 U.S. at 380. For example, the Certification Rule's provisions narrowing the scope of states' and tribes' review of the activities of project applicants contradict the Supreme Court's interpretation of the unambiguous statutory text of Section 401. *See* 40 C.F.R. §§ 121.1(f), (n); 121.3; s*ee also PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 711–13 (interpreting the scope of review broadly). The Certification Rule also aggrandizes the role of federal agencies in the Section 401 process in manner wholly proscribed by the CWA, by providing them with the ability to ignore some state and tribal decisions and to limit the timing and scope of state and tribal requests for information from applicants. *See* 40 C.F.R. §§ 121.6–121.9; *see also City of Tacoma v. FERC*, 460 F. 3d 53, 67 (D.C. Cir. 2006) (noting that, on matters of substance, the federal agency's role is limited to waiting for the state or tribe's decision and deferring to it). In addition, the Certification Rule attempts to significantly limit the number and types of projects for which certification is required. *See* 40 C.F.R. §§ 121.1(f); 121.2.

EPA's promulgation of the Certification Rule was also rife with legal errors because (1) the agency failed to provide sufficient justification for departing from a half century of practice and policy related to the interpretation and implementation of Section 401; (2) it based its decision to do so on an EO aimed at promoting fossil fuel infrastructure, not clean water; and (3) EPA did not present any explanation for how the Certification Rule would be more protective of water quality. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

EPA now supports Plaintiffs' arguments that the Certification Rule suffers from serious legal errors. The Agency has identified many of the same legal mistakes as Plaintiffs related to such issues as the rule's implications for cooperative federalism, the scope of Section 401 review, and the authority of states and tribes to set timelines for section 401 review. 86 Fed. Reg. at 29,542–43; *see Cal. Cmties. Against Toxics*, 688 F.3d at 992–93 (indicating that an agency's acknowledgment of

legal errors can help to establish the seriousness of a legal error). In addition, the Biden administration's rescission of EO 13,868, which mandated revision of EPA's interpretation of Section 401 to help foster fossil fuel infrastructure projects, supports Plaintiffs' claims that the Certification Rule was promulgated based on impermissible factors unrelated to water quality. *See* 86 Fed. Reg. at 7041.

EPA's characterization of these legal errors as "substantial concerns" rather than serious violations of law is belied by the Agency's own statements. *See* 86 Fed. Reg. at 29,542–43. EPA has expressed certainty that the rule must be revised for many of the same reasons that Plaintiffs point to. EPA Motion at 5, 12 (stating that "EPA *will* draft new regulatory language" and that the agency intends to address Plaintiffs' concerns on remand) (emphasis added); Goodin Decl. ¶¶ 9, 11 (stating that EPA "*will* . . . propose revisions to the rule" and that the agency "*intends* to . . . revise the Certification Rule . . . consistent with the cooperative federalism principles central to CWA section 401") (emphasis added). This point is crucial: in assessing the seriousness of a legal error, the Court must consider whether or not the rule is likely to remain the same after the agency supplements its reasoning, or whether "such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Pollinator Stewardship Council*, 806 F.3d at 532.[7] Here, the agency has admitted that there is no chance the same rule will be promulgated following remand, meaning that it should be vacated if remand is granted.

In summary, the Certification Rule is marred by serious violations of the CWA and Administrative Procedure Act. This Court should not allow a rule that is contrary to law and arbitrary and capricious to remain in force for years.

[7] Plaintiffs contend that EPA's concessions about the errors in the rule combined with the flaws on the face of the rule are sufficient to hold the rule invalid and immediately vacate it. *See Cal. Communities Against Toxics*, 688 F.3d at 993 (holding rule invalid based on EPA's concessions as confirmed by the record). Should this Court rule otherwise, Plaintiffs reserve their right to argue for the invalidity of the rule through a fully developed motion for summary judgment in this proceeding in accordance with a schedule set by the court and in forthcoming proceedings.

B. Vacatur of the Certification Rule Is the Less Disruptive Option.

The Court should vacate the Certification Rule upon remand to avoid disruption and return to the status quo ante. *See Pollinator Stewardship Council*, 806 F.3d at 532 (vacating an agency action that was itself disruptive). The Section 401 regulations and guidance in effect prior to the promulgation of the rule worked well, allowing most applications for certification filed each year to be processed promptly. According to EPA's own documents, from 2013 to 2018, an average of 4,266 individual and 58,766 general federal permits requiring Section 401 certification were issued per year. EPA, EPA ICR No. 2603.02, ICR Supporting Statement, Information Collection Request for Updating Regulations on Water Quality Certification Proposed Rule, Docket ID No. EPA-HQ-OW-2019-0405-0070, at 8 (Aug. 2019). As recently as 2019, EPA conceded that denials of permits under Section 401 were "uncommon" and that decisions on certification requests typically occurred within the period of time contemplated by Congress. EPA, Economic Analysis for the Clean Water Act Section 401 Certification Rule, Docket ID No. EPA-HQ-OW-2019-0405-1125, at 15 (May 2020). Delays in processing Section 401 applications most commonly occurred because of "incomplete certification requests." *Id.*

Even if EPA could somehow demonstrate that vacating the rule would lead to serious disruptions, which it cannot, that evidentiary showing alone would not be a sufficient basis for keeping a legally invalid rule on the books. *See Se. Alaska Conservation Council v. U.S. Forest Serv.*, 468 F. Supp. 3d 1148, 1155 (D. Alaska 2020) (finding that although vacatur would cause economic harm to the timber industry, that harm was "not so disruptive and irremediable so as to cause the Court to depart from the APA's normal remedy of vacatur"); *Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144–45 (9th Cir. 2020) (vacating an agency action, even though doing so would result in significantly costly consequences for farmers, because it was characterized by "multiple" legal errors). EPA would need to demonstrate that the disruptive consequences of vacatur are massive—so much so that they outweigh both the major legal errors contained in the Certification Rule and the disruptive consequences of failing to vacate the rule. *Compare Nat'l Fam. Farm Coal.*, 960 F.3d at 1144–45 (ordering vacatur despite disruptive consequences where the agency action was characterized by "multiple errors" and "fundamental flaws"), *and Pollinator*

Stewardship Council, 806 F.3d at 532 (ordering vacatur where failing to do so would threaten bee populations and "risk more potential environmental harm than vacating it") *with Cal. Cmties. Against Toxics*, 688 F.3d at 993–94 (denying vacatur where vacatur would delay the construction of a power plant which would result in blackouts, create air pollution, place at risk a billion-dollar investment and hundreds of jobs, and necessitate the passage of new state legislation). The agency cannot make this showing. Vacatur of the Certification Rule certainly will not have consequences on par with the type of enormous and irremediable social, environmental, and economic disruptions that the Ninth Circuit has concluded prohibit vacatur. *See Cal. Cmties. Against Toxics*, 688 F.3d at 993–94.

Indeed, as in *Pollinator Stewardship Council*, here harm, and particularly harm to the environment, would be caused by a failure to vacate the Certification Rule. *See* 806 F.3d at 532 (vacating an EPA action on the grounds that a failure to do so would place populations of bees at risk). Just as in *Pollinator Stewardship Council*, Plaintiffs have identified endangered and threatened species of fish that they are concerned would be placed at risk between now and the spring of 2023 by a failure to vacate the Certification Rule. Morgan Decl. ¶¶ 10, 20, 23, 26, 27; Goldberg Decl. ¶¶ 4, 7. They have also identified other types of environmental harms tied to projects slated for Section 401 review between now and the spring of 2023. These imminent environmental harms include threats to air quality, water bodies, and the aesthetic character of affected areas. *See, e.g.*, Morgan Decl. ¶ 25; Goldberg Decl. ¶¶ 6, 12, 15. And much of this harm, should it occur, would be irreparable. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature … is often permanent or at least of long duration, *i.e.*, irreparable.").

The Certification Rule also places unique cultural resources of tribes at risk. *See, e.g.*, Goldberg Decl. ¶ 14 (discussing threats to the Confederated Tribes and Bands of the Yakama Nation). For instance, Pyramid Lake Paiute Tribe has explained how keeping the Certification Rule in effect could result in pollution to Pyramid Lake, an irreplaceable cultural resource for the Tribe. Morgan Decl. ¶¶ 1, 9, 10, 20, 24, 26, 27. The Tribe also relies on the health of Pyramid Lake for revenue from its fishing and recreational industries. *Id.* ¶ 11.

In addition, Pyramid Lake Paiute Tribe has described how the Certification Rule would create obstacles to routine Section 401 reviews of Construction General Permits. *Id.* ¶¶ 18–20. The Tribe notes that the regulation would cause a significant resource strain on their already-taxed staff by upending the Tribe's standard practices and procedures for information-gathering for all Section 401 certification reviews for projects affecting the waters of the Pyramid Lake Reservation. *Id.* ¶¶ 13–17.

These significant disruptions to Plaintiffs represent a small sampling of the nationwide chaos unleashed by the Certification Rule. *See, e.g.*, States' Opp'n at II.A.2. For example, as Co-Plaintiffs demonstrate in their papers, the Army Corps of Engineers has relied on the Certification Rule to reject the certification decisions and conditions of many states for sixteen nationwide CWA permits related to "oil and gas pipelines, surface coal mining, residential development, and various aquaculture activities." *Id.* Absent vacatur of the rule, this federal override of state Section 401 authority has led and will continue to lead to substantially increased administrative burdens on both state agencies and the Corps for years, along with harms that can be expected to result from additional obstacles to the efficient environmental regulation of these important areas of the economy. *Id.*

The magnitude of the legal errors contained in the regulation and the severity of the disruptions that would be caused by failing to vacate the rule far outweigh the magnitude of the disruption caused by nullifying the Certification Rule. The damage caused by leaving an illegal rule in effect for at least eighteen months will be significant and include the precise harms to water quality that the CWA was designed to avoid. EPA has not made the showing necessary to justify having a large number of projects reviewed under the unlawful regime created by the Certification Rule or expending the judicial and administration resources necessary to attempt to ensure that those certification processes comply with the CWA as Congress intended. The Court should deny EPA's motion to remand without vacatur.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully ask the Court to deny EPA's motion for remand without vacatur, or, in the alternative, only grant EPA's motion for remand if the Court vacates the Certification Rule.

DATED: July 26, 2021

Respectfully submitted,

/s/ *Moneen Nasmith*
MONEEN NASMITH (NY Bar # 4427704)
[Admitted Pro Hac Vice]
MICHAEL YOUHANA (NY Bar # 5819032)
[Admitted Pro Hac Vice]
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
(212) 845-7384 / (212) 284-8033
mnasmith@earthjustice.org
myouhana@earthjustice.org

KRISTEN L. BOYLES (CA Bar #158450)
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
(206) 343-7340
kboyles@earthjustice.org

GUSSIE LORD (DC Bar # 1009826)
[Admitted Pro Hac Vice]
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(720) 402-3764
glord@earthjustice.org

THOMAS S. WALDO (AK Bar # 9007047)
[Admitted Pro Hac Vice]
OLIVIA GLASSCOCK (AK Bar # 1809072)
[Admitted Pro Hac Vice]
Earthjustice
325 4th Street
Juneau, AK 99801
(907) 500-7123 / (907) 500-7134
twaldo@earthjustice.org
oglasscock@earthjustice.org

Attorneys for Plaintiffs

NATHAN MATTHEWS (CA Bar #264248)
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5695
nathan.matthews@sierraclub.org

Local Counsel and Attorney for Sierra Club

ROB BONTA
Attorney General of California
SARAH E. MORRISON
ERIC KATZ
Supervising Deputy Attorneys General
CATHERINE M. WIEMAN, SBN 222384
TATIANA K. GAUR, SBN 246227
ADAM L. LEVITAN, SBN 280226
BRYANT B. CANNON, SBN 284496
LANI M. MAHER, SBN 318637
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6329
Fax: (916) 731-2128
E-mail: Tatiana.Gaur@doj.ca.gov
Attorneys for Plaintiff State of California, by and through Attorney General Rob Bonta and the State Water Resources Control Board

ROBERT W. FERGUSON
Attorney General of Washington
KELLY T. WOOD (*admitted pro hac vice*)
GABRIELLE GURIAN (*admitted pro hac vice*)
Assistant Attorneys General
Washington Office of the Attorney General
Ecology Division
2425 Bristol Court SW
Olympia, Washington 98501
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov
Attorneys for Plaintiff State of Washington

[Additional Plaintiffs and Counsel Listed on Signature Pages]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re

Clean Water Act Rulemaking

CASE NO. 20-cv- 04636-WHA
(consolidated)
Applies to all actions

PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR

COURTROOM: 12, 19TH FLOOR
DATE: AUGUST 26, 2021
TIME: 12:00 PM (via telephone)

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Remand Without Vacatur Is Improper Because It Will Unduly Prejudice the Plaintiff States. 2

1. The 2020 Rule's limitation on the scope of section 401 review results in the elimination of critical environmental protections 3

2. The 2020 Rule will continue to wreak havoc on the "nationwide" permit system 8

3. Countless other harms to Plaintiff States are occurring—and will continue to occur—as a result of the 2020 Rule 11

B. Remand Without Vacatur Does Not Advance Judicial Economy in This Case. 14

C. If the Court Determines That Remand of the 2020 Rule is Appropriate, it Should Be With Vacatur. 17

1. EPA has conceded that the 2020 Rule must be revised because of its legal deficiencies. 19

2. Remand *without* vacatur will be significantly more harmful than any harm resulting from vacating the rule. 20

III. CONCLUSION 22

TABLE OF AUTHORITIES

Cases

All. for the Wild Rockies v. U.S. Forest Serv.,
907 F.3d 1105 (9th Cir. 2018) 17

Am. Waterways Operators v. Wheeler,
427 F. Supp. 3d 95 (D. D.C. 2019) 2

American Forest Resource Council v. Ashe,
946 F. Supp. 2d (D. D.C. 2013) 15

ASSE Int'l, Inc. v. Kerry,
182 F. Supp. 3d 1059 (C.D. Cal. 2016) 18, 20

Burke v. Coggins,
No. 20-667, 2021 U.S. Dist. LEXIS 29999, (D.D.C. Feb. 18, 2021) 21

Cal. Cmtys. Against Toxics v. EPA,
688 F.3d 989 (9th Cir. 2012) 17, 19

Cf. Am. Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 21

Cf. Klamath Siskiyou Wildlands Ctr. v. Grantham,
642 F. App'x 742 (9th Cir. 2016) 22

Chlorine Chemistry Council v. EPA,
206 F.3d 1286 (D.C. Cir. 2000) 2

Ctr. For Native Ecosystems v. Salazar,
795 F. Supp. 2d 1236 (D. Colo. 2011) 18, 22

Farmworker Ass'n of Fla. v. EPA,
No. 21-1079, 2021 U.S. App. LEXIS 16882 (D.C. Cir. June 7, 2021) 18

FBME Bank v. Jacob Lew,
142 F. Supp. 3d 70 (2015) 15

Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.,
109 F. Supp. 3d 1238 (N.D. Cal. 2015) 18

League of Women Voters of U.S. v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 16

N. Coast Rivers All. v. U.S. Dep't of the Interior,
No. 1:16-cv-00307-LJO-MJS, 2016 WL 8673038 (E.D. Cal. Dec. 16, 2016). 17, 19

Nat. Res. Def. Council v. U.S. Dep't of Interior,
275 F. Supp. 2d 1136 (C.D. Cal. 2002) 20

Paulsen v. Daniels,
413 F.3d 999 (9th Cir. 2005).....20

Pollinator Stewardship Council v. EPA,
806 F.3d 520 (9th Cir. 2015).....18, 20

PUD No. 1 of Jefferson Cy. v. Dept. of Ecology,
511 U.S. 700 (1994).....3, 4

Utility Solid Waste Activities Group v. EPA,
901 F.3d 414 (D.C. Cir. 2018) 2, 14, 15

Statutes

33 U.S.C. § 1251(a), (b) 22

33 U.S.C. § 1341 1

33 U.S.C. § 1341(a)(1) 8

33 U.S.C. § 1344(e).....8

33 U.S.C. § 1344(e)(2) 8

H.R. Rep. No. 91-127 (1969) 4

Regulations

33 C.F.R. § 330.1(b).....8

40 C.F.R. § 121.5(b).....13

40 C.F.R. §§ 121.1(f), (n); 121.3.....4

Other Authorities

85 Fed. Reg. 42,227 (July 13, 2020) 16

85 Fed. Reg. at 42,273 (July 13, 2020) 13

86 Fed. Reg. 2,744 (Mar. 15, 2021) 8

Exec. Order No. 13,990.....1

I. INTRODUCTION

In September of 2020, the Environmental Protection Agency's final *Clean Water Act Section 401 Certification Rule* took effect, drastically curtailing state authority under section 401 of the Clean Water Act, 33 U.S.C. § 1341. Because of the significant harms to state fiscal and natural resources posed by the 2020 Rule, the undersigned States filed the current action challenging the rule as violative of the Administrative Procedure Act and the Clean Water Act. Following the new Presidential Administration's statements that it would review the 2020 Rule to determine compliance with an executive order on improving public health and protecting the environment, Exec. Order No. 13,990, the States agreed to stay the case pending EPA's decision on what, if any, actions it would take upon the conclusion of its review. EPA has now made its decision, announcing its intent not to repeal, but to revise, the 2020 Rule and committing only to an "expected" spring 2023 completion date. EPA seeks remand of the 2020 Rule without vacatur, leaving the Rule in place for at least an additional two years and causing significant harms to the States during that time. Moreover, EPA seeks dismissal of the States' legal challenge with prejudice, permanently insulating the 2020 Rule from judicial review.

The States support EPA's efforts to revisit the 2020 Rule and certainly share the substantial concerns EPA itself raises as to the Rule's lawfulness. The States, however, oppose EPA's remand motion and urge the Court to establish an expedited briefing schedule on the merits at the Court's earliest convenience. EPA's assertion that remand will have "limited" prejudicial effect on the States' interests is demonstrably false. As documented in the States' declarations and outlined below, the harms that will flow from the continued application of the 2020 Rule over the next two years are severe and potentially irreversible. Indeed, significant harms that greatly prejudice the States and the States' co-Plaintiffs in this case are *already* occurring. Moreover, no judicial economy is gained by forcing piecemeal litigation of 401

certification decisions over the next several years. As such, the Court should deny EPA's request for remand, lift the litigation stay, and proceed to the merits.

If, however, the Court is inclined to grant EPA's remand request, the Court should exercise its equitable discretion to remand the rule *with* vacatur. While EPA claims that it seeks remand of the Rule without confessing error, EPA's statements about the 2020 Rule indicate its agreement with the States' core argument on the Rule's invalidity; i.e., that the Rule is inconsistent with both the case law and the Clean Water Act's careful preservation of state authority to protect water resources. Because the errors here are significant and no disruptive consequences would result from vacating the Rule, any remand should be with vacatur.

II. ARGUMENT

A. Remand Without Vacatur Is Improper Because It Will Unduly Prejudice the Plaintiff States.

While an agency's stated intent to revisit a challenged rule is a necessary condition to obtain remand, "it is not always a sufficient condition." *Am. Waterways Operators v. Wheeler*, 427 F.Supp.3d 95, 98–99 (D. D.C. 2019). Courts have "broad discretion" to grant or deny an agency's remand request and, in exercising that discretion, routinely deny remand when it would "unduly prejudice the non-moving party." *See Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018), *citing FBME Bank Ltd. v. Lew*, 142 F.Supp.3d 70, 73 (D. D.C. 2015). Courts have also denied agency requests for voluntary remand where the agency does not propose to vacate the rule and plaintiffs are left "subject to a rule they claimed was invalid." *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000).

Here, EPA fails to justify its request for remand because harms to the States from the 2020 Rule are both significant and already occurring. Every day, Plaintiff States receive requests for 401 certifications, with some individual states handling thousands of certification requests per year. Declaration of Scott E. Sheeley in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Sheeley Decl.) ¶ 23; Declaration of Eileen

Sobeck in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Sobeck Decl.) ¶¶ 9–10; Declaration of Paul Wojoski in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Wojoski Decl.) ¶ 8; Declaration of Loree' Randall in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Randall Decl.) ¶ 5. Between now and EPA's estimated completion of a revised rule in 2023, the 21 States challenging the Rule in this action will receive and process thousands of 401 certification requests.[1] *See, e.g., id*. All of those requests are (or will be) governed by the illegal and restrictive 2020 Rule—a rule that, even by EPA's own reckoning, fails to adhere to the cooperative federalism principles embodied within the Clean Water Act and significantly impairs the States' abilities to protect water quality. EPA Motion for Remand at 7 (EPA Br.). As set out below, far from having "limited" impacts, the 2020 Rule is causing (and will continue to cause) detrimental effects to water quality and State resources. Because the States will be severely prejudiced if the Rule is allowed to stand while EPA conducts a multi-year revision process, the Court should deny EPA's request for remand and allow the parties to proceed to the merits.

1. The 2020 Rule's limitation on the scope of section 401 review results in the elimination of critical environmental protections

First, the 2020 Rule hamstrings state authority under the Clean Water Act and undermines—or in some cases eliminates—state environmental protections that have been applied to control the water quality impacts of federally approved projects for decades. Prior to the 2020 Rule, section 401 certifications considered *all* potential water quality impacts of a proposed project, both direct and indirect and over the project's full operational life. *See PUD No. 1 of Jefferson Cy. v. Dept. of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*). Parallel to that scope, and consistent with the Clean Water Act's requirement that section 401 certifications

[1] In addition to the Plaintiff States, tribal plaintiffs expect to receive a substantial number of requests for 401 certification during the same period.

include "any" conditions necessary to assure compliance with "appropriate" requirements of state law, state section 401 certification conditions long sought to assure that all aspects of a proposed project would comply with applicable state water quality laws. *See e.g.*, Wojoski Decl. ¶¶ 16–22; Randall Decl. ¶ 6, Declaration of Paul Comba in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Comba Decl.) ¶¶ 4, 11. Thus, for example, there was no question that a state could impose minimum flow conditions on a dam to protect aquatic species habitat even if those conditions were not directly associated with any specific point source discharge from the dam. *See PUD No. 1*, 511 U.S. at 711–12. Or, states might include erosion and sediment control measures designed to address nutrient and sediment pollution. Wojoski Decl. ¶¶ 18–20. That broad scope of state 401 certification review and conditions has long been viewed as the cornerstone of the Clean Water Act's system of cooperative federalism and reflected the incontrovertible fact that Congress intended section 401 to "provide reasonable assurance . . . that no license or permit will be issued by a federal agency for any activity … that could in fact become a source of pollution."[2]

The 2020 Rule unlawfully guts this authority. In conflict with Supreme Court precedent and decades of EPA's own legal analysis, the 2020 Rule purports to limit state review to only the narrow range of water quality impacts from a project that relate to specific, point-source discharges to certain narrowly-defined "waters of the United States." 40 C.F.R. §§ 121.1(f), (n); 121.3. Thus, when it comes to federally licensed or permitted projects, the 2020 Rule has greatly complicated—if not eliminated—the use of section 401 as a tool for assessing and addressing water quality impacts from non-point sources to state waters and wetlands. Further, the 2020 Rule, for the first time in section 401's history, prohibits states from modifying existing certification conditions to adapt to changing circumstances such as a change in water quality standards.

[2] H.R. Rep. No. 91-127, at 24 (1969), reprinted in 1970 U.S.C.C.A.N. 2691, 2697.

These impacts on state water resources occur across a wide spectrum of activities requiring approvals from various federal agencies, but are perhaps most acutely felt in the context of hydropower licensing and relicensing. In addition to point source impacts, dams are significant sources of non-point water pollution. Randall Decl. ¶ 7. Without proper mitigation measures, dams cause increased water temperature resulting from decreased water flows within streams and decreased flow rates as a result of ponding behind dam structures. Randall Decl. ¶ 7; Declaration of Corbin J. Gosier in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Gosier Decl.) ¶ 13; Sobeck Decl. ¶¶ 76, 79–80. Dam structures alter flow in rivers and creeks downstream of hydroelectric dams, cause fluctuations of water levels within the impoundment created by dams, kill fish passing through hydroelectric turbines, and prevent the upstream movement of fish and other water or wetland-dependent wildlife. Gosier Decl. ¶ 13; Sobeck Decl. ¶¶ 79, 80. Dam reservoirs also lead to vegetation loss, reducing shading and increasing temperatures, and wave impacts caused by reservoir creation increase turbidity and sedimentation. Randall Decl. ¶ 7; Sobeck Decl. ¶ 79–80. These impacts from dam structures and operations, in turn, can result in a host of adverse impacts, including further temperature increases, smothered aquatic habitat, interference with predation patterns, and lower oxygen levels. Randall Decl. ¶ 7; Gosier Decl. ¶ 15; Sobeck Decl. ¶ 76, 79–80. Increased turbidity triggered by dams can also cause an increase in toxin mobility, including PCBs and other "forever chemicals," due to increased absorption of these chemicals by sediment particles. Randall Decl. ¶ 7.

Typically, states and tribes have relied on the section 401 certification process to mitigate or eliminate these and other impacts. For example, certifying authorities included in 401 certifications requirements to mitigate vegetation loss, geoengineer shorelines to decrease erosion, and ensure reservoir discharge points are lower in the water column where temperatures are lower. Randall Decl. ¶ 8; Gosier Decl. ¶ 15; Sobeck Decl. ¶ 78. Additionally, because hydropower licenses can last up to 50 years, the ability to revisit and modify 401

certifications to adapt to changing conditions (such as modifications to state water quality standards) provided states with a critical means to adjust conditions for these long-term projects as new research and data establish needs for further or modified protections.[3] Randall Decl. ¶¶ 9–10; Gosier Decl. ¶¶ 11, 15; Sobeck Decl. ¶¶ 72, 78, 81.

The 2020 Rule substantially frustrates these efforts, resulting in severe harm to states and tribes. While some states will continue to attempt to apply section 401 as broadly as possible, the fact remains that they do so against the headwind of the 2020 Rule's unlawful limitation on scope and the use of "reopener" clauses, among other detrimental provisions. At *best*, the 2020 Rule will result in scores of lawsuits related to individual 401 certification decisions. At *worst*, critical protections of water resources may be eliminated from federally approved projects altogether.

Far from being hypothetical, these impacts will occur during EPA's reconsideration of the 2020 Rule, with numerous relicensings set to take place in multiple Plaintiff States if the 2020 Rule is in effect for the next two years. Randall Decl. ¶ 10; Gosier Decl. ¶ 23; Sobeck Decl. ¶ 73. And, because FERC licenses for dams will last between 30-50 years, the lack of adequate water quality conditions attached to these licenses will have adverse impacts for a *generation*. Randall Decl. ¶ 11; Sobeck Decl. ¶ 72. For instance, in Washington alone three hydropower dams on the Skagit River will require 401 certifications between now and the spring of 2023, well within EPA's estimate of how long the 2020 Rule will remain in effect. Randall Decl. ¶ 10. The Skagit is home to numerous anadromous fish species, including Chinook salmon—a threatened species and the primary source of food for the endangered

[3] This practice was long permitted as a practical and necessary part of section 401 authority, but is now prohibited by the 2020 Rule. 85 Fed. Reg. 42,280 (July 13, 2020) *citing* 40 C.F.R. § 121.6(e).

Southern Resident Orca population in Puget Sound.[4] *Id*. Because Chinook and other salmonids are extremely sensitive to thermal stress, even relatively small temperature increases cause intense physical distress, with most perishing once water temperatures reach the upper 70 degrees Fahrenheit. *Id*. As such, Washington relies on its section 401 authority to impose conditions to minimize adverse thermal pollution (among other) impacts and as a key part of its Southern Resident Orca recovery efforts. *Id*. Similarly, New York is currently reviewing 40 hydropower project relicensings, at least 10 of which have pending section 401 requests or are anticipated to file request in the near future. Gosier Decl. ¶ 23.

Other states will suffer similar impacts. Like much of the West, California is experiencing extreme drought conditions and is struggling to maintain its rivers at a temperature habitable for salmonids and native fishes. Sobeck Decl. ¶¶ 53, 79–80. Even under non-drought conditions, temperature management is a material issue in most FERC-related certifications where inaction for decades could result in permanent water quality impairments and impacts to threatened, endangered, or other aquatic species of concern. *Id.* ¶ 79. The 2020 Rule hamstrings California's efforts to address temperature and other impacts resulting from hydropower operations. It may be too late to provide the water quality protections at all in some cases if the 2020 Rule is left standing until 2023. *Id.* ¶ 81. North Carolina regularly relied on section 401 to control nutrient loading and excess sedimentation, two of the most harmful threats to North Carolina's water quality and the cause of many of the impacts discussed above, including destruction of aquatic habitat and increased pollution transport. Wojoski Decl. ¶¶ 19–22, 33. Colorado estimates that the vast majority of conditions it utilizes under section 401 to control adverse water quality impacts from water supply projects to streams and reservoirs (like increased temperatures, reduced flows and higher metal concentrations) are

[4] Southern Resident Orcas are in severe decline and threatened with extinction. The iconic Puget Sound population is down to only 73 individuals, its lowest level in over four decades. Randall Decl. ¶ 10.

called into question by the 2020 Rule. Declaration of Aimee M. Konowal in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Konowal Decl.) ¶¶ 3–6.

As these examples demonstrate, the 2020 Rule will impede Plaintiff States' ability to apply water quality protections that have long been utilized to mitigate harms against multiple projects that will be permitted over the next two years.

2. The 2020 Rule will continue to wreak havoc on the "nationwide" permit system

The 2020 Rule is also causing ongoing harms related to the re-certification of the so-called "nationwide" permits issued by the U.S. Army Corps of Engineers (the Corps)—harms that will be repeated in dozens of general permit actions in the two years EPA expects it will take to revise the 2020 Rule. The Corps issues nationwide permits for activities occurring under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899 and that have "minimal impacts" to water quality. 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1(b). Nationwide permits are considered "general" permits, and certifying authorities typically make programmatic section 401 decisions that apply to all activities within their respective jurisdictions issued under a nationwide permit, thereby eliminating the need for project proponents covered under such a permit to seek individual section 401 certifications. Randall Decl. ¶ 13. Nationwide permits are usually valid for periods of 5 years, after which they must be renewed. 33 U.S.C. § 1344(e)(2). Renewal triggers the need for re-certification under section 401. 33 U.S.C. § 1341(a)(1).

Shortly after EPA finalized the 2020 Rule, the Corps moved forward with the final steps necessary to re-issue and re-certify the Nationwide Permit Program, including 16 nationwide permits covering oil and gas pipelines, surface coal mining, residential development, and various aquaculture activities. *See* 86 Fed. Reg. 2,744 (Mar. 15, 2021); Randall Decl. ¶ 14. The Corps expects to renew the remaining 40 nationwide permits in the

next two years. Wojoski Decl. ¶ 30; Randall Decl. ¶ 24. Citing the 2020 Rule as justification, the Corps upended the nationwide permit system for these permits. To begin with, and as recently explained by the Council on Environmental Quality (CEQ), the Corps' expedited process for 401 certification of the nationwide permits was "unusual" and significantly curtailed state authority and input throughout the process. Randall Decl. ¶¶ 14–17, Ex. E. As CEQ noted, "[t]he timing for renewal of the permits occurred earlier than in previous renewals, 401 certification was requested on proposed permits rather than final ones, and requests for extensions of the reasonable period of time by which to submit 401 certifications were declined." *Id*.

Despite the fact that the Clean Water Act requires federal agencies to accept 401 certification decisions as written, the Corps relied on the 2020 Rule to require states to review certification requests and issue decisions within an unprecedented short review window, force states to certify draft permits, "declined to rely" on certifications based on its determination that certifications contained "reopener" clauses and, in one case, declared waiver of state certification authority based on a state's inadvertent omission of written explanations for certification conditions. Randall Decl. ¶ 14, 18; Declaration of Rebecca Roose in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Roose Decl.) ¶ 22, Wojoski Decl. ¶¶ 5, 26–28, Sheeley Decl. ¶ 31; Sobeck Decl. ¶ 17. As a result of the 2020 Rule, the Corps invalidated state certification decisions and conditions for these 16 nationwide permits throughout a wide swath of the country, including multiple Plaintiff States. The Corps' application of the Rule also led to the complete loss of section 401 authority for multiple permits in several states.

The Corps' actions on the nationwide permits and pursuant to the 2020 Rule have significant consequences absent reinstatement of prior procedures. For one, without programmatic 401 certifications for these permits, projects that would otherwise qualify for streamlined permit procedures must be processed individually—defeating the purpose of the

nationwide permit system and overwhelming both Corps staff and state certifying authorities. Randall Decl. ¶¶ 19–20; Roose Decl. ¶ 22; Sobeck Decl. ¶ 17. For example, in Washington, the invalidation of the nationwide aquaculture permits resulted in a flood of individual 401 certification requests for shellfish growing operations. Randall Decl. ¶ 20. Because the planting of shellfish seed must occur during specific, narrow windows of the growing season, timely permitting is essential, and the failure to begin these projects during the limited planting window can doom a grower for a season or even permanently. *Id.* ¶ 21. To meet the unprecedented demand for individual aquaculture permits and associated certification requests, Washington was forced to hire new staff and reassign existing employees. *Id.* ¶ 22. While this expenditure of extra resources has allowed Washington to keep pace with the surge (for now), the Corps has been unable to keep up with this increase and has notified Washington and its growers of a potential two-year delay in processing individual permits, which may force a number of growers out of business. Randall Decl. ¶ 23.

Similarly, California projects that the Corps' invalidation of California's general water quality certifications of the Corps' nationwide permits, purportedly due to the 2020 Rule, will require California to process approximately 135 additional individual water quality certifications that would otherwise have been addressed by the general water quality certifications. Sobeck Decl. ¶ 17. California estimates that this will require an additional workload of almost two full-time staff who would otherwise have been devoted to working on higher water quality priorities for California. *Id.* Yet, not all states facing these challenges have the funding necessary to hire new staff and thus are forced to choose between the various federal permitting actions when allocating limited water quality certification resources. *See* Roose Decl. ¶ 23.

Moreover, waiver determinations made by the Corps have effectively eliminated—and likely will continue to eliminate—section 401 authority altogether. For instance, in North Carolina the Corps used the 2020 Rule to declare waiver and refuse to accept North Carolina's

denial of certification for seven nationwide permits based on the state's inadvertent failure to include the rationale for the denial during the rushed and unusual 2020 nationwide certification process.[5] Wojoski Decl. ¶¶ 28–29. When North Carolina tried to remedy its omission, the Corps stated that it had "no choice" under the 2020 Rule other than to declare waiver. Wojoski Decl. ¶ 28, Attachment A. Three of these permits are final, and North Carolina expects the other four to be final in the coming months. Wojoski Decl. ¶ 28. As a result of the Corps' waiver decision under the 2020 Rule, North Carolina is prevented from using its section 401 authority to apply state water quality requirements to projects covered under these permits. Wojoski Decl. ¶¶ 29–30. Facing similar waiver determinations by the Corps, California has had to expend additional resources to issue additional state water quality approvals to protect the quality of its waters. Sobeck Decl. ¶ 18.

These impacts from the Corps' rejection of nationwide permit certifications will continue at least until the permits renew in five years. Wojoski Decl. ¶ 29; Roose Decl. ¶ 23. More importantly, the Corps is on target to renew 40 additional nationwide permits in the coming year and has indicated its intent to follow the same procedure, based on the 2020 Rule. Wojoski Decl. ¶ 30; Sobeck Decl. ¶ 17. These harms are significant and will only be avoided by invalidation of the 2020 Rule.

3. Countless other harms to Plaintiff States are occurring—and will continue to occur—as a result of the 2020 Rule

In addition to the harms noted above, countless other adverse impacts from the 2020 Rule will continue to affect Plaintiff States during EPA's review. These include, but are not limited to:

- The 2020 Rule mandates that project proponents submit a pre-filing meeting request 30 days before an application can be submitted, regardless of whether such a meeting has any

[5] The purpose of this denial was to ensure that North Carolina could include individualized conditions for projects relying on these nationwide permits. Wojoski Decl. ¶¶ 28–29.

utility. This requirement both upsets existing state procedures and leads to unreasonable delays. For example, under the 2020 Rule even environmentally beneficial projects that need to be performed on an expedited basis—such as wildfire restoration and recovery projects, cleaning up pollution discharges, stream bank repairs, and other in-water remediation work—are subject to the 30-day pre-application clock *without exception*. Declaration of Steve Mrazik in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Mrazik Decl.) ¶ 5; Wojoski Decl. ¶ 9; Sheeley Decl. ¶ 25. Even where states have adopted their own procedures to address emergency situations, the 2020 Rule includes no exception for emergencies. *See* Sheeley Decl. ¶ 25. Because the 2020 Rule contains no provisions for addressing emergency permitting requests, the 30-day pre-application requirement creates an unnecessary, and potentially dangerous, regulatory hurdle that will continue to exist while EPA reconsiders the Rule. This was recently demonstrated in Oregon where projects focused on recovering from the historic 2020 wildfire season faced confusion and delay. *See* Mrazik Decl. ¶ 6.

- The 2020 Rule's elimination of any provision for modification of 401 certifications is causing significant problems and inefficiencies. In California, the 2020 Rule has led to confusion over whether California may modify conditions related to an emergency safety project on the Lake Fordyce Dam where an aspect of the approved proposal was determined to be unsafe. Sobeck Decl. ¶¶ 22–34. At present, and after shifting positions multiple times, the Corps is denying California's and the project proponent's request to amend the 401 certification for the project to accommodate the change in design, leading to significant delays to this critical (and potentially life-saving) project. *Id*. ¶¶ 35–49. *See e.g.* Randall Decl. ¶ 29; Sheeley Decl. ¶ 29 (applicants must submit entirely new applications solely for the modified elements resulting in two water quality certifications for one project).

- The 2020 Rule severely limits the amount of information that a project proponent must supply in order for a certification request to trigger the countdown for the "reasonable period of

time" in which state action must be completed. *See* 40 C.F.R. § 121.5(b). This portion of the 2020 Rule prohibits the certifying authority from determining when it has enough information about a proposed project such that the application can be deemed complete; instead, a project proponent is considered to have submitted a complete request so long as the minimal information required by the 2020 Rule is provided, and without regard to the requirements of state administrative procedures or the quality, descriptiveness, or completeness of the submitted materials. Wojoski Decl. ¶¶ 10–11; Randall Decl. ¶¶ 26–29. As a result, the "reasonable period of time" clock may begin counting down well in advance of when a certifying authority has the information necessary to adequately review the potential impacts to water quality. Wojoski Decl. ¶ 11; Randall Decl. ¶ 27. Moreover, while the 2020 Rule does permit a certifying authority to request additional information it deems necessary for an adequate (and legally defensible) review of the proposal, the clock for the state's review does not reset when that information is provided. EPA's solution to this is for certifying authorities to simply *deny* the certification request. 85 Fed. Reg. at 42,273 (July 13, 2020). Thus, where state administrative procedures require an applicant to provide additional information, state agencies must choose between complying with state administrative procedures (and risk waiving their authority under the 2020 Rule) or complying with the 2020 Rule (and risk being sued for noncompliance with state law). *See* Sheeley Decl. ¶¶ 30, 34; Randall Decl. ¶ 28. This leads to inefficiencies, project delays, and wasted staff time. Sheeley Decl. ¶ 30; Wojoski Decl. ¶ 11; Roose Decl. ¶ 21; Mrazik Decl. ¶ 7.

In summary, EPA's assertion that the resulting harms and the prejudice to Plaintiff States will be "limited" is inaccurate. The harms to Plaintiff States are neither abstract nor speculative. Instead, the harms are extant, and the resulting prejudice more than outweighs EPA's desire to avoid adjudication of the merits. Especially in light of the fact that EPA requests dismissal with prejudice, effectively insulating the 2020 Rule from scrutiny, EPA's motion should be denied. *See* ECF No. 143–2.

B. Remand Without Vacatur Does Not Advance Judicial Economy in This Case.

EPA attempts to support its remand request by asserting that granting remand without vacatur promotes judicial economy. EPA Br. at 9. These contentions are unsupported by the law and the facts.

First, cases cited by EPA in support of its judicial economy argument do not support remand. Instead, the cases either refute EPA's arguments for remand or do not address the situation at hand. In particular, *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018), directly demonstrates that EPA's judicial economy argument is incorrect. In that case, EPA faced challenges from environmental and industry groups related to a rule governing the disposal of "coal residuals." *Id*. at 420. Some aspects of the rule were not subject to challenge, and all parties agreed that those provisions of the rule should stay in effect until a new rule was promulgated. *Id*. at 437. Because no controversy existed with regard to the rule's unchallenged provisions, the court found that "no party will suffer prejudice from remand without vacatur" of those provisions. *Id*. at 438. With regard to the rule's challenged provisions, however, EPA sought voluntary remand to reconsider its interpretation of the statute. *Id*. at 436.

The court granted remand with regard to some parts of the rule challenged by industry, in large part because industry petitioners supported remand. *Id.* at 435–36. The court, however, denied EPA's request for remand to reconsider the provisions challenged by environmental petitioners for two reasons. *Id*. at 436–37. First, because remand would prevent the court from reaching the merits of environmental petitioners' challenge, the court determined that remand would "prejudice vindication of [petitioners'] claim." *Id*. at 436. Second, and critically, the court denied remand because petitioners' claim involved the scope of EPA's statutory authority and, thus, was "intertwined with the exercise of agency discretion going forward." *Id*. at 436–67.

In other words, judicial economy favored denying remand and reaching the merits because it made little sense to allow EPA to reconsider its position without guidance from the court as to the scope of EPA's statutory authority on the very questions it would reconsider. *See id*. The court proceeded to the merits on these claims, determined that EPA's interpretation was arbitrary and capricious, and remanded *with* vacatur. *Id*. at 449. This is precisely the situation in the present case where Plaintiff States' arguments go to the very heart of EPA's statutory authority under section 401 and the very issues in the 2020 Rule that EPA seeks to reconsider. As a result, and consistent with *Utility Solid Waste*, remanding to the agency without reaching the merits both prejudices vindication of Plaintiff States' claims and fails to achieve an economy of judicial resources because it will not provide any guidance that would enable the agency to avoid repeating its prior mistakes.

Other cases cited by EPA are inapposite and do not counsel remand because none involve the situation presented here: i.e., where the agency's request for remand would leave the challenged rule in place for years despite serious concerns over its legality. In *FBME Bank*, the agency's remand request was granted, but only after the court expressly recognized that the rule in question had already been enjoined and would not apply to the plaintiff during the course of the agency's reconsideration. *FBME Bank v. Jacob Lew*, 142 F. Supp. 3d 70, 75 (2015). The court in *American Forest Resource Council v. Ashe*, 946 F. Supp. 2d 1 (D. D.C. 2013), had already determined on the merits that the rule was invalid and only departed from the typical rule requiring vacatur because the harms of leaving an endangered species without *any* habitat protections during remand outweighed the benefits of vacating the rule. *Id*. at 44–45.

Second, EPA's judicial economy argument is self-defeating. In attempting to undercut the non-governmental organization Plaintiffs' harms, EPA asserts that piecemeal litigation can be raised in the future as project proponents, environmental groups, and even states bring as-applied challenges to individual 401 certification decisions. EPA Br. at 12. But this contention

only serves to highlight the fallacy of EPA's claim of judicial economy. Rather than preserve judicial resources, this approach actually *increases* judicial strain by requiring multiple state and federal courts to take up the burden of adjudicating the 2020 Rule's merits on a case-by-case basis in the future. Moreover, this case does not present a situation where as-applied litigation would present additional information helpful to resolution of a merits challenge. Arguments related to the validity of the 2020 Rule are entirely legal ones; no further factual development of the record is required, and with the Rule having been in effect for most of the past year, the impacts to the states are already well known. *See, e.g., supra* Section A. The present case is by far the most efficient means of adjudicating the merits of the 2020 Rule.

Finally, EPA's argument on impacts to agency resources also rings hollow. To begin with, EPA is under no legal obligation to defend the 2020 Rule—especially in light of its concession that the 2020 Rule fails to adhere to cooperative federalism, is contrary to Supreme Court case law, and negatively impacts states' abilities to protect water quality. Indeed, agencies frequently decline to defend rules with which they disagree or have changed policy on. *See, e.g., League of Women Voters of U.S. v. Newby*, 838 F.3d 1 (D.C. Cir. 2016) (United States Election Assistance Commission declining to defend administrative decisions approving guidance on voting laws that required proof of citizenship). But, even if EPA does defend the validity of the 2020 Rule, impacts to the agency would be minimal. Notably, questions related to the legality of the 2020 Rule are entirely legal ones, and EPA will not be required to develop or provide any additional scientific or technical basis for the 2020 Rule. Indeed, in adopting the 2020 Rule, EPA admitted that it did not consider potential adverse water quality impacts or any other non-policy concerns. 85 Fed. Reg. 42,227 (July 13, 2020). Thus, any impacts to the agency are limited—a point that is driven home by the fact that EPA's declaration in support of its motion to remand does not allege any lack of resources necessary to engage in the current litigation. *See* ECF No. 143-1 (Goodin Declaration).

In short, neither the case law nor the circumstances relating to the 2020 Rule favor a finding that judicial resources are conserved by remand in this case. In fact, the opposite is true. The Court should decline EPA's request to avoid an adjudication on the merits and establish a briefing schedule for summary judgment.

C. If the Court Determines That Remand of the 2020 Rule is Appropriate, it Should Be With Vacatur.

In the event the Court decides to remand the 2020 Rule, the Court should remand with vacatur.[6] Generally, vacatur is the default in cases where a court orders a remand of a challenged agency action. *See, e.g., All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) (citing *Alsea Valley All. v. DOC*, 358 F.3d 1181, 1185 (9th Cir. 2004)). EPA's motion does not explain why vacatur of the 2020 Rule is not appropriate. Given (1) the clear and serious errors involved in the 2020 Rule; (2) the agency's essential concession that the Rule must be significantly revised in order to address its numerous deficiencies, and (3) the serious harms that will result from its continued implementation during EPA's two-year new rulemaking process, vacatur is appropriate and justified.

To determine whether vacatur is warranted, courts in the Ninth Circuit evaluate two key factors, commonly referred to as the *Allied-Signal* factors[7]: (1) the seriousness of the agency's errors and (2) the disruptive consequences that would result from vacatur. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). In analyzing the first factor, courts assess "whether the agency . . . could adopt the same rule on remand, or whether [the] fundamental flaws in the agency's decision make it unlikely that the same rule would be

---

[6] Plaintiffs' Complaint seeks vacatur of the 2020 Rule. Compl. (Dkt. No. 1) at 6, 27. Accordingly, consideration of Plaintiffs' request of remand with vacatur together with Defendants' request for remand without vacatur is appropriate. *See N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 8673038, at *6 (E.D. Cal. Dec. 16, 2016).

[7] *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993).

adopted on remand." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). As to the second factor, "courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) (internal quotations).

In appropriate circumstances, and consistent with the Administrative Procedure Act, vacation of an agency action without an express determination on the merits "is well within the bounds of traditional equity jurisdiction." *Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–1242 (D. Colo. 2011) (*citing Nat. Res. Def. Council v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002)). In exercising this equitable discretion, courts generally consider the two-part test from *Allied-Signal* set out above. *Id*. at 1242 (*citing United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1993)). Additionally, the vacatur analysis discussed above applies to motions for voluntary remand. *See ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016) ("Courts faced with a motion for voluntary remand employ the same equitable analysis courts use to decide whether to vacate agency action after a ruling on the merits.") (internal punctuation and citation omitted); *see also Farmworker Ass'n of Fla. v. EPA*, No. 21-1079, 2021 U.S. App. LEXIS 16882, at *2–3 (D.C. Cir. June 7, 2021).

Applying the vacatur analysis here demonstrates that vacatur of the 2020 Rule is warranted and necessary. EPA's motion does not explain why vacatur of the 2020 Rule is not warranted. As set out below, EPA has effectively conceded that the 2020 Rule has significant legal deficiencies and, as a result, EPA plans to revise the Rule. Moreover, the overwhelming and potentially irreversible harms from continuing to apply the rule for the duration of EPA's planned rulemaking vastly outweigh the harms from vacating the rule promptly and restoring the previous regulatory framework. The *Allied-Signal* factors are met here, and the Court should exercise its equitable authority to vacate the rule on remand.

1. EPA has conceded that the 2020 Rule must be revised because of its legal deficiencies.

"One way to measure the seriousness of an agency's errors is to attempt to evaluate the likelihood that the agency will be able to justify future decisions" that would be the same as the challenged agency action. *N. Coast Rivers Alliance,* 2016 WL 8673038, at *8. In assessing this factor, courts have relied on the agency's admission of error or the agency's concession that the challenged decision must be revised. *See Cal. Cmtys. Against Toxics*, 688 F.3d 989, 993 (2012) (considering EPA's concession that there are flaws in the reasoning supporting its challenged rule in the evaluation of the first *Allied-Signal* factor); *N. Coast Rivers Alliance,* 2016 WL 8673038, at *8 (considering the Department of Interior's admission that its new decision will need to be revised). EPA has effectively conceded that the 2020 Rule was promulgated in error. EPA specifically admits that it must "reconsider and revise the 2020 Rule" because it has "'substantial concerns with a number of provisions of the 401 Certification Rule that relate to cooperative federalism principles and CWA section 401's goal of ensuring that states are empowered to protect their water quality.'" EPA Br. at 7 (citing 86 Fed. Reg. at 29,542) EPA also points to its serious concerns that "'the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality.'" *Id.* In particular, EPA will specifically seek to reconsider and revise "the Rule's interpretation of the scope of certification and certification conditions, and the definition of 'water quality requirements' as it relates to the statutory phrase 'other appropriate requirements of State law,' including whether the Agency should revise its interpretation of scope to include potential impacts to water quality not only from the 'discharge' but also from the 'activity as a whole' consistent with Supreme Court case law." EPA Br. at 3.

When seeking remand without vacatur, it is the agency's burden to demonstrate that it could re-adopt the challenged agency action on remand; failure to meet that burden weighs in favor of vacatur. *See N. Coast Rivers Alliance*, 2016 WL 8673038, at *9 (concluding that

because there was no evidence on the record to enable the court to evaluate whether the agency can reach the same decision on remand, the first *Allied-Signal* factor favors vacatur); *see also Nat. Res. Def. Council*, 275 F. Supp. 2d at 1145 ("Where the existing rule is more likely to fall during remand, the courts are more reluctant to enforce that rule in the intervening remand period.").

Tellingly, nowhere does EPA's motion attempt to establish that it "could adopt the same rule on remand." *Pollinator Stewardship Council*, 806 F.3d at 532. In fact, the motion lists a series of issues with the 2020 Rule that the agency "has committed to reconsidering" in its new rulemaking and unequivocally states that it will propose a "rule detailing revisions" to the 2020 Rule. EPA Br. at 2–5. Indeed, EPA admits that its "concerns mirror many of the Plaintiffs' allegations." *Id.* at 7. EPA promises that the revised rule will "restore the balance of state, Tribal, and federal authorities consistent with the cooperative federalism principles central to" section 401, effectively conceding that the 2020 Rule fails to strike the correct balance. EPA Br. at 2–3; Goodin Decl. ¶ 11

Because EPA has in fact conceded that the Rule was adopted in error and could not be re-issued as is, the first *Allied-Signal* factor demonstrates that vacatur may be appropriate if this Court determines that remand is necessary.

2. Remand *without* vacatur will be significantly more harmful than any harm resulting from vacating the rule.

The balance of equities similarly weighs heavily in favor of vacatur. EPA has not given any "indication that [they] . . . or anyone else would be seriously harmed or disrupted" if the 2020 Rule were vacated. *See ASSE Int'l v. Kerry*, 182 F. Supp. 3d 1059, 1065 (C.D. Cal. 2016). The 2020 Rule upended the long-standing regulatory regime that governed state certifications for nearly 50 years. Compl. ¶¶ 1.6, 5.15–5.31. Vacating the 2020 Rule will simply restore the status quo that existed for more than four decades while EPA engages in a rulemaking to remedy the Rule's defects. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The

effect of invalidating an agency rule is to reinstate the rule previously in force.") As courts have observed, a "return to the status quo causes little or no disruption." *See Burke v. Coggins*, No. 20-667, 2021 U.S. Dist. LEXIS 29999, at *10 (D.D.C. Feb. 18, 2021). Further, EPA's intent to revise the 2020 Rule in light of the various "substantial concerns" outlined by the agency provides another reason why vacatur of the flawed 2020 Rule will not be disruptive. *Cf. Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 46 (D.D.C. 2013) (vacatur "may well be disruptive" where the agency represented that the revised rule would *not* be materially different from the challenged rule).

Even if there was a credible argument to be made that vacatur and return to the prior familiar regulatory framework will be disruptive, the seriousness of any such disruption is vastly outweighed by the significant harms from continuing to implement the 2020 Rule on remand. As set forth in Section A above, Plaintiffs have presented detailed testimony demonstrating that the harms from maintaining the Rule while the agency engages in prolonged rulemaking are numerous, significant, and potentially irreparable. These serious harms include frustration of Plaintiffs' efforts to implement environmental protections to limit the water quality impacts of federally approved projects, such as hydropower projects and dams, on state natural resources and endangered species; ensure critical drought protections of water resources are put in place timely; and impose conditions required by state law on federal projects governed by Army Corps' nationwide permits, among others. Wojoski Decl. ¶¶ 16–22; Randall Decl. ¶¶ 7–10; Gosier Decl. ¶¶ 12–13; 23 Sobeck Decl. ¶¶ 17–19, 22–48, 70–79. And the Rule has and will continue to cause delay, confusion, inconsistencies, and increased administrative costs borne by the Plaintiffs as they try to comply with its onerous and illegal requirements. Sobeck Decl. ¶¶ 21, 22, 48, 50; Konowal Decl. ¶ 7 (issues with modification); Wojoski Decl. ¶ 10–11; Randall Decl. ¶¶ 26–28 (issues with insufficient info); Mrazik Decl. ¶ 5; Wojoski Decl. ¶ 9; Sheeley Decl. ¶ 25 (issues with prefilling meeting requests).

All of these harms are directly relevant to the Court's vacatur analysis. *See Ctr. for Native* Ecosystems, 795 F. Supp. 2d at 1243 (concluding that harms associated with delay and cost due to Endangered Species Act consultations that will be required as a result of vacatur are "irrelevant" because they contradicted Congressional intent to prevent species extinction regardless of cost). In particular, Plaintiffs' harms directly relate to Congress' goal in the Clean Water Act ensure water quality is protected and Congressional policy that states and tribes are afforded broad authority to safeguard their water resources. *See* 33 U.S.C. § 1251(a), (b). The fact that many of the harms that Plaintiffs have experienced and will continue to experience during EPA's new rulemaking consist of potentially irreversible environmental impacts on state water resources further supports the conclusion that the 2020 Rule must be vacated. *Cf. Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 F. App'x 742, 745 (9th Cir. 2016) (leaving agency decision to issue grazing permits in effect on remand because vacatur would result in reinstating prior permits with terms that are less environmentally protective).

Because the harms that Plaintiffs are bound to suffer if the 2020 Rule remains effective on remand significantly outweigh any potential disruption from reverting to the status quo, this Court should vacate the Rule.

III. CONCLUSION

The Court should deny EPA's motion to remand without vacatur. EPA fails to establish that the harm to Plaintiff States is outweighed by EPA's desire to not defend the 2020 Rule on the merits. The harms are severe, extant, and well documented, and the burden on EPA if it chooses to defend the rule is minimal. Especially in light of the fact that EPA's motion would effectively shield the 2020 Rule from scrutiny, Plaintiff States request that the Court deny remand and set briefing schedule for adjudication on the merits. In the alternative, and to the extent the Court is inclined to grant remand, the Court should exercise its discretion to remand *with* vacatur in light of the significant legal deficiencies with the 2020 Rule, which EPA has essentially conceded. Vacatur would not result in any prejudice; rather restoring the status quo

would place both regulators and regulated parties on more predictable and sound footing while EPA revises the Rule.

Dated: July 26, 2021 Respectfully submitted,

SIGNATURES – State Plaintiffs

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ Kelly T. Wood
KELLY T. WOOD
Managing Assistant Attorney General
GABRIELLE GURIAN
Assistant Attorney General
Washington Office of the Attorney General
PO Box 40117
Olympia, Washington 98504-0117
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov

FOR THE STATE OF CALIFORNIA and THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

ROB BONTA
Attorney General of California

By: /s/ Tatiana K. Gaur
TATIANA K. GAUR
ADAM LEVITAN
Deputy Attorneys General
California Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Telephone (213) 269-6329
E-mail: Tatiana.Gaur@doj.ca.gov

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut

By: /s/ Jill Lacedonia
JILL LACEDONIA
Assistant Attorney General
Connecticut Office of the Attorney General
165 Capitol Avenue
Hartford, Connecticut 06106
Telephone: (860) 808-5250
E-mail: Jill.lacedonia@ct.gov

FOR THE STATE OF MARYLAND

BRIAN FROSH
Attorney General of Maryland

By: /s/ John B. Howard, Jr.
JOHN B. HOWARD, JR.
Special Assistant Attorney General
Maryland Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
Telephone: (401) 576-6970
E-mail: jbhoward@oag.state.md.us

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

By: /s/ William Grantham
WILLIAM GRANTHAM
Assistant Attorney General
New Mexico Office of the Attorney General
Consumer and Environmental Protection Div.
201 Third Street NW, Suite 300
Albuquerque, New Mexico 87502
Telephone: (505) 717-3520
E-mail: wgrantham@nmag.gov

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

By: /s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (504) 947-4593
E-mail: paul.garrahan@doj.watate.or.us

FOR THE STATE OF NEVADA

AARON D. FORD
Attorney General of Nevada

By: /s/ Katie S. Armstrong
KATIE S. ARMSTRONG
Deputy Attorney General
Nevada Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (775) 684-1224
E-mail: karmstrong@ag.nv.gov

FOR THE STATE OF COLORADO

PHILIP J. WEISER
Attorney General of Colorado

By: /s/ Annette M. Quill
ANNETTE M. QUILL
Senior Assistant Attorney General
CARRIE NOTEBOOM
First Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, Colorado 80203
Telephone: (720) 508-6000
E-Mail: Annette.quill@coag.gov

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York

By: /s/ Brian Lusignan
BRIAN LUSIGNAN
Assistant Attorney General
New York State Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
Telephone: (518) 776-2399
E-Mail: Brian.Lusignan@ag.ny.gov

FOR THE STATE OF NORTH CAROLINA

JOSHUA S. STEIN
Attorney General of North Carolina

By: /s/ Daniel S. Hirschman
DANIEL S. HIRSCHMAN
Senior Deputy Attorney General
TAYLOR H. CRABTREE
ASHER P. SPILLER
Assistant Attorneys General
North Carolina Department of Justice
PO Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6400
E-Mail: tcrabtree@ncdoj.gov;
aspiller@ncdoj.gov

FOR THE STATE OF NEW JERSEY

ANDREW J. BRUCK
Attorney General of New Jersey

By: /s/ Lisa Morelli
LISA MORELLI
New Jersey Office of the Attorney General
Richard J. Hughes Justice Complex
25 Market Street
PO Box 093
Trenton, NJ 08625-4503
Telephone: (609) 984-6640

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island

By: /s/ Alison B. Hoffman
ALISON B. HOFFMAN
Rhode Island Office of Attorney General
150 south Main Street
Providence, Rhode Island 02903
Telephone: (401) 274-4400
E-Mail: ahoffman@riag.ri.gov

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General of District of Columbia

By: /s/ Brian R. Caldwell
BRIAN R. CALDWELL
D.C. Office of the Attorney General
Public Advocacy Division
441 Fourth Street Northwest, Suite 600-S
Washington, DC 20001
Telephone: 202-727-6211
E-Mail: brian.caldwell@dc.gov

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General of Commonwealth of Virginia

By: /s/ David Cardwell Grandis
DAVID CARDWELL GRANDIS
Virginia Office of Attorney General
202 North 9th Street
Richmond, Virginia 23219
Telephone: 804-225-2741
E-Mail: dgrandis@oag.state.va.us

FOR THE STATE OF VERMONT

TJ DONOVAN
Attorney General of Vermont

By: /s/ Laura B. Murphy
LAURA B. MURPHY
Vermont Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
Telephone: (802) 828-1059
E-Mail: laura.murphy@bermont.gov

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

By: /s/ Peter N. Surdo
PETER N. SURDO
Minnesota Office of the Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101
Telephone: (651) 757-1061
E-Mail: peter.surdo@ag.state.mn.us

FOR THE STATE OF MICHIGAN

DANA NESSEL
Michigan Attorney General

By: /s/ Gillian Wener
GILLIAN WENER
Michigan Office of the Attorney General
ENRA Division
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 335-7664
E-Mail: wenerg@michigan.gov

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Massachusetts Attorney General

By: /s/ Matthew Ireland
MATTHEW IRELAND
Massachusetts Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boxton, MA 02108-1598
Telephone: (617)-727-2200
E-Mail: Mathew.ireland@mass.gov

FOR THE STATE OF WISCONSIN

JOSH KAUL
Wisconsin State Attorney General

By: /s/ Gabe Johnson-Karp
GABE JOHNSON-KARP
Wisconsin Department of Justice
Post Office Box 7867
Madison, Wisconsin 53702
Telephone: (608) 267-8904
E-Mail: johnsonkarpg@doj.state.wi.us

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Illinois State Attorney General

By: /s/ Jason Elliott James
JASON ELLIOTT JAMES
Illinois Office of the Attorney General
Environmental Bureau
69 West Washington Street 18th Floor
Chicago, Illinois 60602
Telephone: (312) 814-0660
E-Mail: jjames@atg.state.il.us

FOR THE STATE OF MAINE

AARON FREY
Maine State Attorney General

By: /s/ Jillian Renee O'Brien
JILLIAN RENEE O'BRIEN
Maine Office of the Attorney General
6 State House Station
Augusta, Maine 04333
Telephone: (207) 626-8582
E-Mail: jill.obrien@maine.gov

SIGNATURE ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: July 26, 2021

/s/ Kelly T. Wood
Kelly T. Wood

ROB BONTA
Attorney General of California
SARAH E. MORRISON
ERIC KATZ
Supervising Deputy Attorneys General
CATHERINE M. WIEMAN, SBN 222384
TATIANA K. GAUR, SBN 246227
ADAM L. LEVITAN, SBN 280226
BRYANT B. CANNON, SBN 284496
LANI M. MAHER, SBN 318637
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6329
Fax: (916) 731-2128
E-mail: Tatiana.Gaur@doj.ca.gov
Attorneys for Plaintiff State of California, by and through Attorney General Rob Bonta and the State Water Resources Control Board

ROBERT W. FERGUSON
Attorney General of Washington
KELLY T. WOOD (*admitted pro hac vice*)
GABRIELLE GURIAN (*admitted pro hac vice*)
Assistant Attorneys General
Washington Office of the Attorney General
Ecology Division
2425 Bristol Court SW
Olympia, Washington 98501
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov
Attorneys for Plaintiff State of Washington

[Additional Plaintiffs and Counsel Listed on Signature Pages]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re

Clean Water Act Rulemaking

CASE NO. 20-cv-04636-WHA
(lead consolidated)
Applies to all actions

DECLARATION OF EILEEN SOBECK IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION FOR REMAND

Courtroom: 12, 19th Floor
Date: August 26, 2021
Time: 12:00 P.M.

1. I am Eileen Sobeck, Executive Director of the State Water Resources Control Board ("State Water Board" or "Board"). I submit this declaration to demonstrate that California's interests have been and are being adversely impacted by the rule entitled "Clean Water Act Section 401 Certification Rule" ("401 Rule") promulgated by the United States Environmental Protection Agency ("U.S. EPA") on July 13, 2020. Although U.S. EPA has announced its intent to reconsider and revise the 401 Rule, it is unlikely to complete the process until spring 2023 at the earliest. Thus, under the schedule proposed by U.S. EPA, the harms experienced by California are ongoing and will continue, at a minimum, for multiple years while the 401 Rule is in effect.

2. The 401 Rule has caused and will continue to cause considerable harm to the State of California. Since the September 11, 2020 effective date of the 401 Rule, California's efforts to protect the state's water quality have been, and will continue to be, drastically impaired. In addition to the effects on California's sovereign authority to protect water quality and the resulting environmental harms, California has experienced administrative and programmatic injury. As described below, the 401 Rule creates confusion and uncertainty, complicates the certification process, and delays projects with public health and safety implications. Moreover, the 401 Rule's harms are particularly acute in the hydropower licensing context, where federal licenses issued by the Federal Energy Regulatory Commission ("FERC") are in effect for up to 50 years. Without the ability to address the water quality impacts of an activity subject to Section 401 certification as a whole and to modify conditions to protect water quality during the decades-long term of the FERC license, permanent environmental damage is likely to occur. These harms will continue to occur while the 401 Rule is in effect.

3. In preparing this declaration, I relied on my professional experience and training which have provided me a strong basis to determine ongoing and future harms caused by the

401 Rule. If called upon to testify about the matters discussed herein, I could and would testify competently hereto.

PERSONAL BACKGROUND

4. I have been employed as the Executive Director of the State Water Board since 2017. My duties and responsibilities include overseeing all divisions and offices of the State Water Board, including the Division of Water Rights and the Division of Water Quality. The Division of Water Rights is responsible for issuing Section 401 water quality certifications ("certifications") for activities or facilities subject to FERC licensing or involving the diversion or use of water. The Division of Water Quality is responsible for issuing certifications related to discharges not associated with a FERC license or appropriation of water. The Division of Water Quality also coordinates certification responsibilities for the nine Regional Water Quality Control Boards ("Regional Water Boards").

5. Prior to joining the State Water Board, I headed the National Oceanic and Atmospheric Administration as the Assistant Administrator at the United States Department of Commerce from 2014 to 2017. Prior to that work, I served as the United States Department of the Interior's Acting Assistant Secretary for Insular Affairs (2012-2014) and its Deputy Assistant Secretary for Fish, Wildlife and Parks (2009-2012). I also worked for 25 years at the United States Department of Justice, ultimately serving as Deputy Assistant Attorney General for Environment and Natural Resources, from 1999 to 2009. I received my Juris Doctor and Bachelor of Arts degrees from Stanford University.

CERTIFICATIONS ISSUED UNDER CLEAN WATER ACT SECTION 401

6. Section 401 of the Clean Water Act ("Section 401") requires that every applicant for a federal permit or license for an activity that may result in a discharge to waters of the United States provide a certification from the state in which the discharge occurs that the activity will meet requirements adopted under specific Clean Water Act sections as well as

"other appropriate requirements of state law." 33 U.S.C. § 1341(a), (d). Any conditions of issuing such a certification become part of the federal permit or license. *Id.* § 1341(d).

7. Section 401 allows each state to designate an agency responsible for reviewing and approving or denying water quality certification requests. 33 U.S.C. § 1341(a)(1). In California, the State Water Board is the agency with certification authority. Cal. Water Code § 13160; Cal. Code Regs. tit. 23, §§ 3830-3838, 3855-3861, 3867-3869.

8. Section 401 is the means by which the State Water Board ensures federally permitted or licensed projects meet state water requirements.

9. In California, the State Water Board and the nine Regional Water Quality Control Boards (collectively, "Water Boards") issue water quality certifications. The Water Boards issue about 1,000 water quality certifications each year.

10. In the past three years, the Water Boards have issued almost 3,000 water quality certifications related to discharges not associated with a FERC license.

11. In the past three years, the Division of Water Rights has issued 29 certifications, including amendments, related to FERC licenses or other federal permits or licenses relating to the diversion or use of water.

12. The Water Boards most commonly issue certifications for two types of federal permits and licenses: (1) dredge or fill permits issued by the United States Army Corps of Engineers ("USACE") pursuant to Section 404 of the Clean Water Act; and (2) hydropower licenses issued by FERC.

13. The State Water Board issues certifications for discharges that may fall under the jurisdiction of more than one Regional Water Quality Control Board or involve an appropriation of water, a hydroelectric facility where the proposed activity requires a FERC license or amendment to a FERC license, or any other diversion of water for domestic, irrigation, power, municipal, industrial, or other beneficial use.

14. All other water quality certifications are issued by the Regional Water Board with jurisdiction over the region in which a discharge may occur.

IMPACT OF THE 401 RULE

15. I have reviewed the 401 Rule, and my knowledge and experience allow me to understand the impacts of the 401 Rule. Pursuant to the State Water Board's regulations, as the Executive Director, I have been delegated authority "to take all actions connected with applications for certification, including issuance and denial of certification." Cal. Code Regs. tit. 23, § 3838(a). I am familiar with the processes and issues associated with certifications, including compliance with the 401 Rule. I have also conferred with my staff to further identify the impacts of the 401 Rule to date and anticipated in the future.

16. U.S. EPA's drastic departure from its long-standing regulations and guidance has necessitated programmatic changes and the expenditure of resources to meet the new procedural and substantive requirements of the 401 Rule. Water Boards staff have expended hundreds of hours trying to adjust certifications to satisfy the requirements of the 401 Rule. Because the regulations are vague and therefore subject to arbitrary application, the federal permitting and licensing agencies do not have a settled interpretation or application of the regulations. Therefore, these resource expenditures by the Water Boards are expected to continue in the future.

17. The 401 Rule is having a substantial impact on the Water Boards with regard to USACE Nationwide Permits. The State Water Board issued general water quality certifications for 18 USACE Nationwide Permits: 1, 3a, 4, 5, 6, 9, 10, 11, 12, 14, 20, 22, 28, 32, 36, 54, 57, and 58. The USACE determined that the certifications for Nationwide Permits 12, 57, and 58 were invalid due to the 401 Rule. In addition, the USACE has indicated that it intends to determine that the certifications for the remaining Nationwide Permits were invalid due to the 401 Rule. Based on data collected over the past five years, these determinations will

require the Water Boards to process approximately 135 individual water quality certifications that would otherwise have been addressed by the general water quality certifications. The estimated additional workload associated with these individual water quality certifications is approximately 3,700 staff hours annually for each year the 401 Rule remains in effect. This is roughly equivalent to two full-time staff who, as a result of the 401 Rule, will not be available to work on other, higher water quality priorities for the Water Boards.

18. The Water Boards have also had to make programmatic adjustments due to the 401 Rule. For example, in some instances where the USACE has found waiver of the Water Boards' Section 401 certification authority based on the 401 Rule, the Water Boards have had to issue additional state water quality approvals, known as waste discharge requirements, to protect water quality. These additional approvals result in greater resource expenditures for largely the same result as under the prior rules.

19. Project proponents requesting water quality certification have disputed the applicability of the 401 Rule. For example, some entities challenging certifications issued by the Board have argued that the 401 Rule should be applied retroactively to applications or requests filed before its effective date notwithstanding U.S. EPA guidance to the contrary. This has led to increasingly adversarial proceedings, which result in additional delay and expenditure of resources, even when the 401 Rule does not apply.

20. The USACE has also found conditions required to be included in certifications pursuant to California law to be waived under the 401 Rule's requirements. The Emergency Drought Salinity Barrier Project, described below in greater detail, is one such instance.

21. The 401 Rule has introduced a high level of uncertainty and confusion into the certification process in California which inhibits, rather than promotes, the system of cooperative federalism established by the Clean Water Act. Both the Lake Fordyce Dam Safety Project and Emergency Drought Salinity Barrier Project, discussed below, show how

this has required Water Boards staff to spend time and resources addressing questions and situations created or left unanswered by the 401 Rule.

22. If it remains in effect, the 401 Rule will also have impacts on California's water quality that will last for multiple generations and may be irreversible. The discussion below regarding certifications for FERC-licensed hydropower facilities demonstrates how the 401 Rule significantly restricts California's ability to ensure that hydropower projects will comply with water quality standards and other state law requirements. Due to the long terms of FERC licenses, which can last up to 50 years, resulting environmental damage will last for decades and possibly permanently.

A. Lake Fordyce Dam Safety Project

23. The Lake Fordyce project provides one example of how the 401 Rule has created uncertainty and confusion, complicating the certification process and consuming additional State Water Board staff resources and time, and delaying projects with public safety implications.

24. Lake Fordyce Dam, initially constructed between 1873 and 1882 from soil and rock material, has a long history of seepage. Previous efforts to reduce seepage by constructing new design features and repair existing design features have been unsuccessful.

25. While all dams have some seepage, uncontrolled seepage is a safety concern as it can lead to erosion, damage to concrete structures, and dam failure.

26. In California, the Division of Safety of Dams ("DSOD") within the Department of Water Resources regulates dams to prevent failure, safeguard life, and protect property. Lake Fordyce Dam and Fordyce Reservoir are under the jurisdiction of DSOD.

27. DSOD has classified Lake Fordyce Dam as having an extremely high downstream hazard potential, meaning that dam failure when Fordyce Reservoir (also referred

to as Lake Fordyce) is full is expected to cause considerable loss of human life or result in an inundation area with a population of 1,000 or more.

28. In 2005, DSOD instituted a seepage threshold for Lake Fordyce Dam. Seepage at the dam exceeded this threshold in 2011, and DSOD subsequently required the owner of Lake Fordyce Dam, Pacific Gas & Electric Company ("PG&E"), to submit a plan and schedule to mitigate the seepage.

29. PG&E engaged in a multi-year planning and engineering effort to develop a seepage mitigation plan as required by DSOD. As the seepage mitigation project proposed by PG&E includes the discharge of dredged and fill material into waters of the United States, PG&E applied to USACE for a Clean Water Act Section 404 permit.

30. On May 26, 2020, PG&E submitted a request for water quality certification to the State Water Board. While Lake Fordyce Dam does not have hydropower production, it is part of the FERC-licensed Drum-Spaulding Hydroelectric Project, which is owned and operated by PG&E. Accordingly, the State Water Board received and processed PG&E's application for certification. *See* Cal. Code Regs. tit. 23, § 3855.

31. The State Water Board worked diligently to analyze the environmental and water quality impacts of PG&E's proposed seepage mitigation project. The Board requested and received an extension of time until October 31, 2020 from the USACE to model project impacts on turbidity and analyze whether compliance with California's water quality standards could be achieved.

32. The State Water Board was the California Environmental Quality Act ("CEQA") lead agency for the project. As part of the project's CEQA process, on September 24, 2020, the State Water Board released a draft Initial Study/Mitigated Negative Declaration for public review and comment. After considering the comments received, on October 30,

2020 the State Water Board adopted a Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program.

33. On October 30, 2020, the State Water Board also issued a water quality certification for the project, which set forth 29 conditions. These conditions were incorporated into the Section 404 permit subsequently issued by USACE.

34. Project work was expected to begin in July 2021 and take place between July and October for three construction years, with a possibility that limited activities would occur in a fourth construction year.

35. On March 24, 2021, PG&E reached out to the State Water Board and USACE to discuss changes to the project. Based on further engineering analysis, PG&E had determined that one aspect of the previously approved project, cofferdam installation, would be unsafe, and proposed changes related to this aspect of the project. PG&E subsequently provided an overview of its proposed changes.

36. On May 18, 2021, State Water Board staff met with USACE's Sacramento District to discuss and identify a potential procedural path for certifying and permitting PG&E's proposed changes in light of the 401 Rule.

a. During the meeting, USACE's Sacramento District expressed the opinion that the 401 Rule would apply, and that, under USACE's their interpretation of the 401 Rule, certifications cannot be amended or modified.

b. State Water Board staff explained that because the terms of the October 2020 certification did not allow for the implementation of PG&E's proposed changes, the certification would need to be amended. Board staff also explained that, based on a U.S. EPA Fact Sheet providing answers to frequently asked

questions,[1] PG&E's proposed changes to this existing project should be processed under the previously applicable Clean Water Act Section 401 regulations because PG&E had submitted its certification request prior to the September 11, 2020 effective date of the 401 Rule. State Water Board staff provided USACE's Sacramento District with a link to this U.S. EPA document and requested that USACE consider U.S. EPA's and Board staff's positions.

37. On May 19, 2021, USACE's Sacramento District informed the State Water Board that after internal discussion and debate, USACE management continued to interpret the 401 Rule as prohibiting modifications to a certification after issuance, even when the request for certification was submitted before the effective date of the 401 Rule. According to USACE, the key inquiry was whether "the modified activity constitutes as 'material change' that has a potential to violate [water quality] standards without an update to the [certification]." If so, USACE would consider it a new action subject to the procedural requirements of the 401 Rule.

38. On May 24, 2021, USACE' Sacramento District informed the State Water Board that after discussing the State Water Board's position with management, the question would be reviewed by officials at USACE's headquarters in Washington, D.C.

39. On May 27, 2021, USACE's Sacramento District informed the State Water Board that Sacramento District management had agreed that certifications may be modified or amended regardless of the date of issuance if the request for certification was received prior to the September 11, 2020 effective date of the 401 Rule. USACE stated that it would be able to modify the Section 404 permit and refer to an amended certification issued by the State Water Board.

[1] Available at https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf.

40. On June 3, 2021, the State Water Board communicated with PG&E and USACE's Sacramento District, setting forth the steps and information necessary to move forward and request an amendment to the October 2020 certification. The State Water Board and PG&E subsequently engaged an environmental consultant to assess and analyze PG&E's proposed changes as required by CEQA, discussed the scope of environmental review work and documentation, and began the environmental review process.

41. On June 24, 2021, PG&E requested an amendment to the certification and provided the necessary information. PG&E, the environmental consultant, and the State Water Board subsequently executed a Memorandum of Understanding for Preparation of Environmental Documents. On July 2, 2021, the State Water Board issued a notice of PG&E's request for water quality certification amendment.

42. Board staff was actively engaged with the environmental consultant, reviewing PG&E's proposed changes and analyzing their impacts when, on July 8, 2021, USACE's Sacramento District requested a telephone meeting to discuss the project.

43. On July 9, 2021, USACE's Sacramento District informed the State Water Board via telephone that officials at USACE's headquarters in Washington, D.C. had determined that the 401 Rule applied to PG&E's proposed changes and, based on the USACE's interpretation of the 401 Rule, the October 2020 certification could not be amended.

44. On July 15, 2021, USACE's Sacramento District emailed the State Water Board, relaying guidance provided by USACE headquarters to USACE districts regarding interpretation of the 401 Rule. The email explained that USACE districts had been instructed that "in the absence of a 'material change' determination by the permitting agency [], proposed project modifications (if approved) may proceed subject to the terms and conditions of the existing [certification];" if, on the other hand, the permitting agency determines that proposed project modifications do constitute a 'material change,' a new certification is required, and all

procedural requirements of the 401 Rule must be followed, beginning with a request for a pre-filing meeting. With regard to the Lake Fordyce project, USACE explained that it had determined that, absent additional information from PG&E or the State Water Board indicating that a water quality standard or standards established in the existing certification would be violated by PG&E's proposed changes, PG&E's proposed changes do not constitute a 'material change.' USACE did not specify a timeline for providing this additional information, or a date on which its preliminary determination would become final. USACE did, however, state that unless it made a 'material change' determination for the Lake Fordyce project, if the State Water Board were to issue a certification amendment, USACE would not make that amendment a binding condition of the USACE permit. The USACE also thanked the State Water Board for its "continued patience and understanding" as USACE "navigate[s] the new 401 WQC rule."

45. Due to USACE's changed position, the State Water Board found itself yet again faced with numerous questions left unanswered by U.S. EPA in the 401 Rule and accompanying explanatory text in the preamble to the 401 Rule. *See* 85 Fed. Reg. at 42,210-284.

46. Under USACE's most recent position, changes in certification conditions needed as a result of changed circumstances, including changes in the project, cannot be accomplished by amending the certification, and the certifying agency must instead issue an entirely new certification. Previously, no applicant or federal agency has argued that the State Water Board lacks authority to amend a certification in response to a request by the applicant.

47. Issuing an entirely new certification, including following the procedures and making the findings required by the 401 Rule, would require the State Water Board to devote much more time and resources than would be required for an amendment, even if there were no changes made to the project. If the State Water Board issues a new certification under the

401 Rule, it would also run the risk that conditions of certification that are now in effect and uncontested will be deemed waived by USACE based on the USACE's interpretation of the limits on state authority adopted in the 401 Rule.

48. The State Water Board is currently evaluating potential paths for proceeding with the certification process for PG&E's proposed changes to this project with public safety implications. As PG&E has requested an amendment to the October 2020 certification, not an entirely new certification, and has not requested a pre-filing meeting as required by the 401 Rule, the Board finds itself in an unprecedented procedural posture.

49. Staff and management from the Division of Water Rights and attorneys from the Board's Office of Chief Counsel have had multiple internal meetings and exchanged numerous emails to try to understand and discuss USACE's positions and find a way forward with the certification process for this important public safety-related project. As the events discussed in the preceding paragraphs show, even where the 401 Rule may not apply, considerable State Water Board resources are being consumed due to uncertainty and confusion introduced by the 401 Rule. This additional workload has also occurred at a time when Board staff are extremely busy due to the extreme drought conditions in California.

50. USACE's varying positions on this project show that federal agencies are struggling to interpret and apply the 401 Rule, further compounding the harm from the rule.

B. Emergency Drought Salinity Barrier Project

51. The Emergency Drought Salinity Barrier Project provides an example of how the 401 Rule has created uncertainty and confusion, complicating and delaying the certification process for an urgently needed project during a state of emergency.

52. San Francisco Bay and the Sacramento–San Joaquin Delta Estuary ("Delta") are the hub of California's water supply system and the most valuable estuary and wetlands system on the West Coast, serving cities, farms, fishing communities, boaters, and fish and wildlife.

Water from the Delta is exported to more than 25 million people in the San Francisco Bay Area, Southern California, and other areas of the state.

53. In 2021, extreme drought conditions and unusually warm temperatures depleted the expected runoff from the Sierra-Cascade snowpack, resulting in a historic and unanticipated reduction of water supply from reservoirs and stream systems, including the Delta watershed. The extreme drought conditions created the risk of contamination of fresh water supplies conveyed through the Delta, water scarcity, and degraded habitat for fish and wildlife species.

54. On May 10, 2021, California Governor Gavin Newsom proclaimed a state of emergency in multiple California watersheds, including the Delta. This proclamation directed the Department of Water Resources ("DWR") to take actions addressing potential salinity issues, including the potential installation of emergency drought salinity barriers at locations within the Delta to "conserve water for use later in the year to meet state and federal Endangered Species Act requirements, preserve to the extent possible water quality in the Delta, and retain water supply for human health and safety uses." Additionally, the proclamation suspended Water Code section 13247, which requires state agencies to comply with water quality control plans approved by the State Water Board, and suspended CEQA for actions taken pursuant to the directive.

55. As the project includes the discharge of dredged and fill material into waters of the United States, DWR applied to USACE for a Clean Water Act Section 404 permit. DWR sought, and received, emergency authorization from the USACE under Regional General Permit 8 – Emergency Repair and Protection Activities ("RGP 8") pursuant to Section 404. As determined by the USACE, an emergency situation is "one which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a Department of the Army permit

is not undertaken within a time period less than the normal time to process the request under standard processing procedures."

56. On May 14, 2021, DWR applied to the State Water Board for water quality certification for the Emergency Drought Salinity Barrier Project. The certification request was subject to the 401 Rule.

57. According to DWR, without the protection of the drought salinity barrier, saltwater intrusions from the San Francisco Bay could render Delta water unusable for agricultural needs, impair habitat for aquatic species, and affect roughly 25 million Californians who rely on the export of this water for domestic use.

58. The purpose of the Emergency Drought Salinity Barrier Project is to control saltwater intrusion into certain portions of the Delta and conserve water in upstream reservoirs for other uses. The project involves installing embankment rock at a specific location in the Delta.

59. On May 24, 2021, USACE determined that the reasonable period of time to grant certification was 60 days, resulting in a certification deadline of July 13, 2021. However, given the emergency drought conditions, DWR wanted to proceed with the project as soon as possible.

60. On Friday, May 28, 2021, the State Water Board issued a certification for the project, which set forth 25 conditions, including three conditions required by the California Code of Regulations. The Board transmitted the certification electronically to DWR and USACE.

61. Later that day, USACE sent an email to the State Water Board stating: " . . . Conditions 10, 11, 15, 16, 20, 23, 24, and 25, do not contain a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements. Therefore, these conditions do not meet the requirements of 40

CFR 121.7(d)(1)." USACE's email requested additional information or rationale for the enumerated conditions by noon on June 1, 2021.

62. Monday, May 31, 2021 was Memorial Day. To comply with USACE's request, State Water Board staff worked long hours over the holiday weekend to prepare the requested information.

63. The State Water Board submitted the supplemental information requested by USACE on June 1, 2021. The general conditions addressed monitoring and data accessibility (Condition 10), compliance with the state and federal Endangered Species Acts (Condition 11), compliance with applicable federal, state, or local laws (Condition 15); compliance in the event that authorities and responsibilities are transferred to successor agencies (Condition 16), and the scope of the Board's approval (Condition 20). In addition, the certification included standard conditions required by the Board's regulations, providing for modification or revocation on administrative or judicial review (Condition 23), the scope of the certification as not applying to FERC-licensed hydroelectric facilities (Condition 24), and requiring total payment of any fees (Condition 25). The Board provided a rationale for each condition and explained that the conditions at issue address the scope and legal effect of the certification and other legal requirements that may apply to the project.

64. Later on June 1, 2021, USACE responded, stating: "The supplemental information you provided only includes the requisite information for conditions 10 and 16, therefore, in accordance with 40 CFR 121.9(b), conditions 11, 15, 20, 23, 24, and 25 are waived."

65. Three of the conditions USACE found to be waived (conditions 23, 24 and 25) are required by regulation to be included in water quality certifications. *See* Cal. Code Regs. tit. 23, § 3860. These conditions place the permittee on notice that the certification action may be modified or revoked following administrative or judicial review and ensure that any

applicant for a federal license or permit for an activity which may result in a discharge into waters of the United States is subject to the appropriate state certification. The conditions also require payment of a fee as a condition of certification, which in this case was based on the discharge's threat to water quality and complexity.

66. In other certification proceedings involving nationwide permits, however, USACE has accepted similar simple rationale as sufficient for these standard conditions required by the State Water Board's regulation. This demonstrates the inconsistent application of the 401 Rule within a single federal agency.

67. On June 2, 2021, the USACE authorized the proposed activity under RGP 8.

68. On June 2, 2021, DWR transmitted a notice of intent to begin construction activities that evening.

69. The speed with which this certification progressed and with which DWR began construction were in response to the urgent need for the Emergency Drought Salinity Barrier Project to address conditions during a state-declared emergency. The State Water Board expeditiously issued the certification consistent with past practices, its own regulations, and the specific circumstances before it. Citing the 401 Rule, however, the USACE effectively delayed an emergency drought project despite issuing its own emergency authorization for the project. The uncertainty regarding conditions that are permissible in a certification under the 401 Rule (as well as variations in interpretations by different federal agencies or divisions of federal agencies) resulted in an unnecessary and undesirable delay for this critical project.

70. Equally of concern, the 401 Rule impairs the state's sovereignty by impeding the Water Boards' ability to impose conditions that will ensure that the proposed activity will comply with water quality standards and other appropriate requirements of state law. As an example, one of the conditions the USACE rejected based on 401 Rule provides that the certification may be revised as required by decisions on administrative appeal and judicial

review. Allowing the 401 Rule to stay in place will effectively deprive the state courts of their authority to grant relief in an action seeking judicial review of a water quality certification. This is but one example of state law requirements that do not fit within the 401 Rule.

C. FERC-Licensed Hydropower Facilities

71. The 401 Rule has particularly grave implications for California's ability to protect water quality in the hydropower licensing context, where FERC licenses are in effect for multiple decades. In this context, the 401 Rule causes confusion, fosters uncertainty, and creates inconsistencies for reasons similar to those described above. It also significantly diminishes California's ability to protect water quality impacts resulting from the whole of the hydropower activity and to modify the certification in light of changing circumstances over the years.

72. Because the Federal Power Act preempts the field of hydropower regulation absent an exception to preemption, and FERC project licenses are valid for a fixed period of up to 50 years, water quality certifications for FERC license applications provide the State Water Board with a singular opportunity to ensure compliance with the state's water quality standards and other requirements. Many hydropower projects in California have operated under an initial FERC license with limited water quality or environmental protection conditions for decades because they were constructed and began operating prior to environmental laws such as the Clean Water Act and CEQA.

73. Before the U.S. EPA completes its new Section 401 rulemaking in mid-2023, Board staff anticipates receiving multiple requests for certification associated with FERC-related projects, including FERC license applications, FERC-related maintenance projects, and drought-related requests for flow variances. For example, by December 2022, staff expects approximately four applications for FERC licenses, four applications for FERC-related maintenance projects, and at least six requests for flow variances. These expected requests for

certification represent a considerable workload for staff, which is increased due to the additional requirements imposed by the 401 Rule.

74. Through the adoption of water quality control plans, the Water Boards designate the beneficial uses of water that are to be protected (such as municipal and industrial, agricultural, and fish and wildlife beneficial uses), water quality objectives for the reasonable protection of the beneficial uses and the prevention of nuisance, and a program of implementation to achieve the water quality objectives. The Water Boards also employ other state law authorities to protect water quality, such as waste discharge requirements.

75. Hydropower projects, however, present complex water quality issues that often are not readily addressed through the state's other regulatory authorities, due to field preemption by the Federal Power Act. The 401 Rule strips the state of its authority to fully address impacts associated with activities reviewable under Section 401, but otherwise exempt from state water quality regulation.

76. Hydropower projects cause water quality impacts that, depending on the circumstances, may not be attributable to a point-source discharge. Common water quality impacts resulting from hydropower operations and facilities include: changes in turbidity, sediment, temperature, dissolved oxygen, algal productivity, siltation, and erosion; aquatic habitat loss; barriers to fish passage; algal-produced toxins; alterations to stream geomorphology; and reductions in stream flows.

77. California has more than 100 FERC-licensed hydropower facilities.

78. Prior to the 401 Rule, the State Water Board imposed, or considered the need for certification conditions to protect water quality on project activities that fall outside the typical understanding of point-source discharges, such as requirements for minimum instream flows and ramping rates; temperature management; aquatic invasive species management; plans for gravel replenishment, large woody material placement and other habitat measures;

reservoir operation plans; erosion and sediment management plans; and monitoring and management of dissolved oxygen, mercury, pesticides, and other constituents of concerns. Previously issued certifications have typically included management, monitoring, and reporting measures to ensure compliance with water quality measures and to identify potential modifications if circumstances change. The certifications also contained conditions to address point source discharges. In its certifications, the State Water Board has historically reserved authority to modify the conditions of the certification for specified reasons, including to incorporate changes in technology, sampling, or methodologies, provide for adaptive management, to implement new or revised water quality standards, or to otherwise ensure that the continued hydropower facility operation does not violate water quality objectives or impair beneficial uses. These reservations of authority provided the State Water Board with sufficient assurance that the project would comply with water quality standards and other appropriate requirements of state law throughout the term of its multi-decade FERC license.

79. As one specific example, temperature management can be a material issue associated with hydropower facilities. Hydropower facilities (such as dams and reservoirs) and their associated operations alter the temperature regime of rivers, often to the detriment of cold-water species such as salmonids and other aquatic plants and animals that have adapted to colder waters. Water stored in reservoirs greatly increases the surface area exposed to solar heating and reduces the amount of water protected by shade. Large reservoirs "stratify" in summer: the water is warmer at the surface and cooler below the thermocline in deeper waters. Absent any control devices, or multi-level intakes, downstream temperature management is primarily achieved directly through flow management. In addition to changes in temperature due to reservoir storage and release, reservoirs also modify the temperature regime of downstream reaches by diminishing the volume of water below diversions for hydropower generation. Hydroelectric dams, which are generally built to take advantage of mountain

gradients, also can trap fish in the typically warmer, valley reaches of a river, absent effective fish passage. Thus, in addition to the thermal impacts of the hydropower dams themselves, the facilities can prevent fish from reaching waters of appropriate temperature upstream.

80. As a result, diversions, reservoir storage, and dams contribute to altered water temperatures and flow regimes that negatively impact salmonids and other native fish, encourage warm-water and non-native fishes, and alter the base of the food web. In addition, such conditions allow undesirable and nuisance algae (e.g., Microcystis), and submerged aquatic vegetation (e.g., Egeria) to become established and potentially widespread. In sum, temperature impacts are directly related to hydroelectric facility construction and operations. Thus, as appropriate, certifications include requirements for temperature management and monitoring to ensure protection of water quality and beneficial uses of water.

81. Because FERC licenses are granted for decades, the State Water Board must act comprehensively to protect the state's water quality in stream systems affected by FERC projects. Prior to the 401 Rule, the State Water Board could condition certification to address water quality impacts from the activity as a whole. While the 401 Rule remains in effect, it will confine the State Water Board's authority to the regulation of point source discharges, thus restricting the state's ability to protect beneficial uses and to address water quality problems from nonpoint sources of pollution. Moreover, the 401 Rule impairs the California's ability to protect water quality if water quality standards or other appropriate requirements of state law are revised or adopted, through adaptive management of water quality parameters, or if circumstances change over the decades that the FERC license is in effect. If the State Water Board cannot act to protect water quality through water quality certification now, then the harm to the state's water quality over the decades-long life of a FERC license is likely to be permanent.

82. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed on July 26, 2021 in Sacramento, California.

Eileen Sobeck
Executive Director
State Water Resources Control Board

ROBERT W. FERGUSON
Attorney General of Washington
KELLY T. WOOD (*admitted pro hac vice*)
GABRIELLE GURIAN (*admitted pro hac vice*)
Assistant Attorneys General
Washington Office of the Attorney General
Ecology Division
2425 Bristol Court SW
Olympia, Washington 98501
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov
Gabrielle.Gurian@atg.wa.gov
Attorneys for Plaintiff State of Washington

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking	Case: No. 20-cv-04636-WHA (consolidated) Applies to all actions **DECLARATION OF LOREE' RANDALL IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 A.M. ORAL ARGUMENT REQUESTED

I, Loree' Randall, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am now and at all times mentioned herein have been a citizen of the United States and a resident of the State of Washington, over the age of 18 years, and competent to make this declaration. The following is based on my own personal knowledge and understanding.

2. I am now and have been employed by the State of Washington, Department of Ecology (Ecology), since October, 1984. For the last 20 years (beginning April, 2001), I have been the Shorelands and Environmental Assistance Program Section 401/CZM Policy Lead. As the Section 401 Policy Lead, I am familiar with Ecology's procedures for processing Section 401 certification requests. Part of my duties include providing training and guidance on Section 401, including recommendations to Ecology's upper management when new rules or policies are developed regarding section 401 certification. I also review requests for Section 401 Certification under the Clean Water Act, coordinate with other staff and programs within Ecology in performing that review, and draft section 401 decisions on behalf of Ecology. In addition, I review draft section 401 decisions made by other staff within Ecology and provide comments and technical assistance to them.

3. Department of Ecology is the certifying agency in Washington State under Section 401 of the U.S. Clean Water Act. As such, Ecology reviews and approves, approves with conditions, or denies proposed projects, actions, and activities directly affecting waters of the United States.

4. The Environmental Protection Agency's (EPA) final Rule (2020 Rule), *Clean Water Act Section 401 Certification Rule*, which took effect in September 2020, is a significant departure from EPA's prior 401 certification practice. It is already causing significant adverse impacts to Washington State, its residents, and its waters. EPA's decision to revise instead of repeal the 2020 Rule, with an estimated date of completion of Spring, 2023, will only exacerbate these harms as regulated entities continue to seek 401 certifications prior to the Rule's revision.

5. Ecology receives 401 requests daily, typically four hundred per year. However, this year, Ecology's 401 workload has nearly tripled. Each certification request Ecology receives is now subject to the 2020 Rule and the administrative, fiscal and environmental concerns it raises. To date, a little more than half way through the year, Ecology has received at least 393 new requests (predominantly from state shellfish farmers due to the Nationwide Permit decision, explained below), and reviewed and issued 396 certifications.

Scope:

6. EPA's Rule dramatically curtails the scope of water quality impacts that Washington can look at—and attempt to address—when it comes to reviewing project proposals. EPA's 2020 Rule narrowly defines the scope of 401 certification as "limited to assuring that a discharge from a federally licensed or permitted activity will comply with water quality requirements" and defines "discharge" as from "a point source to a water of the United States." 40 C.F.R. §§ 121.1(f), 121.3. This is directly contrary to EPA's and Ecology's longstanding 401 practice and guidance that, in line with relevant Supreme Court decisions, directed states to view *all* potential water quality impacts from a project proposal, both upstream and downstream and over the entire life of the project. For decades, Washington has used this clear, consistent authority to examine the full range of water quality impacts from proposed projects and condition (or deny) projects accordingly, in order to satisfy state law requirements applicable to both point and non-point water pollution.

7. For example, hydropower projects implicate a broad range of water quality impacts from the project as a whole that are unassociated with any specific point-source discharge. Dams specifically contribute to increased water temperature from decreased water flows within streams and decreased flow rates caused by ponding behind dam structures. Dam reservoirs also cause resuspension of shoreline sediments due to wave action and pool level fluctuations and overall vegetation loss, reducing shading and increasing temperatures. Wave impacts within reservoirs also cause increased turbidity and sedimentation. This, in turn, can result in further temperature increases, smothered aquatic habitat, interference with predation patterns, and lower oxygen levels. Increased turbidity can also cause an increase in toxin mobility, including PCBs and other "forever chemicals," due to increased absorption of these chemicals to sediment particles. These impacts are unrelated to any particular discharge from the project, but can have significant detrimental effects on water quality in and around project sites.

8. Typically, Section 401 is one of the primary mechanisms by which Ecology would mitigate these water quality impacts—by including conditions necessary to assure compliance with any "appropriate" requirements of state law and applicable state water quality laws. For example,

conditions to 401 certifications could include requirements to mitigate vegetation loss, geoengineer shorelines to decrease erosion, and have the reservoir discharge point lower in the water column where temperatures are lower.

9. These conditions are crucial as hydropower licenses can last up to 50 years. As such, it becomes necessary to allow for 401 certifications to adapt to changing conditions (such as a change in state water quality standards) and provide the critical ability to adjust water quality protections as new research and data establish needs for further or modified water quality protections during that time frame; however, this is another thing that the Rule does not allow. The Rule prohibits the states from amending, modifying or having any type of reopener to deal with the need to adapt to changes.

10. The 2020 Rule greatly complicates Washington's ability to implement these protections. Washington is facing this reality now and will continue to as EPA works to revise the Rule. For instance, three hydropower dams on the Skagit River will require 401 certifications between now and Spring, 2023, when EPA proposes to revise the Rule. The Skagit River is home to numerous anadromous fish species, including Chinook salmon, which is a threatened species and the primary source of food for the endangered Southern Resident Orca population in Puget Sound. Southern Resident Orcas are in severe decline and threatened with extinction. The Puget Sound population is down to only 73 individuals, its lowest level in over four decades. To minimize adverse impacts, such as temperature (among others), Washington relies on its section 401 authority to impose conditions as a key part of its Southern Resident Orca recovery efforts.

11. Therefore, as explained above, because FERC licenses for dams last between 30-50 years, the lack of adequate water quality conditions attached to these licenses would have adverse impacts for generations.

Nationwide Permit Problems:

12. Pursuant to 33 U.S.C. § 330.1(b), the Army Corps issues nationwide permits for activities occurring under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899 with regard to certain activities that have "minimal impacts" to water quality.

13. Nationwide permits are considered "general" permits, and certifying authorities typically make programmatic section 401 decisions that apply to all activities within their respective jurisdictions issued under a nationwide permit, thereby eliminating the need for project proponents covered under such a permit to seek individual section 401 certifications. Nationwide permits are valid for a period of no more than 5 years, after which they are renewed. 33 U.S.C. § 1344(e)(2). Renewal triggers the need for re-certification under section 401.

14. After the 2020 Rule was finalized, the Corps moved to re-issue and re-certify the Nationwide Permit Program, which included 16 Nationwide Permits covering oil and gas pipelines, surface coal mining, residential development, and various aquaculture activities. *See* 86 Fed. Reg. 2,744. On October 20, 2020, citing the new 401 Rule as justification, the Army Corps required certifying authorities issue section 401 certifications on the Nationwide Permit Program while they were still in draft form and were still subject to change—only just proposed for public comment a few weeks earlier. The Corps also stated that, despite a long-standing agreement with Washington allowing for a full year on all Corps-related 401 certifications, the reasonable period of time for review would be limited to 60 days. Attached hereto as Exhibit A is a true and correct copy of the October 14, 2020 letter to Laura Watson, Director of Washington State Department of Ecology, from Michelle Walker, U.S. Army Corps of Engineers.

15. Washington, along with numerous other states, requested that the time period be extended as authorized by both Corp and EPA regulations, but the Corps denied those requests. Attached hereto as Exhibit B is a true and correct copy of the November 19, 2020 letter to Colonel Alexander Bullock, U.S. Army Corps of Engineers, from Laura Watson, Director of Washington State Department of Ecology. Also, attached hereto as Exhibit C is a true and correct copy of the December 7, 2020 letter to Laura Watson, Direct of Washington State Department of Ecology, from Colonel Alexander Bullock, U.S. Army Corps of Engineers.

16. Some of the implications of this were identified in a letter submitted by various states, including Washington, to the Army Corps on May 11, 2021. Attached hereto as Exhibit D is a true and correct copy of the May 11, 2021 letter to Lieutenant General Scott A. Spellmon, U.S.

Army Corp of Engineers from the Attorneys General of the States of Washington, California, Connecticut, Maryland, New Mexico, Oregon, and the California State Water Resources Control Board.

17. On July 8, 2021, the Council on Environmental Quality responded by letter agreeing that the previous administration's process to renew and revise the Nationwide permits was both "unusual" and also "complicated an important process" by which states carry out responsibilities to protect water quality. Attached hereto as Exhibit E is a true and correct copy of the July 8, 2021 letter from Brenda Mallory, Chair, Council on Environmental Quality, to State of Washington Governor Jay Inslee.

18. Despite the short time frames, Ecology worked hard to review and provide programmatic 401 certification decisions. Rather than accept these certifications, the Corps "declined to rely" on them causing major impacts statewide.

19. For example, without programmatic 401 certifications, projects that would have qualified before for the streamlined permit procedure must now be processed individually. Prior to this, in 2020 Ecology's programmatic decisions applied to roughly 472 of the nationwide permits received from the Corps—only around 169 projects triggered an individual review. This allowed staff time to thoroughly review and issue decisions. In sharp contrast, already in 2021, Ecology has issued 396 individual decisions, 361 of these solely for aquaculture projects.

20. Ecology's ability to review these requests in a thorough and timely manner is essential to protecting Washington state's environment and economy, but the significant increase in applications and other procedural requirements of the EPA Rule has overwhelmed Ecology and Army Corps partners. Additionally, the invalidation of the nationwide aquaculture permits resulted in a flood of individual 401 certification requests for shellfish growing operations.

21. Because the planting of shellfish seed must occur during specific, narrow windows of the growing season (usually between March and August), timely permitting is essential. Without the necessary permits, growers cannot plant farms and are impacted for a season or, in some cases, permanently.

22. Prior to the increase in individual 401 applications, Ecology relied on a staff of five environmental specialists to review and issue Section 401 decisions. Those staff also developed and supported Ecology's aquatics database and made federal Coastal Zone Management Program consistency decisions. So, to meet the huge increase in demand for individual aquaculture permits, Washington was forced to hire four new staff, and reassign at least two existing employees to process the surge in applications. Ecology anticipates hiring up to five more additional staff to deal with this increase in workload associated with the nationwide permit decision, but also with 2020 Rule changes—for example shortened timeframes, validation of 401 requests and other related tasks.

23. This expenditure and increase in staff has allowed Ecology to keep pace with the increase (for now), but the Corps has not been able to keep up. The Corps recently notified Washington and its growers of a potential two-year delay in processing individual aquaculture permits.

24. It is our understanding that the Corps plans to renew the remaining 40 nationwide permits in the next two years (as the current ones are set to expire in March, 2022).

Additional Harms:

25. In addition to the ongoing harms detailed above, the 2020 Rule imposes countless others, further explained below.

26. Overall, the 2020 Rule significantly shortens the amount of time Ecology has to process 401 certification requests and limits the amount of information Ecology can seek from project proponents resulting in unpredictable and increased workloads. Ecology has traditionally viewed the 401 timeline to begin when it receives a signed and completed Joint Aquatic Resource Permit Application (JARPA), which requires project proponents to submit a detailed suite of information related to the proposed project and its potential impacts, including impacts to water quality. The information required in a JARPA is substantially more in depth than what project proponents are now required to submit to start the 401 review clock pursuant to the Rule. In terms of project impacts, proponents of individual licenses or permits need only identify the location and

nature of potential discharges, along with the receiving water(s), and a description of how the proponent plans to monitor and "treat, control, or manage" the discharge. 40 C.F.R. § 121.5(b). For general licenses or permits, proponents need only identify the "number of discharges expected to be authorized by the proposed general license or permit each year." 40 C.F.R. §121.5(c). Under the Rule, project proponents can submit this minimal information to certifying authorities well before information required in the JARPA is submitted.

27. Taken together, project proponents are able to start the 401 clock with far less information than Ecology would typically have in order to appropriately evaluate and address potential water quality impacts from proposed projects. This truncated timeline means that Ecology may be forced to make 401 decisions without critical documentation that is often developed for projects that also require 401 certification.

28. For just one example, environmental reviews conducted under both the National Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA) provide critical information for Ecology's review of water quality impacts. While 401 certifications themselves are exempt from SEPA, Washington law provides that if any non-exempt permits are required for a project that also requires 401 certification, the certification cannot occur unless the lead agency completes the SEPA process. So, in other words, Ecology will be required to conduct its 401 review either before the bulk of materials that actually describe the water quality impacts (typically gathered during SEPA) are complete, or be in conflict with state law.

29. In all, because of this (especially with regard to larger and more complex projects) Ecology is forced to evaluate and complete 401 certification requests without adequate information, requiring Ecology either broadly condition project proposals in anticipation of "worst-case-scenario" impacts, or deny permits outright because of lack of information. Rather than make the process more efficient, the 2020 Rule has resulted in more uncertainty and more delay.

30. On top of this, this year alone, Ecology has already received 387 pre-filing meeting requests (which are now required by the 2020 Rule without exception). Each request has multiple steps associated with it. This is a significant workload increase for staff, who receive these requests,

upload them to the Ecology database, check for "validity" under the new Rule, communicate with both project proponents and the federal agency to determine the reasonable period of time, and route them appropriately. None of this accounts for the applicant's timing needs —the applicant must wait the 30-day period before submitting the 401 certification request, making this pre-filing meeting requirement disruptive and time consuming to say the least. Ecology has a number of projects that have been working to receive funding just to learn that there is another time delay causing the project to no longer be able to be constructed this year.

31. Overall, the 2020 Rule also caused the need for significant internal procedural changes, which strains agency resources. In response to the changes, Ecology was forced to develop all new 401 certification templates and forms, engage in significant staff training, re-design webpages, draft focus sheets and completely alter databases to address the changes.

32. The 2020 Rule also removed the provision that allowed for modifications, which has led to confusion and delay. For example, recently, Ecology issued a 401 certification with a specific in water work window (also referred to as a fish window in order to protect salmonids), based on information submitted by the applicant. Later, Ecology learned that the applicant had provided conflicting information in their request and needed to conduct work outside the work window that Ecology specified in the 401 certification. The applicant proposed a different work window based upon U.S. Fish and Wildlife Service's regulations. With the 2020 Rule in place, Ecology is unable to modify, amend or change the 401 certification conditions. Therefore, the applicant must start the whole process over again, reapply, and obtain a new 401 certification to conduct the work as proposed.

//

//

//

//

//

33. As described above, the 2020 Rule is harming Washington State now, in a multitude of ways. Leaving the Rule in place until at least early 2023 will only exacerbate these harms.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 23, 2021.

Signature: /s/ *Loree' Randall*

Printed name: Loree' Randall

Address: 300 Desmond Drive, Lacey WA 98403

Phone Number: 360-485-2796

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1

I hereby attest that I have on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/s/) within this e-filed document.

Executed this 23rd day of July 2021 in Olympia, Washington.

/s/ Kelly T. Wood
KELLY T. WOOD
Assistant Attorney General

EXHIBIT A

October 14, 2020 Letter

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, SEATTLE DISTRICT
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

Regulatory Branch October 14, 2020

Ms. Laura Watson
Director, Washington State Department of Ecology
Post Office Box 47600
Olympia, Washington 98504

Reference: 2020 Nationwide Permits
401 Water Quality Certification

Dear Ms. Watson:

On September 15, 2020, the U.S. Army Corps of Engineers (Corps), Seattle District (Seattle District) published in the Federal Register its proposal to reissue the Nationwide Permits (NWPs).

The Seattle District requests water quality certification under Section 401 of the Clean Water Act for the proposed issuance of those NWPs that may result in a discharge in waters of the United States where Ecology has 401 water quality certification authority in the State of Washington. The Seattle District believes the proposed NWPs meet Ecology's water quality requirements. However, we recognize that you may need to add conditions or require individual review for some activities to ensure compliance with water quality requirements.

In accordance with the U.S. Environmental Protection Agency's current water quality certification regulations at 40 CFR part 121, the Seattle District is providing the following information to comply with section 121.5(c) of those regulations:

(1) The Seattle District's point-of-contact for the proposed issuance of the NWPs is: Mr. Andrew Shuckhart, Phone: (206) 316-3822, Email: andrew.j.shuckhart@usace.army.mil. General NWP questions may also be submitted to NWP-SeattleTeam@usace.army.mil

(2) The proposed categories of activities to be authorized by the NWPs for which certification is requested are described in the text of the proposed NWPs. Nationwide permits numbered 15, 16, 17, 18, 21, 25, 29, 30, 34, 39, 40, 41, 42, 43, 46, 49, 50, and E would authorize activities that result in discharges of dredged or fill material and therefore 401 water quality

certification is required for those NWPs. Nationwide permits numbered 3, 4, 5, 6, 7, 12, 13, 14, 19, 20, 22, 23, 27, 31, 32, 33, 36, 37, 38, 44, 45, 48, 51, 52, 53, 54, C, and D would authorize various activities, some of which may result in a discharge of dredge or fill material and require 401 water quality certification, and others which may not. Nationwide permits numbered 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B do not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. In the case of NWP 8, it only authorizes activities seaward of the territorial seas.

(3) Enclosed is a copy of the text of the proposed NWPs.

(4) Enclosed is a table that provides estimates of the annual number of times each of the proposed NWPs may be used in the Seattle District. This estimate reflects the number of discharges anticipated to be authorized by each of the proposed NWPs in a given year. A graph has also been enclosed to display the total amount of permits issued by the Seattle District during the 2017 NWPs.

(5) A pre-filing meeting request was submitted to your office on September 14, 2020. A copy of the pre-filing meeting request is enclosed.

(6) The Seattle District hereby certifies that all information contained herein is true, accurate, and complete to the best of its knowledge and belief.

(7) The Seattle District hereby requests that the certifying authority review and take action on this 401 water quality certification request within the applicable reasonable period of time which the Seattle District has determined is 60 days.

The Seattle District is proposing regional conditions for the proposed NWPs. Enclosed is a copy of the Seattle District's public notice inviting public comment on the proposed regional conditions.

In accordance with the Corps' regulations at 33 CFR 330.4(c), if you deny water quality certification for certain activities authorized by the proposed NWPs where Ecology has 401 water quality certification authority in the State of Washington, then the Corps will deny without prejudice authorization for those activities. Anyone wanting to perform such activities must first obtain an activity-specific water quality certification or waiver thereof from your office before proceeding under the NWP.

Thank you for your attention regarding this matter. We remain available to discuss issues or proposed conditions you may be considering for the NWPs. We look forward to working with your office on this effort.

Sincerely,

Kristina G. Tong

for Michelle Walker
Chief, Regulatory Branch

Enclosures

EXHIBIT B

November 19, 2020 Letter

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

November 19, 2020

Colonel Alexander Bullock
PO Box 3755
Seattle, WA 98124-3755

Dear Colonel Alexander Bullock:

I write to request an extension for water quality certifications of 57 nationwide permits (NWP), submitted to the Washington State Department of Ecology (Ecology) by the U.S. Army Corps of Engineers (Corps) on October 14, 2020, via letter. In your request, the Corps asserts that Ecology is limited to a window of sixty days for Ecology to grant, condition, or deny the certifications. We disagree that federal agencies have the authority to dictate to states the timeline for exercise of section 401 authority. But, even putting that disagreement aside, sixty days is insufficient for Ecology to review these requests and meet requirements under the U.S. Environmental Protection Agency's (EPA) new Clean Water Act §401 rule. For these reasons, we request an additional sixty days, extending the due date from December 13, 2020, to February 11, 2021.

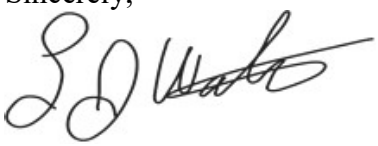
The new §401 rule became effective on September 11, 2020, establishing new requirements that each condition included in a certification reference an existing water quality law or regulation. Because this is the first time that Ecology, as the certifying authority, will be required to reference laws and regulations when developing a Section 401 water quality certification, it is imperative that Ecology have sufficient time to review the NWP program and cite the appropriate laws and regulations. Our review must take into consideration: (1) major changes in many NWP permits; (2) changes in general considerations; (3) the addition of five new permits; and (4) any cumulative and interconnecting impacts from other recent federal rulemaking actions. As always, we must also consider input from the public.

Moreover, Ecology's certification decisions will apply for up to 5 years, until the next reissuance of the NWPs. Thus, we need to ensure that every effort be made now to exercise due diligence in considering the water quality laws and regulations as these pertain to Ecology's Section 401 certification decisions under the NWP Program. It benefits both Ecology and the Corps to develop solid and legally defensible permit decisions. Unfortunately, the sixty-day review and comment period is inadequate for this volume of review and analysis and will undermine our joint goal of well-informed and defensible decisions.

Finally, in past iterations of the NWP program, Ecology has worked closely with the Corps to review and develop appropriate regional conditions. In this renewal cycle, and in a reversal from what has been done in the past, we are being asked to issue decisions on draft regional conditions from the Corps. The requested extension of time will allow the Corps and Ecology to coordinate further on regional decisions and potential effects to our Section 401 certification decisions so that we can exercise our water quality certification authority and protect state waters.

Thank you for your prompt consideration of our request. I look forward to our continued partnership on this issue. If you have questions, please contact Ecology's lead on 401 water quality certifications, Loree' Randall at loree.randall@ecy.wa.gov .

Sincerely,



Laura Watson
Director

EXHIBIT C

December 7, 2020 Letter

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SEATTLE DISTRICT
PO BOX 3755
SEATTLE, WA 98124-3755

DEC 0 7 2020

Regulatory Branch

Ms. Laura Watson, Director
Washington State Department of Ecology
Post Office Box 47600
Olympia, Washington 98504-7600

Dear Ms. Watson:

I am responding to your letter dated November 19, 2020, requesting an additional sixty days to provide water quality certification decisions on the 57 nationwide permits. I understand the importance of developing a solid and legally defensible decisions on this matter and I also completely understand the added complexity brought on because of the new Section 401 recently promulgated by the Environmental Protection Agency. The U.S. Army Corps of Engineers is pursuing an aggressive schedule for completion of the Nationwide Permit re-authorization and therefore, I cannot support your extension request. There is little room for delay in the reauthorization schedule and the water quality certifications are an important element of the process. Therefore, the 60-day period ends on December 13, 2020.

I appreciate your attention to this matter and if you have any additional questions, we have our next monthly call scheduled for December 11, 2020. Additional questions can also be directed to my Regulatory Branch Chief, Ms. Muffy Walker at (206) 764-6915 or michelle.walker@usace.army.mil.

Sincerely,

Alexander "Xander" L. Bullock
Colonel, Corps of Engineers
District Commander

EXHIBIT D

May 11, 2021 Letter

ATTORNEYS GENERAL OF THE STATES OF WASHINGTON, CALIFORNIA, CONNECTICUT, MARYLAND, NEW MEXICO, OREGON, AND THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

May 11, 2021

By U.S. Mail and E-Mail: Scott.a.spellmon@usacoe.army.mil
Attn: United States Army Corps of Engineers
Lieutenant General Scott A. Spellmon
55th Chief of Engineers and
Commanding General of the U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314-1000

Re: State Section 401 Certifications of Nationwide Permits

INTRODUCTION

The undersigned States have significant concerns regarding the United States Army Corps of Engineers (the Corps) handling of the reauthorization of Nationwide Permits pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. We mince no words: the Corps' actions will cost jobs, millions of dollars in unnecessary delays, and will allow some projects to go forward without any conditions to protect state water quality, resulting in significant environmental degradation. Moreover, these actions are purportedly based on the United States Environmental Protection Agency's (EPA) 2020 section 401 regulation that: (1) is subject to review and potential rescission or significant revision pursuant to Executive Order 13990; and (2) even as written, the Corps is misapplying. It is not too late to correct these issues and repair the longstanding cooperative relationship between the States and the Corps in the implementation of the Clean Water Act. In fact, the impacts of these actions are wholly avoidable, and both the States and EPA have proposed ways in which this situation can be remedied. We urge the Corps to immediately engage with the States to address the concerns set out below.

BACKGROUND

On September 11, 2020, EPA's "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42210 (section 401 Rule), which drastically alters section 401 certification procedures, went into effect. Little more than a month later, on October 20, 2020, the Army Corps began requesting that certifying authorities issue section 401 certifications for more than 40 Nationwide Permits affecting tens of thousands of projects across the country. In doing so, the Corps took the unprecedented step of requesting that States certify draft Nationwide Permits that had only just been proposed for public comment a few weeks earlier and were thus still subject to change. Even though the existing Nationwide Permits would not have expired until 2022, the Corps stated that the reasonable period of time for certifying authorities to act on its request to certify all new Nationwide Permits was only 60 days, contrary to longer time periods allowed in previous years, and despite the fact that the Corps had express agreements with numerous states permitting up to one year for section 401 certification decisions. Numerous States requested that

this time period be extended as authorized under the Corps' and EPA's regulations and section 401 of the Clean Water Act. In a departure from its long-established practice of granting requests for expansion of review periods for far less complex and onerous section 401 certification reviews, the Corps summarily denied the States' requests.

This brief review period provided no time for States to consult with the Corps regarding how it intended to interpret and apply the new section 401 Rule. Indeed, the Corps provided no advance notice to States that it intended to take unprecedented actions such as refusing to incorporate state certification conditions and finding waivers of state section 401 authority based on the section 401 Rule.

1. "Decline to Rely" Letters

Despite the unjustifiably short review period imposed by the Corps, the States worked to review the Nationwide Permits and provide their certification decisions by the required deadlines. Rather than accepting these certifications as mandated by the both the Clean Water Act and the section 401 Rule, the Corps issued, or threatened to issue, letters that "decline to rely" on many of the state 401 certifications. Though rationale for these letters is somewhat unclear, our understanding is that the Corps apparently believes that certain language within the section 401 certifications creates a "re-opener" for states to revisit their 401 certifications for the Nationwide Permits. In addition, in California, the Corps identified certain certification conditions as "not acceptable" because of a purported "inconsistency with Corps Regulations."

The impact of the "decline to rely" letters is significant. Because of the letters, projects that would otherwise qualify for the streamlined Nationwide Permit process and the programmatic certifications that the state agencies specifically developed for these projects must now obtain individual section 401 certifications in affected states, resulting in costly and unnecessary delays.

These "decline to rely" letters are both illegal and unfounded. To begin with, the law is abundantly clear as to the proper means and forum for resolving disputes over the legality of section 401 certification conditions. If the Corps has a substantive issue with a state's section 401 condition, its only options are to accept the condition as written or file a lawsuit in state court challenging the condition. *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006) (stating that federal agencies' "role [in the section 401 certification process] is limited to awaiting and then deferring to, the final decision of the state."); *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) ("a State's decision on a request for Section 401 certification is generally reviewable only in State court").

The preamble to the section 401 Rule clearly makes this point: "[t]he EPA's final regulatory text . . . contemplate[s] that the federal licensing or permitting agency will review certifications only to ensure that certifying authorities have included certain required elements

and completed certain procedural aspects of a section 401 certification." 85 Fed. Reg. 42267. If those requirements are met, "the federal agency must implement the certifying authority's action, irrespective of whether the federal agency may disagree with aspects of the certifying authority's substantive determination." *Id*. at 42,268. As 40 C.F.R. § 121.10 expressly instructs, "[a]ll certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit." The Corps cannot by unilateral action refuse to implement a state's section 401 certification based on its own substantive disagreement with a particular certification condition.

Moreover, even if the "decline to rely" letters were procedurally valid, the Corps is incorrect in concluding that the certifications include re-opener provisions. While we do not agree that so-called "re-opener" provisions are unlawful, the specific language that the Corps found unacceptable falls into a few categories. Most of the objected-to language reflects the States' concerns over being asked to certify Nationwide Permits with draft regional permit conditions. For that reason, the States' section 401 certification decisions included provisions allowing them to revisit their certification to address final Nationwide Permit conditions that differ from the draft permit conditions. Other States, such as Washington and California, included language long used in prior Nationwide Permit 401 certifications stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual section 401 certifications.[1]

Neither case creates the re-opener alleged by the Corps. For one, and as described in the preamble to the section 401 Rule, re-opener provisions are purportedly inconsistent with section 401 because such provisions would allow the certifying authority to "take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future." 85 Fed. Reg. at 42,280. But regardless of whether this analysis is consistent with the Clean Water Act, neither of the certification conditions discussed above creates the re-opener alleged by the Corps because the conditions only allow the certifying authority to determine which projects fall within the proper scope of their certifications.

With regard to section 401 certification conditions allowing States to revisit the certification if the final permit conditions change, that language reflects the fact that the States were put in the untenable position of certifying Nationwide Permits when it was unclear as to what the final regional conditions would look like. It is our understanding that some States were not even provided draft regional conditions to evaluate. It should go without saying that States cannot provide final water quality certification of permits *that are not final*, and any interpretation of either section 401 or the section 401 Rule determining otherwise is manifestly unreasonable. A certification only applies to the permit as it was described in the request for

[1] Note that this letter does not discuss all the States' section 401 certification conditions that the Corps has "declined to rely on" on the ground that they constitute "re-openers" in the Nationwide Permits context. Rather, the letter focuses on the most common examples of purported "re-opener" language.

certification. To the extent that what was described in the request changes, the certification is no longer valid. In the end, however, the draft conditions in most States were adopted unchanged. Thus, and as has been pointed out to the Corps repeatedly, most States' concerns over the need to revisit the final Nationwide Permits have been eliminated and the language in question rendered moot.

The Corps' concerns are similarly unfounded with regard to language stating that projects that do not qualify for Nationwide Permit coverage may need to obtain individual certifications. This language was used by California not as a condition that is imposed on dischargers that seek coverage under a Nationwide Permit, but simply as a reservation of rights. In Washington, the language in question was simply carryover language from prior certifications and that had indeed rarely—if ever—been invoked during the decades in which such language was in place. Washington has repeatedly offered to remove the conditions or agree not to invoke them. Despite these offers, the Corps has inexplicably refused to meaningfully engage with Washington on resolving the issue.

In both cases, the Corps should do what multiple States have urged: simply acknowledge that the conditions in question do not create a re-opener of the Nationwide Permit certifications, rescind the "decline to rely" letters, and not issue additional letters. In the alternative, we request that the Corps either re-open public comment on the final Nationwide Permits or extend its reasonable period of time determination, and allow States to supplement their certifications for the limited purpose of removing and/or clarifying the language at issue.

2. Waiver Determinations

In addition to the "decline to rely" letters, the Corps also issued waivers to several of the States' Nationwide Permit section 401 certifications based on alleged failures to comply with Section 121.7 of the section 401 Rule. This section of the rule purports to grant federal agencies the authority to declare waiver where certifying authorities fail to provide written explanations and citations to legal authority for the conditions imposed in their section 401 certification. In one case, the Corps declared waiver with regard to a State that failed to include certain material required by the section 401 Rule as result of a simple clerical error. That state swiftly sought to correct the error, only to be rebuffed by the Corps.

The federal government's authority to declare waiver based on federal procedural requirements is—*at best*—highly questionable. In drafting this provision of the section 401 Rule, EPA cited no authority for this position. Indeed, this portion of the rule flies in the face of congressional intent, applicable case law, and the foundation of "cooperative federalism" upon which the Clean Water Act is built. By the plain language of the Act, a State waives its section 401 authority only by "failing or refusing to act." 33 U.S.C. § 1341(a)(1). An error of not marking off a procedural checkbox is not equivalent to "failing or refusing to act" on a

certification request. *See id*. Even if EPA does not rescind this provision of the section 401 Rule in the coming months, we have every confidence that it will be invalidated by the court in the States' pending legal challenge to the rule.

Placing legal deficiencies aside, however, the Corps' waiver declarations represent bad governance and are a slap in the face to the Corps' State partners. Impacted States where the Corps has declared waiver have requested an opportunity to remedy alleged procedural defects. The Corps has refused for reasons that defy logic. The Corps' assertion that it cannot allow certifying authorities to supplement section 401 certification decisions in the absence of regulations governing that process is clearly erroneous. The preamble to the section 401 Rule preserves federal agencies' authority to allow States to remedy purportedly deficient denials. 85 Fed. Reg. at 42,269. There is also nothing in the Clean Water Act that forbids an agency from allowing a state to correct a non-substantive clerical error in a certification decision. It is important to note that the Corps' requests for certifications of the Nationwide Permits were among the first to be received by the States after the section 401 Rule took effect. It is thus patently unreasonable for the Corps' to refuse to allow any flexibility to the States considering there were, and still are, many questions and uncertainties regarding the application of the rule.

More importantly, even if supplementation was substantive, allowing the States to supplement is well within the Corps' authority, especially under the circumstances here. The Clean Water Act allows state certifications to occur within a "reasonable period of time (which shall not to exceed one year)." 33 U.S.C. § 1341(a)(1). While we disagree with this portion of the section 401 Rule, the rule authorizes the Corps to determine what constitutes a reasonable amount of time within that one-year timeframe. Because the Corps' certification requests were received by the States several months ago, we are still well within the one-year window authorized by the Clean Water Act. Neither section 401 itself nor the section 401 Rule prevent the Corps from extending its reasonable period determination to allow the States to supplement their certification decisions. Section 401 requires certification to occur before a federal license or permit authorizes an "activity." *Id*. A Nationwide Permit by itself does not authorize anything until an applicant applies for, and is granted, coverage. As such, limitations on modifying section 401 certifications contained in other subsections of section 401 do not apply to a state's programmatic certification of a general permit. The Corps, therefore, has clear authority to extend its arbitrary 60-day timeframe for certifying authorities to supplement certification decisions for the Nationwide Permits. Its refusal to do so here is unreasonable and unacceptable.

CONCLUSION

In summary, the Corps must change course and engage with the States to find solutions to the current Nationwide Permit situation—a situation that is the direct result of the Corps' misapplication of an already haphazard section 401 Rule that may be rescinded or significantly revised in coming months. Refusal to rectify the situation will result in significant harm to the

environment, regulated parties, impacted industries, and impacted states. We look forward to your response.

SIGNATURES

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ Kelly T. Wood
KELLY T. WOOD
Managing Assistant Attorney General
Washington Office of the Attorney General
PO Box 40117
Olympia, Washington 98504-0117
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov

FOR THE STATE OF CALIFORNIA and THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

ROB BONTA
Attorney General of California

By: /s/ Tatiana K. Gaur
TATIANA K. GAUR
ADAM LEVITAN
Deputy Attorneys General
California Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone (213) 269-6329
E-mail: Tatiana.Gaur@doj.ca.gov

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut

By: /s/ Jill Lacedonia
JILL LACEDONIA
Assistant Attorney General
Connecticut Office of the Attorney General
165 Capitol Avenue
Hartford, Connecticut 06106
Telephone: (860) 808-5250
E-mail: Jill.lacedonia@ct.gov

FOR THE STATE OF MARYLAND

BRIAN FROSH
Attorney General of Maryland

By: /s/ John B. Howard, Jr.
JOHN B. HOWARD, JR.
Special Assistant Attorney General
Maryland Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Telephone: (401) 576-6970
E-mail: jbhoward@oag.state.md.us

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

By: /s/ William Grantham
WILLIAM GRANTHAM
Assistant Attorney General
New Mexico Office of the Attorney General
Consumer and Environmental Protection Div.
201 Third Street NW, Suite 300
Albuquerque, NM 87502
Telephone: (505) 717-3520
Email: wgrantham@nmag.gov

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

By: /s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
E-mail: paul.garrahan@doj.watate.or.us

cc: Radhika Fox
Principle Deputy Administrator
Office of Water
United States Environmental Protection Agency
Fox.Radhika@epa.gov

EXHIBIT E

July 8, 2021 Letter

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

July 8, 2021

Governor Jay Inslee
Washington

Dear Governor Inslee,

Thank you for your May 17, 2021 letter to President Biden regarding the U.S. Army Corps of Engineers Nationwide Permits and water quality certification by states and Tribes under section 401 of the Clean Water Act. I appreciate your commitment to work in good faith with federal partners on water quality.

As you note in your letter, the 2020 Clean Water Act Section 401 Certification Rule is under review at the Environmental Protection Agency (EPA) in accordance with Executive Order 13990. As part of this review, EPA held listening sessions on June 14, 15, 23, and 24, 2021. As you also note, the Nationwide Permit renewals initiated under the previous administration are in process, and your comments regarding the interaction between the Certification Rule and the Nationwide Permits are timely.

The process undertaken by the previous administration to renew and revise Nationwide Permits was in many ways unusual. The timing for renewal of the permits occurred earlier than in previous renewals, 401 certification was requested on proposed permits rather than final ones, and requests for extensions of the reasonable period of time by which to submit 401 certifications were declined. Without question, this approach has complicated an important process by which the federal government, states, Tribes, and territories carry out shared responsibilities to protect water quality.

We are grateful for your participation in the ongoing processes and look forward to working with you as this matter unfolds.

Thank you,

Brenda Mallory

Brenda Mallory
Chair

PHILIP J. WEISER
ATTORNEY GENERAL OF COLORADO
ANNETTE M. QUILL, 27683 (*PRO HAC VICE*)
SENIOR ASSISTANT ATTORNEY GENERAL
CARRIE NOTEBOOM, 52910 (*PRO HAC VICE*)
FIRST ASSISTANT ATTORNEY GENERAL
RALPH L. CARR COLORADO JUDICIAL CENTER
1300 BROADWAY, 7TH FLOOR
DENVER, CO 80203
TELEPHONE: (720) 508-6000
E-MAIL: ANNETTE.QUILL@COAG.GOV
CARRIE.NOTEBOOM@COAG.GOV

Attorneys for the State of Colorado

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking	Case: No. 20-cv-04636-WHA (consolidated) Applies to all actions **DECLARATION OF AIMEE M. KONOWAL IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 A.M. ORAL ARGUMENT REQUESTED

I, Aimee M. Konowal, declare as follows:

1. I currently hold the position of Watershed Section Manager at the Water Quality Control Division of the Colorado Department of Public Health and Environment. I have held this position for 5 years, and prior to this position I worked for 20 years in various management and technical staff roles in the Watershed Section including managing the Environmental Data Unit and as technical staff assessing water quality and developing water quality standards. My current job responsibilities include supervising

three units with 30 technical staff in the Watershed Section. The Watershed Section is responsible for a variety of programs including Colorado's 401 Certification Program.

2. I submit this declaration in support of the Plaintiffs States' opposition to EPA's motion for remand without vacatur. I have personal knowledge of the facts stated herein and can testify to them if called as a witness. The 401 certification rule promulgated by EPA in 2020 (the "2020 Rule") threatens to strip Colorado of its ability to protect its valuable water resources from the operational impacts of large water supply projects. These projects are essential for providing water for various beneficial uses in our semi-arid state, and they will become even more critical as the state's population continues to grow. Colorado relied on EPA's prior rule of nearly 50 years to impose conditions on water supply projects to ensure they are protective of water quality both during construction and through long-term operation. Time is of the essence; Colorado cannot afford to operate under the 2020 Rule for an undefined period of time while EPA considers its regulatory options.

3. Colorado has received an average of 14 certification requests per year since 2015. Since September 2020, Colorado has received 13 certification requests. As mentioned above, Colorado's largest and most complex 401 certifications are conditional certifications of large water supply projects, which are triggered by the need for a 404 dredge and fill permit from the U.S. Army Corps of Engineers. Since 2012, Colorado has issued 4 such certifications, and we are currently working on 3 projects of similar scope that will require 401 certifications in the relatively near future.

4. The water quality impacts from water supply projects in Colorado fall within 3 broad categories: (1) water quality in new or expanded reservoirs; (2) changes to water quality downstream of new reservoir releases; and (3) changes to water quality as a result of increased diversions to fill new or expanded reservoirs. For each of our certifications of major water supply projects, we have included conditions addressing some or all these concerns. For example:

a. **New and Expanded Reservoirs**: In past certifications, Colorado has required multiple years of monitoring in expanded reservoirs following project completion, background data collection in new reservoirs beginning even before the reservoirs are full, and the development of adaptive management plans to address project-related water quality impairments if they occur in the future. These conditions are critical to ensuring that reservoir water quality can support aquatic life, recreational, agricultural, and drinking water uses. In addition, conditions requiring monitoring of fish tissue mercury help protect public health and are especially important in new or expanded reservoirs, where fish tissue mercury tends to increase shortly after the reservoir begins to fill.

b. **Releases from Reservoirs**: Colorado has imposed certification conditions designed to prevent increases in water quality parameters, such as stream temperature, increases in the concentrations of heavy metals, and nutrients resulting from natural biogeochemical processes that occur at the bottom of reservoirs. These conditions have generally included monitoring, establishment of an adaptive management plan, and the development of plans to address project-related impairments, should they occur. These plans have often relied on the construction of multi-level outlet works to manage the quality of releases.

c. **Increased Water Diversions:** Every water supply project Colorado involves increased diversions. Diversions change the relative proportion of streamflows that come from various sources; thus, increased diversions can have a major effect on water quality when they cause the proportion of downstream flow coming from relatively polluted sources to increase. Furthermore, diversions reduce the amount of flow available in the original waterbody, making streams more susceptible to warming and less hospitable for aquatic life. To account for these impacts, Colorado has imposed conditions requiring extensive temperature, aquatic life, *E. coli*, and nutrients monitoring along with the development of adaptive management strategies, ranging from curtailment of diversions to stream restoration and enhancement, to address project-related degradation in water quality.

5. Under the 2020 Rule, Colorado likely does not have the ability to impose *any* of these

conditions because they concern the operation of the "activity as a whole" rather than the discharge that triggered the federal permitting requirement. As a result, Colorado is severely limited in its ability to protect its streams and reservoirs from the major impacts that water supply projects can have on stream temperature and water quality. Furthermore, project proponents now have less incentive to include protective measures, such as multi-level outlet works and environmental flow releases, in their project proposals. These costly, complex measures are critical to protecting water quality from project-related impacts and to developing adaptive management strategies. However, only the 401 certification provides a mechanism through which these measures can be enforced to ensure compliance with state water quality requirements; thus, in its absence, project proponents feel less regulatory pressure to incorporate these and other water quality mitigation measures in their projects from the outset. Besides the major implications for aquatic life downstream of water supply projects, such as increased stream temperatures, reduced flows, and higher concentrations of certain metals and nutrients related to increased diversions and/or reservoir releases, this also undermines public health given that most water supply projects are designed to increase public water supplies. For example, relatively pristine water is typically diverted to storage in reservoirs, where certain biogeochemical processes can reduce water quality. At the same time, reducing flows from high quality sources to the stream results in increased contributions from relatively low quality sources, such as stormwater outfalls, non-point sources (*e.g.*, agricultural fields), and tributaries flowing through developed areas. These impacts can lead to increased concentrations of arsenic, iron, and manganese above water supply diversions and to increased concentrations of *E. coli* in recreational areas. In addition, the unique aquatic environment in large, recently constructed or expanded reservoirs can lead to spikes in fish tissue mercury concentrations. These reservoirs are often open to public fishing. Under the 2020 Rule, Colorado would lose its ability to condition new water supply projects to account for these impacts.

6. Colorado's concern with the 2020 Rule is perhaps best illustrated by a conditional 401 certification for the Northern Integrated Supply Project (NISP). The certification request was evaluated under previous federal rule, and the certification was issued in January 2020. NISP is a water supply

project involving the construction of two new reservoirs and increased diversions from a highly managed river system. Proposed discharges into waters of the United States during construction triggered the need for a 404 permit. Colorado coordinated with the applicant and the Army Corps of Engineers to formulate 30 conditions designed to protect water quality during construction and operation of the project:

- Conditions 1 through 7 require monitoring, modeling, and mitigation to address in-stream temperature impacts associated with increased diversions and reservoir releases. Some reaches of the stream are already impaired due to high temperatures, and modeling suggests that the project could increase warming in certain locations. These impacts are primarily associated with increased diversions.
- Conditions 8 and 9 involve baseline monitoring in the new reservoirs and require mitigation in the event of water quality impairments. Protecting water quality in these reservoirs is necessary to ensure that they can support their likely designated uses (drinking water, recreation, aquatic life, and agriculture).
- Conditions 10 through 15 require monitoring for the potential impacts of reservoir releases on water quality in downstream waters.
- Conditions 16 through 25 address the impacts of increased diversions on in-stream arsenic, copper, *E. coli*, and nutrient concentrations. These conditions were necessary because the project is expected to increase the proportion of stream flow that comes from relatively polluted sources, not because of project-related discharges.
- Conditions 26 and 27 require monitoring for mercury in fish tissue. If mercury concentrations are above standards, the project proponent must post fish consumption advisories. Mercury concentrations in fish tissue are often high in new reservoirs, and notifying the recreating public is critical to protecting public health.
- Conditions 28 and 29 require monitoring for macroinvertebrates to measure the effects of mitigation strategies and to detect and mitigate for any project impacts on aquatic life. Such impacts would be associated with project operations, such as diversions and reservoir releases.
- Condition 30 requires submission of relevant portions of the applicant's stormwater management plan for construction of water pipeline stream crossings and submission of any related monitoring data.

Under the 2020 Rule, however, all but *one* of these conditions (Condition #30) would likely be considered outside of the scope of the 401 certification because they do not relate to the discharge that triggered the need for a federal 404 dredge and fill permit. Instead, these 29 conditions relate to the operation of the project, or the "activity as a whole," consistent with U.S. Supreme Court directives and EPA's practice under the previous federal rule.

7. In addition to the federal 401 framework, Colorado's 401 certification program operates pursuant to the Colorado Water Quality Control Commission's Regulation #82 (5 C.C.R. 1002-82).

Several provisions of Regulation #82 are arguably inconsistent with the 2020 Rule and will need to be revised if the federal rule remains unchanged. Colorado has not yet sought to revise Regulation #82 because of the uncertainty surrounding the status of the rule (in light of the ongoing litigation over the rule, the change in presidential administrations, and EPA's stated intent to revise the rule). Leaving the 2020 Rule in place while remanding it to the agency would continue this uncertainty, or require Colorado to update its regulations multiple times as the rule changes in the future.

8. Under Regulation #82, Colorado is required to perform antidegradation reviews for projects receiving 401 certifications. Antidegradation reviews for most water supply projects require protection against "significant degradation," which is defined generally as degradation to water quality that erodes the difference between baseline conditions and the applicable standard; in other words, significant degradation occurs before water quality exceeds standards. Increased diversions and other changes in flow associated with water supply projects can cause significant degradation of temperature, nutrients, and other water quality constituents. Under the 2020 Rule, however, Colorado would be barred from developing conditions that address these impacts. In this way, Colorado could not comply with its own state water quality regulations because of the narrower scope of the 2020 Rule.

9. Regulation #82 assumes that adaptive management is a permissible strategy for providing "reasonable assurance" that a project will comply with water quality standards. This is consistent with the prior rule, which required certifying authorities to provide "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards" as part of its certification. The 2020 Rule, by contrast, limits the scope of the state certification to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." To the extent that the "will comply" language of the new rule precludes the "reasonable assurance" approach, both the language in Regulation #82 and the overall framework for certifying large water supply projects will need to be significantly altered. Regulation #82 frequently refers to developing conditions that address the potential impacts from operation of the project as a whole. The narrowed

scope of the 2020 Rule suggests that this language (and Colorado's associated process for certifying large projects) would have to change to be consistent with the vastly narrowed scope of the federal rule.

10. If the 2020 Rule remains in place while EPA proceeds with a new rulemaking, Colorado will likely experience harm to its water resources as a result of the limited scope of conditions available for large water supply projects that are currently under development in our state. Colorado cannot afford to wait for EPA to undergo what could be a lengthy rulemaking process while the 2020 Rule remains in place.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 21, 2021.

Signature: _____

Printed name: Aimee M. Konowal

Address: 4300 Cherry Creek Drive South Denver CO 80246

Phone Number: 720-284-2370

JOSHUA H. STEIN
Attorney General of North Carolina
DANIEL S. HIRSCHMAN
Senior Deputy Attorney General
TAYLOR H. CRABTREE
(*admitted pro hac vice*)
Assistant Attorney General
ASHER P. SPILLER
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6400
E-mail: tcrabtree@ncdoj.gov
E-mail: aspiller@ncdoj.gov

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking	Case: No. 20-cv-04636-WHA (consolidated) Applies to all actions **DECLARATION OF PAUL WOJOSKI IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 A.M. ORAL ARGUMENT REQUESTED

I, Paul Wojoski, declare as follows:

1. I am the supervisor of the 401 and Buffer Permitting Branch of the Division of Water Resources. I have been in this role since March of 2020 and previously served as the acting

supervisor for approximately 5 months in 2019. Prior to my current position, I was a Senior Environmental Specialist in the 401 and Buffer Permitting Branch.

2. I have a Bachelor's of Science in Biology with an emphasis in Computation Science from Wofford College awarded in 2005. I carry North Carolina Surface Water Identification Training and North Carolina Wetland Assessment Method Training Certifications.

3. As the Branch Supervisor, I am responsible for coordinating staff and overseeing review of applications for 401 water quality certifications, State waters permits, riparian buffer authorizations and variances. I also coordinate staff and oversee stream, wetland, and buffer mitigation and nutrient offset projects. I am the primary point of contact for state rulemakings related to the 401 water quality certification program, riparian buffer protection program and state waters permitting programs. I provide technical expertise on Federal rulemakings and national issues impacting these programs. I also provide leadership and technical expertise for coordination of these programs across seven regional offices to ensure consistent and uniform application of these programs.

4. I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

5. I make this declaration in support of the above captioned challenge to the final action of the United States Environmental Protection Agency ("EPA") to promulgate the "Clean Water Act Section 401 Certification Rule," published at 85 Fed. Reg. 42,210 (Jul. 13, 2020) ("Rule") and in support of the Plaintiff State's Response in Opposition to EPA's motion to remand without vacatur. As explained below, the State of North Carolina has already been significantly prejudiced by the challenged rule. Most notably, the Army Corps of Engineers ("Corps")—after the promulgation of the Executive Orders directing the reconsideration of the Rule—relied on the Rule to determine that North Carolina had waived its authority to issue state certifications for three Army Corps Nationwide Permits even though North Carolina complied with the terms of the Clean Water Act in taking final action on the Corps' request.

6. If allowed to remain in place while EPA reconsiders the rule, the challenged rule will continue to prejudice the State of North Carolina and its residents by placing into question

North Carolina's ability to include conditions that are critical to the protection of water quality in the State of North Carolina into Section 401 certifications for federally-approved projects, imposing significant and resource-intensive administrative burdens, and needlessly delaying environmentally beneficial projects.

The Rule Imposes Significant Unnecessary Burdens on North Carolina 401 Program.

7. During the ten months the Rule has been in place, the Rule has already imposed a significant burden on North Carolina's 401 water quality certification program. By imposing onerous requirements on NCDEQ's certification process, the Rule has forced and will continue to force the agency to divert resources away from protecting water quality in order to comply with these new requirements.

8. During a typical year, North Carolina DWR reviews over 1,600 401 certification applications. At each stage of the review process, the Rule has increased the burden on the state often with no appreciable benefit.

9. Before the application can even be submitted the Rule requires the submission of a pre-filing meeting request. This pre-filing meeting request is required without regard to whether the request would serve any purpose whatsoever. The request must be filed thirty days before the application can be submitted—no exceptions. This means that even time-sensitive environmentally beneficial projects, like cleaning up hog waste that has discharged into protected wetlands, emergency stream bank repair, or installing groundwater corrective action measures that require work in protected waterways have an additional thirty days added to the application clock no matter what. The requirement has resulted in delays even beyond thirty days where applicants have submitted applications without the pre-filing meeting request and DWR has had to deem otherwise complete applications incomplete simply because the applicant filed to comply with the pre-filing meeting request requirement. Because the pre-filing meeting rules only apply to 401 certification requests, and not federal permits, the requirement causes an otherwise coordinated process to become disjointed. The relevant federal agency continues to process the permit application, but on the 401 side, the applicant must submit its pre-filing request, wait 30 days, and then re-file before

proceeding. All of these issues result in unnecessary delays and administrative burdens. These issues have already arisen in North Carolina and will continue to arise if the Rule is allowed to stay in place.

10. The Rule also sets an unreasonable start date for the State's review of the certification request. For example, the Final Rule contains an exclusive list of materials necessary for a certification request to be deemed complete. § 121.5. That list omits materials that North Carolina has deemed necessary to complete an application. Among the notable items excluded from the Final Rule but included in North Carolina's 401 certification regulations are

(1) "a description of the receiving waters, including type (creek, river, swamp, canal, lake, pond, or estuary) if applicable; nature (fresh, brackish, or salt); and wetland classification,"

(2) "a map(s) or sketch(es) with a scale(s) and a north arrow(s) that is legible to the reviewer and of sufficient detail to delineate the boundaries of the lands owned or proposed to be utilized by the applicant in carrying out the activity; the location, dimensions, and type of any structures erected or to be erected on the lands for use in connection with the activity; and the location and extent of the receiving waters, including wetlands within the boundaries of the lands," and

(3) an application fee.

Compare § 121.5 *with* 15A NCAC 02H .0502(a).

11. This information is essential to conducting an appropriate review. Being forced to request this information from each applicant will drain staff resources and eat in to the time allotted for review of the application. For some cases, this is likely to result in the State having an inadequate amount of time to review an application before being required to act upon it or risk waiving its certification authority.

12. Once the application is submitted, the Rule purports to give the Federal Agency unilateral authority to dictate the timing of North Carolina's review of a certification request. The Rule directs the Federal Agency to set the timeline for North Carolina's review without consulting North Carolina at all about the time it will need. If this timeline is insufficient, North Carolina must devote additional time and staff resources to requesting an extension from the Federal Agency. During the ten months the rule has been in effect, DWR staff has been forced to devote significant time to correspondence with federal agencies requesting extensions and working out an agreed upon approach for the new Rule.

13. Notably, although the Rule sets forth several factors the Federal Agency is required to consider in determining what amount of time is needed, it does not reference the need for a public hearing as one of those factors. § 121.6(c). If there is significant public interest, North Carolina's 401 certification rules requires a public hearing to be held. Public notice must issue at least thirty days before such a hearing, and the record must be open for public comment at least thirty days after such a hearing. *See* 15A NCAC 02H .0503(f). At least one federal agency, the Army Corps, has taken the position that the need for a public hearing *cannot be considered* in determining the reasonable period of time.

14. When this Rule was first proposed, North Carolina was in the final stretches of a lengthy and time-consuming process to update its 401 certification rules. As they stand, these state rules are inconsistent with the Rule in a number of respects. This has resulted in confusion for staff and the regulated community. For example, applicants must now ensure that their requests contain all the elements required by both North Carolina's state rules and the federal Rule. Under EPA's proposed timeline, North Carolina would be forced to choose between updating its rules to conform to a Rule that it knows is likely to change or leaving in place its existing rules and continue to waste time and resources managing the confusion caused by the inconsistency.

15. North Carolina DWR has already been forced to hire an additional administrative staff person specifically to deal with the increased administrative burden of the Rule. It has also been forced to divert significant information technology and database management resources to

address the complexities caused by the Rule's requirements and the decoupling of previously coordinated processes the Rule has necessitated.

The Rule Will Continue to Harm North Carolina's Water Quality By Limiting North Carolina's Authority to Condition 401 Certifications

16. Based on the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (PUD No. 1), and subsequent EPA guidance, North Carolina has long included conditions in its water quality certifications designed to address the impact to water quality of the federally approved project as a whole.

17. These kinds of conditions are particularly important measures in addressing sediment and nutrient pollution—two of the most significant threats to North Carolina's water quality.

18. Nutrient-related (nitrogen and phosphorus) pollution is a water quality issue throughout the State. Although nutrients are necessary for aquatic ecosystems, an overabundance of nitrogen and phosphorus can lead to algal blooms and fish kills.

19. Excess sedimentation from construction projects is a continuing concern in North Carolina and can be a serious problem for aquatic species such as mussels and fish. Excessive silt and sediment loads can have numerous detrimental effects on aquatic resources including destruction of spawning habitat, suffocation of eggs, and clogging of gills of aquatic species. Pollutants such as toxins, bacteria, and nutrients—particularly phosphorus—bind to sediment particles and are transported into streams, where they can accumulate in the sediment and impact aquatic organisms.

20. Because of these water quality concerns, North Carolina includes conditions in its 401 certifications to address nutrient and sediment pollution from federally licensed projects.

21. As just one example, 401 certifications issued by the State of North Carolina generally include a condition that the project must use erosion and sediment control measures designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Sediment and Erosion Control Planning and Design Manual*. Without these

measures, the effects of sedimentation—destruction of spawning habitat, suffocation of eggs, clogging of gills of aquatic species, and increased toxins and nutrients—will increasingly harm North Carolina's waterways.

22. The Final Rule limits the scope of a 401 certification to "assuring that a [point source] discharge from a federally licensed or permitted activity will comply with water quality requirements." It calls into question the ability of North Carolina to include these conditions in its 401 certifications.

Federal Agencies Are Continuing to Rely on the Rule to Inappropriately Curtail State Authority under Section 401.

23. On October 19, 2020, DWR received a request from the Corps for 401 water quality certifications for over forty Nationwide Permits ("NWP"), which includes their permit conditions, thirty-two proposed general conditions, and proposed regional conditions (401 certification request).

24. Although the existing NWPs that these new NWPs would replace do not expire until 2022, the Corps' 401 certification request dictated that DWR would have only 60 days to review *all 40 requests*. When DWR requested an extension based on the volume and complexity of the request, DWR's request was denied without explanation.

25. On December 18, 2020, DWR provided a timely 401 certification response for all the proposed NWPs. DWR denied the Corps' request for certification of seven NWPs, but inadvertently failed to include the rationale required by the Rule. The effect of DWR's denial would have been to allow DWR to include state water quality conditions on an individual project basis for projects that were able to rely on the NWP for federal purposes.

26. On January 13, 2021, the Corps published a number of final NWPs—including three of those for which DWR inadvertently omitted the explanation for its denial—in the Federal Register indicating that they would become final on March 15, 2021 and would expire five years from the effective date.

27. After the January publication, DWR was notified of its omission. On February 19, 2021, DWR formally requested to be allowed to supplement its 401 decision to include the basis for its denials. NCDWR explained that it had been on an unreasonably short deadline and the supplementation would cause no delay because the NWPs were not even slated to take effect until March 15.

28. Nonetheless, the Corps rejected DWR's request. It took the position that the Rule left it "no choice" and that it was required to deem the State's water quality certification authority waived. *See* Collected Correspondence attached as Attachment A.

29. As a result of the Corps' actions taken in express reliance on the Rule, any project that proceeds under these three NWPs during the next five years will do so without any state water quality conditions.

30. It is my understanding that the Corps intends to finalize the remaining NWPs by the end of this year and will take the same position with respect to the other four NWPs for which NCDWR inadvertently failed to include an explanation for the denial.

North Carolina Will Suffer Undue Prejudice if the Rule is Left in Place.

31. If EPA is allowed to leave the Rule in place while it reconsiders it over the next two years, the Rule will cause North Carolina undue prejudice.

32. North Carolina typically processes over 1600 401 certification applications in a year. If the Rule remains in effect, it will call into question the ability of North Carolina to include in each of these 401 certifications critical conditions necessary to protect against sediment and nutrient pollution. Because most of these projects receive only one federal license, and thus only one 401 certification, this 401 certification may well be the only opportunity to include those conditions for the lifetime of the project.

33. Casting doubt on this authority is particularly concerning due to the significant projects that are likely to be under review by the State in the coming years—including several significant highway projects. If the 401 certifications for those projects cannot be conditioned

based on the potential water quality impacts of the project as a whole, North Carolina's water quality is likely to suffer negative impacts for many years to come.

34. In addition to the substantive constraints on State authority, the administrative burdens placed on the State by the Final Rule have had significant impacts and those impacts will continue to grind on the State's resources. Agency staff and resources that could and should have been devoted to protecting North Carolina's water quality instead has been and will continue to be spent on seeking extensions of time from federal agencies and ensuring compliance with procedural requirements of the Rule.

35. The Rule will also impact the State's citizens. Every project in the state, regardless of size, complexity or urgency, is forced to needlessly wait an additional thirty days to submit its application. These delays impose costs on both the State and its citizens and they are costs that are imposed by allowing the Rule to remain in effect.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on *[date]* July 21, 2021.

Signature: Paul Wojoski

Printed name: Paul Wojoski

Address: 1617 Mail Service Center, Raleigh NC 27699

Phone Number: (919) 707-9015

Attachment A

ROY COOPER
Governor
MICHAEL S. REGAN
Secretary
S. DANIEL SMITH
Director

NORTH CAROLINA
Environmental Quality

February 19, 2021

Scott McLendon, Chief
Regulatory Division, Wilmington District
US Army Corps of Engineers
69 Darlington Avenue
Wilmington NC 28403-1343
Delivered via email

Subject: NCDWR's Addendum to its December 18, 2020 401 Certification Response for USACE Nationwide Permits

Dear Chief McLendon,

Recently, the North Carolina Department of Environmental Quality's Division of Water Resources (DWR) became aware that it had failed to include explanations for its decision to deny certain of the U.S. Army Corps of Engineers' (USACE) 401 certification requests for USACE Nationwide Permits (NWP). DWR hereby requests that you consider the attached Addendum A as an addendum to DWR's December 18, 2020 401 certification response, related to the USACE's 401 certification request for NWPs.

BACKGROUND

On September 11, 2020, the federal "Clean Water Act Section 401 Certification Rule" (Federal Rule) became effective, which significantly impacts states' 401 certification procedures.[1] Shortly thereafter, on October 19, 2020, DWR received USACE's request for 401 water quality certifications for over forty NWPs, which includes their permit conditions, thirty-two proposed general conditions, and proposed regional conditions (401 certification request). Although the existing NWPs that these new NWPs would replace do not expire until 2022, USACE's 401

[1] Along with several other states, North Carolina has challenged this rule as unlawful in litigation that is currently pending. *State of California et al v. Wheeler*, 3:20-cv-04869-WHA (N.D. Cal.). The rule has also been expressly identified by the Biden administration as a rule that is currently under review by the incoming administration. *See* List of Agency Actions for Review, *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

North Carolina Department of Environmental Quality | Division of Water Resources
512 North Salisbury Street | 1617 Mail Service Center | Raleigh, North Carolina 27699-1617
919.707.9000

certification request stated that the reasonable period of time for DWR's review for all of these NWPs was only 60 days.[2]

Due to the expedited deadline imposed on DWR, on October 29, 2020, DWR timely requested an extension of time from USACE to take action on the NWPs.[3] In its request, DWR noted the sheer volume of the USACE's 401 certification request and the significance of the request, given that NWPs and DWR's corresponding 401 general certifications are used to permit over 1,600 projects in North Carolina each year. DWR also noted that the USACE's proposal includes significant changes to permitting thresholds in a number of the NWPs. These revised permitting thresholds would have significant impacts on the way the 401-404 permitting process works and thus would require additional time for DWR review. DWR also noted the USACE's unprecedented procedure of requesting DWR to certify *draft* NWPs that were still out for public comment and subject to change after DWR had made its 401 certification decision.

On November 19, 2020, the USACE summarily denied DWR's request for an extension of time. This denial had the effect of forcing DWR to, within 60 days: 1) review USACE's 401 certification request for over forty draft NWPs that include significant changes to permitting thresholds; 2) draft 401 general certifications for those NWPs that DWR was going to certify including new requirements imposed by the new Federal Rule; 3) solicit public comment on the draft 401 general certifications as required by State law; and 4) finalize the 401 general certifications and render a final decision on the entirety of USACE's certification request.

On December 18, 2020, DWR provided a timely 401 certification response for all the proposed NWPs. DWR denied the USACE's request for certification of seven NWPs, which results in each project utilizing those seven NWPs requiring an individual 401 certification rather than a general certification. Several weeks later, DWR was made aware that its denials failed to include an explanation for the denial under the new Federal Rule.[4]

REQUEST TO ALLOW SUPPLEMENTATION

DWR hereby requests that it be allowed to supplement its previous denials to provide the required explanation. The preamble to the Federal Rule preserves federal agencies' authority to allow states to remedy purportedly deficient denials. *See* 85 Fed. Reg. at 42269 (noting that federal agencies may "create procedures whereby certifying authorities may remedy deficient conditions or denials"). DWR asks that USACE exercise that authority and allow DWR to supplement the certification denials as specified in Addendum A.

Allowing supplementation is appropriate in light of the extremely limited time frame provided to DWR for reviewing the substantial number of requests. Moreover, allowing supplementation

[2] Based on USACE's 401 certification request, USACE is relying on the new Federal Rule to, for the first time, impose a 60-day deadline on DWR's review. So, the USACE both applied to DWR and then decided for itself what a "reasonable period of time" was for DWR to review USACE's own application.

[3] Requests for extension of time are expressly addressed by the new Federal Rule at 40 CFR §121.6 and the USACE has granted extensions of time to DWR for other projects.

[4] *See* 40 CFR §121.7(e).

will not result in any delay. Of the denials issued by DWR, only NWPs 21, 43, and 50 have been published in the Federal Register, and these will not become effective until March 15, 2021. The other four NWPs (17, 34, 38, and 49) that DWR denied have not even been published in the Federal Register. None of the proposed regional conditions have been published.

Please contact Paul Wojoski at 919-707-9015 or Paul.Wojoski@ncdenr.gov with any questions.

Sincerely,

S. Daniel Smith, Director
Division of Water Resources

cc: Henry Wicker, USACE (via email)
Todd Bowers, EPA (via email)
DWR 401 & Buffer Permitting Unit

ADDENDUM TO DWR's DECEMBER 18, 2020 CERTIFICATION RESPONSE

Nationwide Permit #17 – Hydropower Projects

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina's surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

Discharges, including in-stream structures, machinery, and channel diversions, necessary for the construction of hydropower facilities typically disrupts the natural function of a stream and preclude the stream from maintaining usages, such as aquatic life survival and maintenance of biological integrity. These projects also have significant potential to violate water quality standards, including temperature, dissolved oxygen, and turbidity. Therefore, DWR cannot certify that the discharges authorized under this NWP will comply with water quality standards without project specific review under an individual 401 certification.

Nationwide Permit #21 – Surface Coal Mining Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

Mine drainage and the discharge of processing wastewater and/or stormwater contains chemicals and/or byproducts such as sulfuric acid and dissolved iron. The discharge from these activities with these parameters present would indicate a high potential for violations of water quality standards listed in 15A NCAC 02B .0211. Therefore, DWR cannot certify that the discharges authorized under this NWP will comply with water quality standards specified in 15A NCAC 02B .0208 or .0211 without project specific review under an individual 401 certification.

Nationwide Permit #34 – Cranberry Production Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

DWR does not have empirical data or experience relating to the water quality impacts stemming from cranberry production activities in North Carolina and is, therefore, unable to certify that discharges authorized under this NWP will comply with water quality standards. Project specific review under an individual 401 certification is required.

Nationwide Permit #38 – Cleanup of Hazardous and Toxic Waste

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

As indicated in the NWP activity description, projects eligible for coverage under NWP 38 involve disturbance of land or water where hazardous and/or toxic chemicals are present. The discharges that result from these activities have a high potential for violations of water quality standards for a variety of the standards listed in 15A NCAC 02B .0211, such as metals, hardness, toxic substances, pesticides, etc; therefore, DWR cannot certify that discharges authorized under this NWP will comply with water quality standards specified in 15A NCAC 02B .0208 or .0211. Project specific review under an individual 401 certification is required.

Nationwide Permit #43 – Stormwater Management Facilities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

Surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

Stormwater management facilities are constructed to treat stormwater runoff from impervious surfaces that may contain oils, deleterious substances or other wastes, as well as hazardous or toxic materials. Treatment of such chemicals through stormwater management facilities constructed within waters of the State would involve discharges which would have significant potential to cause violations of water quality standards for parameters listed in 15A NCAC 02B .0211 as well as others. Therefore, DWR cannot certify that discharges authorized under this NWP will comply with water quality standards, specifically with regards to aquatic life propagation, survival and maintenance of biological integrity, without individual review in all circumstances, regardless of type or size of impacts.

Nationwide Permit #49 – Coal Remining Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

DWR does not have empirical data or experience relating to the water quality impacts stemming from coal remining activities in North Carolina and is, therefore, unable to certify that discharges authorized under this NWP will comply with water quality standards. Project specific review under an individual 401 certification is required.

Nationwide Permit #50 – Underground Coal Mining Activities

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

40 C.F.R. §121.7(e)(2)(i) *The specific water quality requirements with which the discharges that could be authorized by the general license or permit will not comply:*

North Carolina surface water quality standards require that conditions of waters be suitable for all best uses provided for in state rule (including, at minimum: aquatic life propagation, survival, and maintenance of biological integrity; wildlife; secondary contact recreation; agriculture); and that activities must not cause water pollution that precludes any best use on a short-term or long-term basis.

40 C.F.R. §121.7(e)(2)(ii) *A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements:*

DWR does not have empirical data or experience relating to the water quality impacts stemming from underground coal mining activities in North Carolina and is, therefore, unable to certify that discharges authorized under this NWP will comply with water quality standards. Project specific review under an individual 401 certification is required.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WILMINGTON DISTRICT
69 DARLINGTON AVENUE, WILMINGTON, NORTH CAROLINA 28403

February 26, 2021

District Commander
Wilmington District
69 Darlington Avenue
Wilmington, NC 28403

To: HQ USACE, State of North Carolina, and the Environmental Protection Agency:

The Wilmington District requested water quality certifications under Section 401 of the Clean Water Act (401 WQC) for the proposed reissuance of those Nationwide Permits (NWPs) that may result in a discharge in waters of the United States in the State of North Carolina, specifically NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 57 and 58, on October 19, 2020.

The North Carolina Division of Water Resources (NCDWR) conditionally approved 401 WQCs for NWPs 12, 29, 39, 40, 42, 44, 48, 51, 52, 57 and 58. The Wilmington District has reviewed NCDWR's issuance of the 401 WQCs for these NWPs and has determined that the 401 WQCs satisfy the requirements set forth in 40 CFR § 121.7(d)(2). Furthermore, the Wilmington District has determined that all 401 WQC conditions for these NWPs are acceptable in accordance with 33 CFR § 330.4(c), comply with the provisions of 33 CFR § 325.4, and will be included as Regional Conditions.

The NCDWR denied 401 WQCs for NWPs 21, 43 and 50 on December 18, 2020. However, in accordance with the U.S. Environmental Protection Agency's (EPA's) current WQC regulations at 40 CFR Part 121, the Wilmington District has determined that waiver of the 401 WQC requirement has occurred for NWPs 21, 43 and 50 due to the State of North Carolina's failure to comply with other procedural requirements of section 401, per 40 CFR 121.9(a)(2)(iv). Specifically, the denials of these NWPs did not meet the requirements of 40 CFR 121.7(e)(2).

The Corps will rely on the issued 401 WQCs, and issue authorizations for the discharges into waters of the United States for NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 57 and 58. Thank you for your coordination and efforts on the re-issuance of the NWPs.

Sincerely,

Scott McLendon

Scott McLendon
Chief, Regulatory Division
Wilmington District

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, WILMINGTON DISTRICT
69 DARLINGTON AVENUE, WILMINGTON, NORTH CAROLINA 28403

March 29, 2021

Mr. S. Daniel Smith, Director
Division of Water Resources
NC Department of Environmental Quality
1617 Mail Service Center
Raleigh, North Carolina 27699

Dear Mr. Smith:

Please reference your letter dated February 19, 2021, in which you provided an addendum to the December 18, 2020 Water Quality Certifications (WQC) for several Nationwide Permits (NWPs) for which the Water Quality Certifications were denied (NWPs 17, 21, 34, 38, 43, 49, 50). The purpose of this addendum was to provide an explanation to justify the denied WQCs for the NWPs. As you are aware, failure to provide justification for the denial of a WQC does not comport with new 401 WQC Rule (40 CFR 121.7 (e)(2)) and we have no choice but to consider the WQC's for these NWPs waived.

The Federal Register notice for the final rule in Section III (g)(2)(e)(3), concerning remedy of deficient conditions and denials, states that "the Agency has determined not to include in the final rule an express allowance for certifying authorities to remedy deficient conditions after the certification action is taken." This section of the final rule also states that Federal agencies can allow certifying authorities to remedy deficient conditions and denials in their own water quality certification conditions. However, as the Corps does not have its own specific water quality certification regulations that would allow for the submittal of supplemental information to remedy deficient conditions and denials, we have no choice but to consider the subject WQCs waived, consistent with the 401 Rules.

The Corps will rely on the issued 401 WQCs for the remaining NWPs, and provide authorizations for discharges into Waters of the United States for NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 57 and 58. Thank you for your coordination and efforts on the re-issuance of the NWPs. Please do not hesitate to contact me if you have any questions concerning this correspondence.

Sincerely,

Scott McLendon

Scott McLendon
Chief, Regulatory Division
Wilmington District

Electronic Copy furnished:

Todd Bowers, Region IV EPA (via e mail)

HECTOR BALDERAS
Attorney General of New Mexico
WILLIAM GRANTHAM
Assistant Attorney General
Office of the Attorney General
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
wgrantham@nmag.gov

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

Clean Water Act Rulemaking

Case: No. 20-cv-04636-WHA (consolidated)
Applies to all actions

DECLARATION OF REBECCA ROOSE IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR

Courtroom: 12, 19th Floor
Date: August 26, 2021
Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

I, Rebecca Roose, state and declare as follows:

1. My name is Rebecca Roose. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am employed as the Deputy Cabinet Secretary of Administration at the New Mexico Environment Department (Department or NMED).

3. In my role as Deputy Cabinet Secretary, I oversee the Water Protection Division, which includes four bureaus: the Ground Water Quality Bureau, the Surface Water Quality Bureau, the Drinking Water Bureau, and the Construction Programs Bureau. I have been employed by the Department for over two years, including two years as Water Protection Division Director. Prior to joining the Department in 2019, I worked for the U.S. Environmental Protection Agency (EPA). At EPA Headquarters, I devoted 13 years to supporting EPA, states, and tribes with implementation of Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*. (Clean Water Act or CWA) programs. Specifically, I drafted and defended National Pollutant Discharge Elimination System (NPDES) program regulations and effluent limitations guidelines promulgated pursuant to CWA Section 402, provided oversight of states' implementation of NPDES, pretreatment and CWA Section 319 nonpoint source control programs, and developed policy and training for compliance inspections of NPDES permittees and CWA Section 311 spill prevention, control and countermeasures facilities. During my tenure at EPA, I served as a national expert on NPDES requirements for Concentrated Animal Feeding Operations, NPDES program requirements for authorized states, and NPDES compliance monitoring policy. I earned my law degree and natural resources law certificate from the University of New Mexico in 2004.

4. The New Mexico Legislature designated the Water Quality Control Commission (Commission) as the "state water pollution control agency for this state for all purposes of the federal [Water Pollution Control] act." N.M. STAT. ANN. § 74-6-3(E) (2007). The Commission has the duty to "adopt water quality standards for surface and ground waters of the state" and to develop and implement a comprehensive water quality management program and continuing planning process. N.M. STAT. ANN. §§ 74-6-4(B) and (E) (2009). Since the Commission has no technical staff, responsibilities for water quality management activities are delegated to constituent agencies, primarily the Department. See N.M. STAT. ANN. § 74-6-4(F). Responsibilities for activities involving surface waters are delegated to the Department's Surface Water Quality Bureau.

5. The Department serves as agent of the state in matters of environmental management and consumer protection. N.M. STAT. ANN. § 74-1-6(E) (2009). The purpose of the Department is "to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people." N.M. STAT. ANN. § 74-1-2 (1997).

6. The Surface Water Quality Bureau of the Department is responsible for preserving, protecting, and improving the quality of New Mexico's surface waters through development and refinement of water quality standards; monitoring and assessment of water bodies; point source regulation and nonpoint source management; watershed restoration; and overseeing unauthorized discharges to surface waters, disposal of refuse in watercourses, and spill-cleanup. The Department, in review of the National Hydrology Dataset, finds that approximately 7% of the state's rivers and streams are perennial, 4% are intermittent, with the remaining 89% being ephemeral. In addition, New Mexico has approximately 89,000 acres of significant public lakes and reservoirs and 845,000 acres of wetlands.

7. New Mexico's **Water Quality Standards** (Standards) define water quality goals by designating uses for rivers, streams, lakes and other surface waters, setting criteria to protect those uses, and establishing anti-degradation provisions to preserve water quality. 20.6.2 New Mexico Administrative Code (NMAC); 20.6.4 NMAC. The Standards are adopted by the Commission pursuant to N.M. STAT. ANN. § 74-6-4(D) and approved by EPA pursuant to the Clean Water Act. As such, New Mexico's Standards are enforceable under both state and federal law.

8. Pursuant to Section 401 of the CWA, the Department is the state agency charged with certifying federal permits issued by EPA and U.S. Army Corps of Engineers (USACE). N.M.

STAT. ANN. § 74-6-5(B) (2009), 20.6.2.2001-2003 NMAC. The EPA and USACE maintain primacy over CWA activities in New Mexico, and both NPDES permits and dredge and fill (Section 404) permits are issued by these federal agencies, respectively.

9. The Department's role under CWA Section 401 is to ensure that these federal permits comply with the requirements of state law in order to maintain and protect water quality within our borders. Specifically, for each 401 certification the Department conducts a thorough technical review of the proposed NPDES or Section 404 permit conditions in relation to state Water Quality Standards to support one of four actions: grant, grant with condition(s), deny, or waive. The CWA Section 401 certification is part of a larger water quality protection effort that is an integral part of the CWA. New Mexico has been applying this process successfully for decades.

10. I have been involved in implementation of reviewed the EPA's Clean Water Act Section 401 Certification Rule (401 Rule), which was published in the Federal Register on July 13, 2020 and became effective September 11, 2020. I have knowledge and experience that allow me to understand the impacts of the 401 Rule on the Department and surface water quality in New Mexico.

11. As a state that does not have authority over CWA permitting programs within its borders, New Mexico is disproportionally impacted by the 401 Rule. For example, from 2017 through 2019 the Department certified 46 federal CWA Section 402 permits, along with the NPDES Construction General Permit in 2019 and NPDES Multi-Sector General Permit in 2020, which combined cover over a thousand permitted discharges throughout New Mexico. In addition, during 2018 and 2019, the Department certified six federal CWA Section 404 standard individual permits (IPs), two Section 404 regional general permits (RGPs), and confirmed numerous Section 404 nationwide permits (NWPs), which represent the majority of certification actions under Section 404 in New Mexico. In December 2020, NMED certified or certified with conditions 56 proposed NWPs consistent with State law and regulations. Because the USACE rejected these NWP certifications as described in paragraph 22 below, currently,

anyone wanting to perform activities under an NWP issued in March 2021 must first obtain an activity-specific Section 401 certification from the Department.

12. Typical activities requiring CWA Section 404 permits include: construction of flood control and stormwater management facilities, mining, grading, intake/outfall structures, road crossings, pipelines; construction of boat ramps, docks, piers, shoreline or bank stabilization, and fish habitat; construction of revetments, groins, breakwaters, levees, dams, dikes, drop-structures and weirs; placement of riprap, culverts, and footings; and, in some cases, dredging and other excavation require approval when there is a discharge that results in more than incidental fallback (33 C.F.R. 323.2(d)(1)) of dredged or excavated material.

13. Section 401 certification authority is crucial for New Mexico to:

- Ensure regulated activities comply with state Standards;
- Assist regulated entities, EPA, and USACE with implementation and protection of state Standards;
- Identify and correct errors in publicly noticed draft permits;
- Ensure that the state's Standards are successfully implemented into permits in a timely manner; and
- Ensure that any other appropriate requirements of state law are met, such as:
    - water rights considerations under Small Municipal Separate Storm Sewer System (sMS4) permits,
    - cultural or religious value of water,
    - protection of a waterbody's designation under the Wild and Scenic Rivers Act,
    - state regulations dealing with Outstanding National Resource Waters protection,
    - implementation of temporary standards (i.e., variances),
    - required in-stream flows for threatened and endangered species pursuant to the Endangered Species Act, and
    - implementation of state general criteria (i.e., applicable to all waters).

14. The value of healthy surface waters in New Mexico is both cultural and economic. New Mexico's diverse waters recharge aquifers, provide important ecological and hydrological

connections, support an amazing variety of wildlife and aquatic life, maintain drinking water resources, and sustain critical economic activity (e.g., hunting, fishing, rafting, and agriculture). The state's lakes, reservoirs, rivers, streams and wetlands are essential to future vitality of the agricultural, outdoor recreation, and tourism industries.

15. Under the CWA, Congress explicitly recognizes states' primary authority to protect and manage water resources, purposefully designates states as co-regulators, and clearly expresses its intent to:

> …recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.

16. The 2020 401 Rule undermines states' primary authority to protect and manage their water resources. The restrictions imposed by the new rule allow the federal agency to (1) determine the timing, (2) proclaim deficiencies, and (3) unilaterally reject or veto a state's certification or condition(s) and issue the permit regardless of the state's requirements. If the certification or condition(s) are rejected or considered "waived" and the federal license or permit is issued, any subsequent action by a state or tribe under Section 401 to grant, grant with condition, or deny the permit has no legal force or effect. Furthermore, there is no mechanism for the state or tribe to appeal the EPA or USACE final permitting action. It is hard to imagine a set of procedural mechanisms that would undermine the intent of state and tribal certification more than these provisions that remain in effect today.

17. The 2020 401 Rule interprets CWA Section 401 to apply only to discharges. This interpretation diverges from past EPA positions and at least one Supreme Court opinion, which found CWA Section 401 certifications apply to *activities*, not merely discharges. *PUD No.1 of Jefferson County and City of Tacoma v Washington Department of Ecology*, 511 U.S. 700 (1994). In addition, nearly 50 years of state and federal practice, as well as numerous Court of Appeals decisions (e.g., *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997)), support

previous interpretations and reasoning, contrary to the 2020 401 Rule. This deficiency in the 2020 Rule is most pronounced under Section 404, but also impacts the NPDES program. The Department typically conditions best management practices (BMPs) in the state's 401 certifications related to the relevant regulated "activity."

18. The 2020 401 Rule significantly limits New Mexico's ability to impose and enforce conditions that protect and maintain state Water Quality Standards. The state is dependent on the federal agency to accept conditions that do not apply to the discharge but will undoubtedly protect water quality. For example, the Department issued a conditional water quality certification for Regional General Permit (RGP) 16-01 on February 11, 2021. In a response letter, USACE highlighted various "concerns" with the certification, such as:

- requiring permittees to notify the Department and allowing the Department to conduct compliance evaluations to ensure the project activities comply with the certification,
- requiring permittees to implement all practicable and reasonable BMPs related to "…issues that are within the purview of the Corps…" (e.g., discharges within wetlands and requirements for post-construction monitoring), and
- referring permittees to other potential requirements under state regulations for dewatering activities and Section 402 of the CWA for activities that disturb one or more acres.

USACE noted the agency would incorporate the Department's certification by reference in the General Conditions and include it as an attachment; however, USACE also stated that:

- "[t]he [water quality certification] is not a mechanism for providing oversight of the Corps' Regulatory Program, nor is that the role of the certifying authority,"
- "…the Corps will inform the regulated public that mitigation and monitoring requirements are determined by the Corps on a case-by-case basis," and
- "… it should be noted that the Corps has discretionary authority for enforcement of any conditions associated with a [Department of the Army] permit".

This response clearly indicates that under the USACE's implementation of the 2020 401 Rule, the state of New Mexico is not considered a co-regulator and the Section 401 certification is an administrative exercise with no real technical or policy implications. These restrictions on state

certification effectively transfer all the authority and decision-making power to the federal government and drastically weaken and undermine states' authority to manage and protect water quality within their borders.

19. State experts, not federal agencies, should determine the conditions required to protect the state's water quality and the time needed to appropriately and completely certify a project. It should be up to the state to determine which conditions are necessary to comply with their Standards, as it has been for the past 50 years.

20. Under the 2020 401 Rule, the certification clock is established by the federal agency and does not stop when there are insufficient data and information for the state to make an informed and appropriate certification decision. Effectively, this means that an unresponsive permit applicant could delay submittal of data requested by the Department such that the Department is forced to complete its certification without critical information to inform the water quality impact analysis. Under the 2020 401 Rule, such delays do not prevent the Administrator from taking action on a certification request even where the state requests additional information and time.

21. The 2020 401 Rule forces states to review incomplete applications and increases the likelihood of denials. It is well documented by EPA and USACE that the majority of permitting delays are due to the lack of response by an applicant. EPA and USACE regularly request additional information from applicants in order to process applications, and it often takes weeks to months for an applicant to comply with the request. Under the 2020 401 Rule, incomplete applications and unresponsive applicants may result in the state denying certification of some permits rather than face litigation risk by certifying an incomplete application, an outcome that reduces regulatory certainty.

22. The 2020 401 Rule has resulted in a substantial and unjustified increase in workload on the Bureau that unnecessarily limits NMED's ability to protect water quality through implementation of state standards and burdens the regulated community. Acting in reliance on the 2020 Rule, in February 2021 the USACE "declined to rely on" the Department's certification of 16 Nationwide Permits (NWPs), for which the USACE had requested

certification in October 2020. The USACE cited the preamble to the 2020 Rule at 85 Fed. Reg. 42210, 42279 in finding that New Mexico's certification of these permits was invalid because it contained a purported "re-opener" clause. As a result, the USACE is requiring individual certifications for all activities that would otherwise fall under the 16 NWPs finalized and issued by the USACE in March 2021. USACE has stated its intention to finalize later this year the remaining NWPs covered by New Mexico's December 2020 certification, at which time the USACE will similarly "decline to rely on" the state's certification, thereby rejecting state conditions to protect surface waters. Moreover, despite entreaties from New Mexico's Governor, Attorney General, and Congressional delegation, the USACE has refused to allow the Department to revise, reconsider, or amend its certification.

23. Absent intervention or reversal of the USACE's February 2021 decision, the Department will continue to be forced to conduct individual certifications for NWP activities for the five-year permit terms, i.e., through 2026. For example, the Department is currently in the process of certifying a relatively simple project to install a pedestrian bridge and boat dock at Alto Lake under NWP 42. A relatively simple review and confirmation that would have taken two hours to a full day if USACE had incorporated state conditions into the final permit is now taking weeks under the USACE's imposed requirement of an individual certification. Requiring individual certifications for each project under a NWP involves repeated effort by at least seven technical and administrative NMED staff to ensure the public is notified in accordance with the applicable state and federal laws. The technical work that goes into NMED's certification requires additional time and staff resources to draft, review, and finalize by the deadline, i.e., the reasonable period of time to certify. NMED lacks funding to hire new staff to cover this increased workload and pay for a significant increase in newspaper publications. Lack of funding will place additional pressure on existing staff and cause the state to choose between various federal permitting actions when allocating limited water quality certification resources. In addition, infrastructure projects that have been in the planning phase for years may now need to reevaluate their schedules and budgets to accommodate the need to get individual certifications for projects previously covered by the NWP program and associated state

certifications. If, due to resource constraints within NMED, individual certifications are not timely issued, they are considered waived and water quality and public health will suffer as a result.

24. The 2020 401 Rule increases the burden on the state by requiring programmatic and regulatory changes to meet the Rule's additional provisions. Putting additional limitations and requirements on states, such as mandatory meetings, shortened certification times, and limits on when and what a state can request, places emphasis on the bureaucratic process instead of the water quality certification itself.

25. Finally, the combination of the 2020 401 Rule with the Navigable Waters Protection Rule, which became effective on June 22, 2020, significantly diminishes the state's ability to control and protect its waters and puts the majority of waters and wetlands in the state at risk for degradation, including waters used for drinking water, irrigation, and recreation.

26. Approximately 40% of New Mexicans rely on surface water as a drinking water source. The loss of stream and wetlands protections under the Navigable Waters Protection Rule in combination with the weakening of a state's ability to adequately review and certify projects under the 2020 401 Rule threaten water quality. As a result, the cost to treat drinking water and maintain drinking water infrastructure will increase to invest in additional water treatment infrastructure and other costly technologies, such as desalination and ultrafiltration, to provide clean, safe water for drinking.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 22, 2021.

Signature: _____

Printed name: Rebecca Roose

Address: 1190 S. St. Francis Drive, Santa Fe, NM 87505

Phone Number: (505) 827-2855

AARON D. FORD
Attorney General
KATIE S. ARMSTRONG (NV Bar No. 8571)
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1224
E: karmstrong@ag.nv.gov
Attorney for Nevada Division of Environmental Protection

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

Clean Water Act Rulemaking

Case: No. 20-cv-04636-WHA
(consolidated)
Applies to all actions

DECLARATION OF PAUL COMBA IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR

Courtroom: 12, 19th Floor
Date: August 26, 2021
Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

I, PAUL COMBA, declare as follows:

1. I am employed by the Nevada Division of Environmental Protection (NDEP), as the Bureau Chief of the Bureau of Water Quality Planning (BWQP). I have been the Bureau Chief since October 4, 2016. The BWQP issues Clean Water Act Section 401 water quality certifications and conducts statewide monitoring of surface waters.

2. I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

3. Section 401 authorizes states to review discharges to surface waters to ensure that state water quality standards are not violated. The 2020 401 Certification Rule is preventing NDEP staff from adequately reviewing, certifying with appropriate conditions, monitoring, and evaluating the final impact of 404 projects.

4. The limitation in scope of 401 review to point sources prevents NDEP staff from adequately reviewing the potential impacts of proposed projects as a whole, including impacts from nonpoint sources (NPS) that are project related. Violations of state water quality standards could reasonably be the result.

5. Limitation of reviewing impacts of point sources prevents NDEP staff from requiring Best Management Practices (BMPs) throughout the entire project area which may reasonably result in construction debris and sediment being discharged from the project site.

6. Under the current structure of the 401 Certification Rule, if the scope of the project is modified following issuance of a Certification, NDEP staff do not have the opportunity to re-evaluate and determine whether the modification will have the same level of impact as the original certified activity. As the certifying authority, NDEP should have the ability to re-issue the Certification with additional conditions, if warranted, to ensure protection of water quality when the modified activity is predicted to have a greater environmental impact.

7. Changes in the 401 Certification Rule prevent NDEP staff from requiring monitoring and final reporting, therefore overall impacts of 404 projects are not known.

8. The above items 3–7 impede NDEP staff's adequate review of 404 projects and may reasonably result in violations to state water quality standards.

9. The US Environmental Protection Agency's 2020 401 Certification Rule has the potential to cause harm to Nevada's waterways. Although we anticipate other State of Nevada environmental statutes and local jurisdictions may be able to require steps to prevent potential water quality impacts identified herein as examples, NDEP's position is that this weakening of the 401 State Certification program does not meet the requirements or intent of the Clean Water Act.

10. NDEP has provided verbal testimony regarding specific concerns and requests for revision to the 401 Certification Rule at the US EPA's June 14, 2021, national listening session, at

a second US EPA listening session with the Western States Water Council on June 23, 2021, and will submit a formal written response by the August 2, 2021, deadline.

11. One of NDEP's main concerns regarding the Rule that has the most potential to harm Nevada's waterways is the limitation in scope of 401 State Certifications. The Rule restricts consideration and conditioning to point source discharges. Eliminating consideration and conditioning of impacts from the entire project, particularly related to NPS, has the potential to result in substantial negative impacts to surface waters. NPS stormwater discharges during construction activities can deliver sediment-laden runoff to surface waters if temporary BMPs do not function as intended, are not appropriately installed, or are not maintained. Additionally, upon project completion, stormwater runoff from impervious surfaces conveyed to streams untreated will likely contain a mix of pollutants typical of runoff generated on roadways. Limiting the scope of the 401 Certification process complicates NDEP's ability to protect Nevada's surface waters from pollutants resulting from direct discharges as well as nonpoint sources. The US EPA and US Army Corps of Engineers (ACOE) should be collaborative co-regulators to ensure continued and consistent protection of a state's surface water resources.

12. Another of NDEP's main concerns is the prevention of State staff from monitoring projects during implementation and preventing NDEP from requiring final reporting to ensure that a project was adequately stabilized after construction. The Federal entity has the right to inspect projects during construction, and to inspect the operations of completed projects, but due to understaffing, these inspections are unlikely to occur. As co-regulators in protection of the environment among the US ACOE, the US EPA and the States, the partnership should extend to an allowance for State project inspectors to provide oversight of US ACOE 404-permitted projects, particularly regarding State 401 Certification project elements.

13. NDEP staff compared 401 Water Quality Certifications for two projects in the same geographic location and with similar environmental concerns to illustrate the difference in certification conditions allowed before the 2020 401 Rule and after the Rule was promulgated. Both projects involve a jurisdictional waterway (Steamboat Creek) which traverses the areas for these projects. Soils within the Steamboat Creek channel and floodplain have been contaminated

by historical mining and milling operations that were located upstream and used mercury amalgamation to recover gold and silver from Comstock deposit ores. Over time, residual mercury as well as other metal pollutants have been conveyed downstream to the project areas via Steamboat Creek through normal sediment transport, and subsequent flood events have deposited mercury in the adjacent floodplain of the project areas.

The Regional Transportation Commission (RTC) Southeast Connector was a 4.5 mile, 6-lane road construction project that primarily runs parallel Steamboat Creek and the associated floodplain. The water quality certification for the RTC Southeast Connector Project was issued under the pre-2020 401 Rule. The Talus Valley Planned Development will be a 20-year planned residential and commercial development in areas adjacent to Steamboat Creek and the associated floodplain. The 401 Water Quality Certification for the Talus Valley Project which was drafted under requirements of the post-2020 401 Rule has not been issued yet.

The results of the comparison for 401 State Certifications and US ACOE 404 permit elements and potential impacts are displayed in the table below:

Condition	RTC Southeast Connector (Pre-2020 401 Rule)	Talus Valley Planned Unit Development (Post-2020 401 Rule)	Difference
Mercury Impacts	Possible contamination was addressed over entire project area. Soils exceeding established mercury levels required to be excavated and sequestered to reduce potential for exposure. Excavated material required to be controlled as prescribed in the Soil Management Plan that was part of the 404 Permit.	Possible contamination addressed only where a point source discharge may affect Thomas Creek, a tributary water to Steamboat Creek. 401 Certification incorporates the Mercury Materials Handling Plan by reference, requiring mitigation measures of mercury concentrations exceeding established levels.	401 Certification for Talus Valley PUD was not able to consider and condition possible impacts of mercury mobilization to surface waters from the entire project site. Certification conditions limited to area where potential point source discharge may occur.

Condition	RTC Southeast Connector (Pre-2020 401 Rule)	Talus Valley Planned Unit Development (Post-2020 401 Rule)	Difference
Water Quality Standards (WQS)/Beneficial Uses	401 Certification considered impacts from point and diffuse sources to WQS/Beneficial Uses of the entire project.	Review and conditions restricted to point source discharges and only the area downstream of the point source was conditioned to prevent impacts.	401 Certification for Talus Valley PUD was not able to evaluate the overall project and potential impacts to WQS/Beneficial Uses from all sources of pollution. Certification conditions to address impacts from diffuse sources of pollution not included as a result of Rule's prohibition to a State's consideration of projects as a whole.
Best Management Practices (BMPs)	401 Certification considered impacts to the entire area and required photographs of conditions and BMPs before, during and after construction on a quarterly basis. A condition requiring special attention paid to BMPs preventing sediment from being discharged and transported downstream was included.	401 Certification required that work in or adjacent to waters of the State are performed in such a way that minimizes point source discharges of pollutants. BMPs to control and mitigate point source inputs of pollutants are required to be implemented and functional prior to commencement of work and maintained and modified throughout the duration of work.	401 Certification for Talus Valley PUD could not require BMPs that were not directly related to a point source discharge. BMPs are cumulative structural and non-structural controls to prevent nonpoint source pollution; an inability to require them on the whole project area, nor the ability to require regular documentation and reporting could have detrimental impacts to surface waters due to mobilization of contaminants such as mercury.

Condition	RTC Southeast Connector (Pre-2020 401 Rule)	Talus Valley Planned Unit Development (Post-2020 401 Rule)	Difference
Project Modification	401 Certification conditioned that any modifications to the original project submittal be reviewed and approved by staff before implementation.	401 Certification is disallowed from having any "reopener clauses," or it may be waived or denied by the Army Corps of Engineers.	Changes to the scope of the Talus Valley PUD review or subsequent amendment isn't allowed to be conditioned to require staff review or reissuance of the 401 Certification to reflect project operations.
Post-Construction	Final report required so post-construction site stability can be determined.	Condition requiring all temporary and excess materials be removed from the site and affected areas returned to pre-construction elevations and contours.	Under the Rule, there is no ability to require the project proponent to provide post-construction reporting for the certifying authority to determine whether post-construction site-stabilization conditions have been adequately met. Failure to stabilize the site can result in water quality impacts from nonpoint source pollution.
Monitoring	Copies of Discharge Monitoring Reports submitted to NDEP's Bureau of Water Pollution Control (BWPC) required to be submitted to 401 staff.	No monitoring requirements allowed per the Rule.	401 Certification for Talus Valley PUD lacks monitoring reporting requirements. Impacts of the project on surface water during implementation will be unknown.
Final Report	Copy of Final Report submitted to BWPC required to be submitted to 401 staff.	No final report requirement allowed per the Rule.	401 Certification for Talus Valley PUD lacks final reporting requirements. Status of project post-construction will be unknown.

///

//

14. Due to the potential environmental harm to Nevada waterways resulting from implementation of the Rule, NDEP supports recission of the rule pending revision of the Rule.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 21, 2021.

Signature: _____

Printed name: Paul Comba, Chief, Environmental Programs

Address: 901 S. Stewart St., Carson City, NV 89701

Phone Number: (775) 687-9455

LETITIA JAMES
Attorney General of New York
LISA BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN, SBN 4887832
Assistant Attorney General
NYS Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
Telephone: (518) 776-2399
Fax: (518) 650-9363
E-Mail: Brian.Lusignan@ag.ny.gov
Attorneys for Plaintiff State of New York

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking	Case No. 3:20-cv-04636-WHA (consolidated) Applies to all actions **DECLARATION OF CORBIN J. GOSIER IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 A.M. ORAL ARGUMENT REQUESTED

DECLARATION OF CORBIN J. GOSIER

I, Corbin J. Gosier, declare, under penalty of perjury under the laws of United States, that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge or information supplied to me by others:

1. I am the Aquatic Habitat Program Manager within the Division of Fish and Wildlife in the New York State Department of Environmental Conservation (DEC). I submit this

declaration to demonstrate the harms that the State of New York will experience if the "Clean Water Act Section 401 Certification Rule" (the 2020 Rule) remains in effect until at least 2023.

I. SUMMARY

2. I understand that EPA has announced its intent to revisit and either revise or replace the 2020 Rule. However, I also understand that EPA has asked this Court to leave the 2020 Rule in effect until a new rule is promulgated, which EPA does not expect to occur until at least 2023.

3. As explained below, the 2020 Rule is causing harm right now. By limiting DEC to regulating point-source discharges into navigable waterways, the 2020 Rule has the effect of casting doubt upon the propriety of conditions that DEC has historically determined to be necessary to ensure compliance with state water quality standards. In particular, conditions that DEC deems necessary to omit or limit in order to comply with the 2020 Rule will become part of any federal permit issued during this period, which could include multi-decade licenses for a number of largescale hydroelectric projects.

4. The harms described herein could be avoided by vacating the 2020 Rule and restoring the federal-state status quo that was in effect for almost 50 years prior to the issuance of the 2020 Rule.

II. PERSONAL BACKGROUND AND EXPERIENCE

5. I am the Aquatic Habitat Program Manager within the Division of Fish and Wildlife. I have held this position since 2018. My duties include providing direction for DEC's Protection of Waters program which includes Permitting of Stream Disturbance and Excavation / Filling within Navigable Waters, 401 Water Quality Certificates, Instream Flow, Wild, Scenic and Recreational Rivers Act, Hydroelectric Power, and Renewable Energy.

6. I received a Bachelor of Science degree in Environmental and Forest Biology from the State University of New York, College of Environmental Science and Forestry in 2000.

7. I have more than 20 years of experience working in DEC's regional and central office, of which, more than 15 years of experience have been on matters related to water quality certifications and the protection and restoration of aquatic habitats including streams, lakes, freshwater wetlands.

8. Over my career at DEC, I have reviewed dozens of projects involving the issuance of a Section 401 Water Quality Certificate. Between 2004 and 2018, I was one of three DEC biologists working under New York's Environmental Remediation Programs tasked with the review of various remediation and restoration projects (both state and federally led projects) to ensure substantive requirements of waterbody (ECL Article 15) and wetland (ECL Article 24) regulations were met. For most of these projects individual 401 WQCs were required.

9. Currently, I provide support to DEC's nine regions on matters related to Protection of Waters permitting, including WQCs. Recently, I was in a lead role for the Division of Fish and Wildlife in discussions with the two local Army Corps of Engineers districts (Buffalo and New York) regarding the development of regional conditions and DEC's December 2020 blanket Section 401 Water Quality Certificate. Additionally, I oversee the ecological review hydropower projects reviewed by the Federal Energy Regulatory Commission (FERC) and have been involved in the review of other major energy generation projects, primarily wind and solar.

III. NEW YORK STATE'S SECTION 401 PROGRAM BEFORE THE 2020 RULE

10. New York State is rich in water resources. Its freshwater resources include more than 87,000 miles of rivers and streams, nearly 7,900 lakes and ponds totaling about 690,000 acres (not including Great Lakes), and over 400 miles of Great Lakes coastline. The marine waters of the state include more than 1,530 square miles of estuaries, as well as about 120 linear miles of Atlantic Ocean coastline. Additionally, approximately six million residents draw drinking water from abundant groundwater resources in the state and rely on that water source to be free of

contaminants. Water quality, in a majority of these waters, supports the full range of usages, including sources of water supply for drinking, culinary or food processing, fishing, primary and secondary contact recreation, and industrial and agricultural applications. In addition, these waters are suitable for fish, shellfish, and wildlife survival and propagation. Nevertheless, there are waters that are affected by some level of water quality impact caused by various human activities that impair their suitability for particular uses. Specific water bodies are therefore assigned letter classifications and standards based on their suitability for various uses, ranging from AA (the highest quality water with the most designated uses) to D (indicating impaired water quality suitable for fewer designated uses).[1] In addition, approximately 34% of New York's streams have been officially designated as trout waters, thereby requiring the application of more stringent requirements to protect the water quality essential for their survival and reproduction of these ecologically sensitive and recreationally important group of species.

Hydropower Projects

11. Most Section 401 Water Quality Certifications involve the review of relatively small projects with limited impacts on aquatic resources. However, some projects involve the potential for significant impacts on water quality and require significant staff time and effort. For example, the review of individual hydropower licenses requires significant staff effort because of the complicated FERC review process and because the projects involve the potential for significant impacts on aquatic resources. A standard hydropower license is issued for thirty years, meaning any impacts from operation of the hydroelectric project will last for thirty years before being subject to renewal and additional review. A section 401 water quality certification is the primary way that DEC ensures that a federally licensed hydroelectric project will comply with state water quality requirements. As of the date of this declaration, DEC is reviewing 40 projects in various

[1] *See* 6 N.Y.C.R.R. Part 701.

stages of the hydroelectric licensing process. Sixteen of these projects are going through the critical study and/or settlement stages of the FERC review process where New York relies on its 401 authority to protect natural resources.

12. DEC has historically used its authority under Section 401 to obtain information necessary to ensure that hydropower projects will comply with state water quality requirements. Licenses to construct and operate hydropower projects are generally issued by the Federal Energy Regulatory Commission (FERC), meaning opportunity for state review and approval may be limited.

13. Hydroelectric projects can have significant adverse impacts on state water quality from construction and operational activities. Construction impacts can include the release of sediment during excavation or other construction activities located in or near the waterbody. In some cases, these sediments are contaminated with harmful chemicals or heavy metals further exacerbating the impacts on water quality. Of particular concern are operational impacts that are not limited to point source discharges but can include alterations of flow downstream of hydroelectric dams, fluctuations of water levels within the impoundment created by hydroelectric dams, mortality of fish passing through the turbines generating electric power, and prevention of upstream movement by fish and other water or wetland dependent wildlife.

14. DEC has used the Section 401 Water Quality Certification process to require alterations in project operations to protect state water quality. For example, many hydropower licenses include conditions requiring "run of river" operations where projects maintain similar upstream and downstream flows. These flow characteristics are drastically different from "pulsing" operations where downstream water is released in an intermittent manner. Pulsing projects can have significant impacts on aquatic organisms from drastic changes in water flow and impoundment water levels.

15. DEC needs comprehensive, site-specific, and current biological, hydrological, and ecological data to make decisions regarding issuance of 401 water quality certifications for hydropower licenses. These data are necessary to assess current conditions in the affected waterbodies, and how those conditions will be affected by construction and operation of the hydropower facility. For example, operations of the project that change water levels of the impoundment can harm aquatic organisms and degrade ability of the water body to achieve water quality standards, specifically the suitability of the waters for fish, shellfish and wildlife propagation and survival. Lowering water levels and dewatering areas of impoundments can result in the death of freshwater mussels that, as filter feeders, provide valuable water quality functions and other ecosystem services. Given the potential impacts to this declining group of species, DEC can require surveys to assess impact of project operations. Applicants for hydropower licenses have frequently disagreed with DEC regarding the studies necessary to inform Section 401 decisions. While FERC has a history of supporting an applicant's position for study needs, FERC's jurisdiction has been limited to federal study requirements with New York maintaining responsibility for determining state requirements under Section 401.

Natural Gas Pipeline Projects

16. Like hydroelectric projects, the construction and operation of natural gas pipelines and related infrastructure in New York is licensed by FERC. However, DEC issues water quality certifications under Section 401 of the Clean Water Act to ensure that interstate pipeline projects reviewed by FERC comply with New York State water quality requirements.

17. Natural gas pipelines and related infrastructure also have a variety of adverse impacts on state water quality. Because they are linear projects traversing long, continuous stretches of right of way, they generally cross a large number of streams, wetlands, and other waterbodies. Each of these crossings may impact water quality, as the pipeline developer must either dig

through the waterway to lay the pipeline (referred to as the open trench method) or drill under the waterway (known generically as trenchless methods). Either of these techniques can adversely impact water quality.

18. Additionally, because the pipeline is likely to cross the same stream multiple times or cross multiple waterbodies within the same watershed, the pipeline can have cumulative impacts to downstream water quality that are greater than the combined individual impacts of each crossing. For example, the release of turbid water when excavating open trenches at multiple locations will result in the degradation in water quality across the watershed, thus impacting a greater percentage of the streams in that watershed, leading to greater damage to the biological integrity of the stream system. These cumulative impacts threaten state water quality, but transcend individual point source discharges into the waters of the United States.

Dredging Projects

19. New York State relies on the Section 401 Water Quality Certification process to ensure that New York water quality standards are maintained when the Army Corps conducts navigational dredging. Federal dredging projects can have a profound impact on New York's waterways and the only tool available to influence those projects and ensure state water quality standards are being maintained is the 401 certification.

20. DEC routinely issues a 401 certification to the Army Corps of Engineers for navigational dredging on the Hudson River. DEC requires the Army Corps of Engineers to conduct a detailed analysis of sediment contaminants and especially PCB contamination for the Hudson River. Sediment sample collection and analyses are not only time consuming but are also expensive. These sediment analyses are necessary to determine the appropriate best management practices for dredging and the most environmentally sound disposal options.

21. The conditions DEC imposed in the 2017 blanket 401 Water Quality Certificate issued for the Army Corps of Engineer's Nationwide Permits highlights the need for protections beyond the minimum federal requirements. The 2017 blanket 401 Water Quality Certificate for the Army Corps of Engineer's Nationwide Permits included conditions that were substantially more restrictive than the general conditions or the regional conditions provided by the Army Corps of Engineers. The Nationwide Permits provide an easy regulatory path for applicants seeking approval to conduct what the Army Corps of Engineers believes are straightforward and environmentally benign when conducted in accordance with all their general and regional conditions. However, to meet state water quality standards, DEC could not merely issue a blanket water quality certification and had to deny blanket coverage for some projects[2] and require more stringent conditions for other projects. For many cycles of nationwide permitting, DEC has set stringent disturbance thresholds by not allowing blanket coverage for more than a ¼ acre of fill or more than 300 linear feet of disturbance. Blanket coverage of activities without these stringent requirements would not categorically meet New York water quality standards.

IV. HARMS RELATED TO LEAVING THE 2020 RULE IN PLACE UNTIL 2023

Hydropower Projects

22. The Rule will severely limit the ability of New York to protect its water quality as part of the licensing of hydropower projects. Despite years of precedent and an established process, the Rule puts into question the validity of established conditions that ensure compliance with New York water quality standards and the protection of natural resources. FERC could determine that the explanations provided by DEC are insufficient and a failure to satisfy the

[2] For example, Nationwide Permit 17 for hydropower projects, Nationwide Permits 21, 44, 49, and 50 for mining projects, and Nationwide Permit 38 for the clean up of hazardous and toxic waste.

requirements contained in §121.7 leading to a decision by FERC that New York waived its authority to issue a WQC.

23. DEC is currently reviewing 40 projects for hydropower relicensing. At least ten of these projects have section 401 certification requests pending before DEC or anticipated to be submitted in the near future. The Rule could restrict the Department's ability to review and minimize adverse impact to water quality that are not related to point source discharges for these projects, and could limit the Department's ability to complete its review. Even if the Rule is ultimately struck down by the Courts, these hydropower projects will have received 30-year operating licenses that are insufficient to protect state water quality, resulting in long-term or permanent impacts to state water quality.

Pipelines

24. The Department also expects to receive section 401 requests for new natural gas pipeline infrastructure before EPA projects it will promulgates a replacement rule in 2023. For example, in March 2021, Transcontinental Gas Pipe Line Company, LLC told FERC that it intended to submit a new section 401 request for the Northeast Supply Enhancement (NESE) project "later this year," despite have previous section 401 requests denied by both New York and New Jersey.[3] If the 2020 Rule remains in effect until 2023 and the applicant follows through on its stated intent to FERC, the new section 401 request would be subject to the limitations of the 2020 Rule.

Dredging Projects

25. The Rule jeopardizes the incorporation of requirements and conditions necessary to protect state water quality into dredging permits issued to the Army Corps. Under the Rule, the Corps could unilaterally make the determination that the certification failed to comply with the

[3] 86 Fed. Reg. at 16,200.

requirements of 40 C.F.R. § 121.7. Or Army Corps could unilaterally determine that DEC's review time was unreasonable under the "reasonable period of time" clause and could decide that providing time to sample and analyze sediment is excessive and unreasonable. However, without sample results in the Hudson, the areas of higher PCB contamination would not be identified prior to dredging.

26. Historically there has been tension between New York and Army Corps regarding the appropriate use of work windows to protect fish and other aquatic organisms. While overlapping exclusion periods can be difficult, the Rule jeopardizes New York's ability to protect fish best usages of New York's waters by giving Army Corps the final decision regarding what is beyond the scope of certification.

V. CONCLUSION

27. The 2020 Rule is harming New York State right now. Leaving it in place until at least early 2023 will exacerbate these harms as DEC tries to comply with a rule EPA has already announced it intends to revise or replace. This Court should vacate the 2020 Rule and return the regulatory status quo in effect for the 50 years prior to promulgation of the 2020 Rule.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 22, 2021.

Signature: Corbin J. Gosier

Printed name: Corbin J. Gosier

Address: New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-4756

Phone Number: (518) 402-8872

LETITIA JAMES
Attorney General of New York
LISA BURIANEK
Deputy Bureau Chief
BRIAN LUSIGNAN, SBN 4887832
Assistant Attorney General
NYS Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
Telephone: (518) 776-2399
Fax: (518) 650-9363
E-Mail: Brian.Lusignan@ag.ny.gov
Attorneys for Plaintiff State of New York

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking	Case No. 3:20-cv-04636-WHA (consolidated) Applies to all actions **DECLARATION OF SCOTT E. SHEELEY IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 A.M. ORAL ARGUMENT REQUESTED

DECLARATION OF SCOTT E. SHEELEY

I, Scott E. Sheeley, declare, under penalty of perjury under the laws of United States, that the following statements are true and correct to the best of knowledge and belief and are based on my personal knowledge or information supplied to me by others:

1. I am the Chief Permit Administrator in the New York State Department of Environmental Conservation (DEC). I submit this declaration to demonstrate the harms that the

State of New York will experience if the "Clean Water Act Section 401 Certification Rule" (the 2020 Rule) remains in effect until at least 2023.

I. SUMMARY

2. For decades, DEC used its authority under section 401 of the Clean Water Act, 33 U.S.C.§ 1341, in conjunction with state administrative procedures and authority, to protect the physical, chemical, and biological health of New York's waterways and wetlands. EPA promulgated the 2020 Rule over the objections of the State of New York, and apparently without regard to how the 2020 Rule would impact state water quality and administrative procedures. I understand that EPA has announced its intent to revisit and either revise or replace the 2020 Rule. However, I also understand that EPA has asked this Court to leave the 2020 Rule in effect until a new rule is promulgated, which EPA does not expect to occur until at least 2023.

3. As explained below, the 2020 Rule is causing harm right now by increasing administrative burdens for DEC employees who are responsible for reviewing the thousands of section 401 certification requests. Staff time that could be devoted to other important program activities must instead be devoted to complying with the requirements of the 2020 Rule, even though EPA expects to revise the rule. Additionally, the 2020 Rule has created confusion for applicants for section 401 certifications, resulting in unnecessary delay and additional – sometimes duplicative – work for applicants. Moreover, because the 2020 Rule was promulgated without regard to state administrative procedures, DEC staff and applicants alike are forced to follow one set of procedures for section 401 certification requests, and a separate set of procedures for other permit applications.

4. The harms described herein could be avoided by vacating the 2020 Rule and restoring the federal-state status quo that was in effect for almost 50 years prior to the issuance of the 2020 Rule.

II. PERSONAL BACKGROUND AND EXPERIENCE

5. I am the Chief Permit Administrator in the New York State Department of Environmental Conservation (DEC). Working in DEC's central office headquarters in Albany, New York I am responsible for developing policy and guidance for the Division of Environmental Permits in the processing of environmental permit applications, including applications for Section 401 Water Quality Certification. Most permit applications are processed by the Division of Environmental Permits in DEC's regional offices, of which there are nine, each supervised by a Regional Permit Administrator. I provide guidance on permitting matters to the nine Regional Permit Administrators, including guidance on the processing of applications for Section 401 Water Quality Certification.

6. I have a Bachelor of Science degree in Biology/Environmental Science from Taylor University in Upland, Indiana, and a Master of Science degree in Environmental and Forest Biology from the State University of New York, College of Environmental Science and Forestry in Syracuse, New York.

7. I have been an employee of DEC since 1998, working in the Division of Environmental Permits as an Environmental Analyst since that time. I have worked 10 years in the DEC Region 3 office in New Paltz, New York, 11 years in the DEC Region 8 office in Avon, New York, and 2 years in the DEC Central Office in Albany, NY. Since 2003 I have also been designated as a Permit Administrator[1], with authority to review and issue decisions on all state environmental permits subject to the provisions of the New York State Uniform Procedures Act, including those applications processed by subordinate staff who are not designated as Permit

[1] Deputy Regional Permit Administrator 2003-2008 in DEC Region 3, Deputy Regional Permit Administrator 2008-2010 in DEC Region 8, Regional Permit Administrator 2010-2019 in DEC Region 8, Deputy Chief Permit Administrator 2019-2020 in DEC Central Office, and Chief Permit Administrator 2020-Present in DEC Central Office.

Administrators. In addition to Section 401 Water Quality Certifications, environmental permits subject to the provisions of the New York State Uniform Procedures Act include state-regulated freshwater wetlands; state-regulated tidal wetlands; state-regulated protected streams and navigable waters; state-regulated wild, scenic and recreational rivers; coastal erosion management; taking of state-listed threatened and endangered species; mined land reclamation; dam safety; water withdrawal; solid waste management; state pollutant discharge elimination system (SPDES); air pollution control; hazardous waste management; and radiation control. Processing these applications includes, where necessary, meeting with applicants and regulatory agency partners, ensuring public notice requirements are met, responding to public comments and inquiries, ensuring requirements related to historic preservation and coastal zone management are met, and ensuring that all applications subject to the Uniform Procedures Act for a given project are reviewed together.

8. During my work in DEC's regional offices, I have reviewed and issued individual Section 401 Water Quality Certifications for various projects and verified project coverage under DEC's applicable blanket Section 401 Water Quality Certifications. Since 1998 I have personally been assigned the processing of over 400 applications for Section 401 Water Quality Certification and have been the reviewer and responsible for issuing the final decision on hundreds more applications. In my role as the Chief Permit Administrator in DEC's Central Office, I am also responsible for the review and issuance of decisions on blanket Section 401 Water Quality Certifications for regional and nationwide permits issued by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act.

III. NEW YORK STATE WATER QUALITY REQUIREMENTS AND ADMINISTRATIVE PROCEDURES

New York Water Quality Requirements

9. New York State has a well-developed framework to prevent pollution and to reduce or eliminate development in environmentally sensitive areas to preserve the natural functions and ecosystem benefits that wetlands and other waters provide to the citizens of the State.

10. New York's requirements for the protection of water quality are set forth in its Environmental Conservation Law ("ECL"), including Articles 15 (stream disturbance and water withdrawal), 17 (pollution discharges to water), 24 (freshwater wetlands protection), and 25 (tidal wetlands protection), and implementing regulations[2]. These statutes and regulations are intended to protect the State's water resources, including the chemical and biological integrity of the waters as well as ecological functions.[3] New York State accomplishes these objectives using authority derived from both state and federal law. New York State has long relied on federal jurisdiction under the Clean Water Act, especially section 401, to protect streams and wetlands that are beyond the jurisdiction of the ECL.

11. The New York State Legislature enacted the Freshwater Wetlands Act (ECL Article 24) in 1975 with the intent to preserve, protect and conserve freshwater wetlands and their benefits, consistent with the general welfare and beneficial economic, social, and agricultural development of the state. *See* ECL § 24-0103. New York's Freshwater Wetlands Act was enacted after the Clean Water Act became law and works in tandem with the Clean Water Act by regulating activities of a select number of larger wetlands more stringently. Sections 401 and 404 of the Clean Water Act are necessary to protect freshwater wetlands that fall below the standard

[2] 6 N.Y.C.R.R. Parts 608, 700-706, 750, 663, and 661
[3] See, e.g., ECL §§ 15-0105, 17-0103, 24-0103, 24-0105, 25-102.

12.4-acre threshold contained in the State's Freshwater Wetlands Act, or otherwise lie outside the Freshwater Wetlands Act.

12. The New York State Legislature enacted the Protection of Waters Act (ECL Article 15, Title 5) in 1972 to regulate physical disturbance and filling in certain waterbodies, including protected streams and navigable waterways. *See* ECL §§ 15-0501, 15-0505. Article 15 recognizes that New York is rich with valuable water resources, and directs the Department, as stewards of the environment, to preserve and protect certain lakes, rivers, streams, and ponds. These rivers, streams, lakes, and ponds are necessary for fish and wildlife habitat; drinking and bathing; and agricultural, commercial and industrial uses. In addition, New York's waterways provide opportunities for recreation; education and research; and aesthetic appreciation. Certain human activities can adversely affect, even destroy, the delicate ecological balance of these important areas, thereby impairing the uses of these waters.

13. New York State regulates physical disturbance to the bed and banks of about 43% of New York Streams under ECL § 15-0501 by limiting jurisdiction to certain streams, namely streams with a water quality classification or standard of AA, AA(T), AA (TS), A, A(T), A(TS), B, B(T), B(TS), C(T), or C(TS). The designation of "T" describes waters that provide habitat in which trout can survive and grow while "TS" describes waters that provide conditions for trout to spawn and reproduce. Physical disturbance to the bed or banks of the remaining 57% of the streams with a classification of "C" or "D" are not regulated under section 15-0501. Although an additional 10-15% of streams are afforded some protection under another section of state law through the regulation of excavation and fill below mean high water (ECL § 15-0505), roughly 40% of streams in New York are not protected from physical disturbance under New York State Law. As part of a comprehensive strategy, New York has used Section 401 of the Clean Water Act to span the gap in regulatory controls to protect water quality in these streams. Without this

comprehensive strategy, 40% of New York streams would not receive the high level of protection necessary to assure that water quality standards are achieved.

14. DEC regulations provide that an applicant for a section 401 certification "must demonstrate compliance" with state water quality standards, as well as "state statutes, regulations and criteria otherwise applicable to such activities."[4] Thus, in order for DEC to issue a Section 401 Certification, an applicant must submit sufficient information to demonstrate compliance with all applicable water-quality-protection requirements. Among other things, state law requires an applicant to minimize environmental harms to waterbodies from the disturbance of stream beds[5], or the discharge of fill or excavation within navigable waters[6]. An applicant also must avoid any discharge of waste or increase in turbidity that will impair the best uses of a waterbody[7].

New York State Administrative Procedures

15. DEC's permitting process follows procedures established by the Uniform Procedures Act (UPA), *see* ECL article 70, and implementing regulations, *see* 6 N.Y.C.R.R. part 621. The goals of the UPA include: "fair, expeditious and thorough administrative review of regulatory permits"; elimination of "inconsistencies and redundancies"; establishment of "reasonable time periods for administrative agency action on permits"; encouragement of "public participation in government review and decision-making processes"; and replacement of individual permit reviews with "a comprehensive project review approach." ECL § 70-0103. As described below, the UPA's goals are now being thwarted by the 2020 Rule.

[4] 6 N.Y.C.R.R. § 608.9.
[5] ECL § 15-0501
[6] ECL § 15-0505
[7] 6 N.Y.C.R.R. §§ 701.1, 703.2

16. The UPA includes requirements for the contents of a certification application, including an envionmental review under the State Environmental Quality and Review Act (SEQRA), ECL article 8. *See* ECL § 70-0105(2); 6 N.Y.C.R.R. § 621.3(a)(7). The UPA also establishes timeframes for state review of permit applications, and requirements for public notice and comment on certain applications. *See* ECL § 70-0109; 6 N.Y.C.R.R. §§ 621.6-621.8. Importantly, these timeframes are tied to DEC's receipt of a *complete* application, including an environmental review pursuant to SEQRA and other supporting information sufficient to evaluate the environmental impacts of a project. *See* ECL § 70-0109(2); 6 N.Y.C.R.R. § 621.7(a), (f).

17. Section 401 certification applications are specifically listed as being subject to the UPA. ECL § 70-0107(d); 6 N.Y.C.R.R. § 621.1(e). In addition to the general application requirements of the UPA, DEC may request that the applicant for a section 401 certification provide "a properly completed application and supporting documentation for any required federal permits or licenses." 6 N.Y.C.R.R. § 621.4(e)(2).

IV. NEW YORK STATE'S SECTION 401 PROGRAM PRIOR TO THE 2020 RULE

18. DEC reviews proposed projects near New York waterbodies for compliance with all applicable regulatory requirements. This comprehensive review involves a collaborative effort among several Divisions within DEC that primarily includes the Division of Fish and Wildlife, the Division of Environmental Permits, and the Division of Water. Each Division reviews an application under their specific area of expertise. For example, the Division of Fish and Wildlife focuses on physical disturbance to waterbodies and resulting hydrologic changes, as well as impacts on fish and wildlife resources.

19. DEC generally issues permits, including Section 401 Water Quality Certificates, with conditions to assure compliance with regulatory standards. In rare situations, DEC is forced to

deny permits and certifications when applicants do not provide all necessary information to evaluate the impacts on aquatic resources or when projects cannot meet regulatory standards.

20. Many applications received by DEC involve the concurrent review and issuance of permits and certifications using authority granted under state statutes (e.g., Article 15-Protection of Waters, Article 24-Freshwater Wetlands, Article 25-Tidal Wetlands) and under federal statutes (e.g., Section 401 of the Clean Water Act). Annually, DEC processes approximately 4,300 Article 15 applications, 1,270 Article 24 applications, and 1,180 Article 25 applications. In addition, DEC issues approximately 4,050 individual Section 401 Water Quality Certificates each year. Historically, the vast majority of section 401 requests have been granted within 60 days from receipt of a complete application.

21. During the almost 50 years between enactment of section 401 and promulgation of the 2020 Rule, DEC relied upon section 401 to ensure that applicants for federally licensed projects provided sufficient information to DEC to ensure that they would comply with state water quality requirements. DEC also relied upon section 401 to ensure that federally licensed projects would comply with conditions sufficient to protect state water quality. The 2020 Rule has hampered DEC's ability to comply with its own administrative requirements or fulfill with its substantive obligation to protect state water quality.

V. NEW YORK STATE'S EXPERIENCE WITH IMPLEMENTING THE 2020 RULE

22. The 2020 Rule became effective in September 2020, and almost immediately created confusion and uncertainty in DEC's section 401 program. Procedures that had been relied upon since section 401 was enacted had to be revised. The result has been an increase in workload, delays, and confusion for DEC staff and applicants alike.

23. Of the more than 4,000 section 401 certification requests DEC receives each year, the vast majority are for small-scale projects with limited water quality impacts. Many applicants

must apply for multiple federal and state permits for the same project. Additionally, many applicants are homeowners or other individuals with little experience with DEC's administrative process. Accordingly, DEC has developed procedures to streamline these applications. For example, DEC and the Army Corps developed a "Joint Application" form that could be used by an applicant to apply to DEC and Army Corps for any necessary permits.

24. The 2020 Rule establishes a list of nine specific pieces of information that must be included in a section 401 certification request. 40 C.F.R. § 121.5(b). This list was promulgated without regard to DEC's existing Joint Application form or its requirements for permit applications, which includes a variety of additional information but does not necessarily include some of the specific language dictated by the 2020 Rule. *See, e.g.,* 6 N.Y.C.R.R. § 621.3(a)(7) (a permit application is not complete until any required environmental review under the State Environmental Quality Review Act (SEQRA) is complete); *id.* § 621.4(e) (specific requirements for section 401 requests). Accordingly, the Department has been forced to develop a "supplemental" form that applicants must complete in addition to the Joint Application. In other words, the 2020 Rule has *increased* the administrative burden on applicants and the Department.

25. The 2020 Rule also *mandates* that at least 30 days prior to submitting a section 401 request, applicants submit a request for a pre-filing meeting with DEC. 40 C.F.R. § 121.4(a). Although applicants are encouraged to request preapplication conferences under state law, 6 N.Y.C.R.R. § 621.5, such a request is not mandatory nor is there a required 30-day "waiting period." Thus, this is an additional regulatory burden imposed upon applicants. Many section 401 applicants are not familiar with the pre-filing process or with administrative procedures in general, and justifiably assume that by submitting a complete Joint Application form they can commence DEC review. Unfortunately, under the 2020 Rule DEC must reject these applications for failure of the applicant to request a pre-filing meeting. The applicant must then request a pre-

filing meeting and then wait 30 days to re-file their section 401 request. The result is that DEC's review is delayed and the applicant is often frustrated and confused. The 2020 Rule also includes no process by which the 30-day pre-filing request requirement can be waived if, for example, an emergency requires prompt review of a section 401 request. Although the UPA allows DEC to issue emergency authorizations, including water quality certifications, to address situations that pose an immediate threat to life, health, property, or natural resources, 6 N.Y.C.R.R. § 621.12, the 2020 Rule includes no such exception to the 30-day prefiling meeting request requirement.

26. The 2020 Rule has also increased the workload for DEC staff reviewing section 401 requests, meaning that they have less time to perform other programmatic duties necessary to protect the State's environment. For example, the 2020 Rule establishes a list of information that must be included in any state section 401 decision. 40 C.F.R. § 121.7. A section 401 decision that does not include this information could be rejected by the relevant federal licensing agency. 40 C.F.R. § 121.8. In effect, the 2020 Rule imposes federal requirements on state administrative procedures. Accordingly, in addition to following all applicable state procedures, DEC staff now must take additional steps to ensure that section 401 decisions comply with the 2020 Rule.

27. To take one example, the 2020 Rule requires that any section 401 certification that includes conditions include "[a] statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements" and a citation to the relevant state law. 40 C.F.R. § 121.7(d). "Water quality requirements" is defined to mean various Clean Water Act provisions "and state or tribal regulatory requirements for point source discharges into waters of the United States." *Id.* § 121.1(n).

28. Historically, DEC could impose conditions on section 401 certifications necessary to ensure that a project, as a whole, would comply with "any appropriate" requirements of state law, which would include, among other things, water quality requirements under the Freshwater

Wetlands Act and the Protection of Waters Act. Under the 2020 Rule, in order to ensure a section 401 certification is accepted by a federal permitting agency, DEC must first determine whether the specific state law at issue qualifies as a "water quality requirement" under EPA's restrictive definition and then must explain how a condition is related to that requirement. Accordingly, even standard conditions require a substantial time commitment for administrative review if DEC does not want to risk having a certification rejected by the relevant federal agency.

29. The 2020 Rule also provides no mechanism for an applicant to request and for a certifying agency to modify an issued section 401 certification. Historically, if the scope or extent of a proposed project changes, the applicant could provide supplemental information to DEC, which could then be used to review and issue a modification to the previously issued certification. However, EPA guidance provided on the 2020 Rule[8] indicates that the Rule includes no mechanism for an applicant to request modification of an existing a water quality certification nor for a certifying authority to grant such a request. This has created significant administrative uncertainty for DEC and for applicants. DEC has effectively been forced to require that applicants submit entirely new water quality requests (after complying with the mandatory 30-day prefiling request requirement) solely for the modified elements, resulting in two water quality certifications for the same project. This is a waste of DEC's resources and the applicant's time.

30. Not only does the 2020 Rule upend state administrative procedures, generating additional work for DEC staff, but it imposes strict time limits on DEC's review. Under the 2020 Rule, the timeframe for DEC's review is dictated not by state administrative procedures, but by the federal licensing agency. *See* 40 C.F.R. § 121.6. Army Corps has taken this invitation to enforce a 60-day time limit for state review. *See* 33 C.F.R. § 325.2(b). Prior to the 2020 Rule,

[8] EPA state and tribal webinars provided in 2020 and posted on the EPA website at https://www.epa.gov/cwa-401/2020-rule-implementation-materials

Army Corps had given state agencies significant latitude to determine when a "valid" section 401 request had been submitted and the period of time for review began. Now, however, Army Corps generally requires a decision within 60 days, even for potentially significant permitting decisions.

31. As one example of the impacts of the 2020 Rule, in October 2020 – less than a month after the 2020 Rule became effective – Army Corps proposed to re-issue all of its nationwide permits, which are blanket authorizations for a variety of projects that Army Corps determines do not require project-specific permits. DEC was required to determine whether to grant, condition, or deny these nationwide permits within 60 days. Although DEC requested an extension of time to complete its review, Army Corps denied that request. Accordingly, DEC had to review the modified nationwide permits, make initial decisions on whether to grant, condition or deny certification, publish public notice and review public comments, and issue final decisions that complied with both state administrative procedures and the 2020 Rule, all within 60 days. The Department completed this task, but it required a significant increase in staff resources over prior certification decisions for nationwide permits. Additionally, Army Corps ultimately decided *not* to re-issue all of the nationwide permits, meaning some of DEC's water quality decisions were unnecessary.

VI. HARMS RELATED TO LEAVING THE 2020 RULE IN PLACE UNTIL 2023

Administrative Procedures

32. As described in the preceding section, adapting the 2020 Rule to state administrative procedures is a time-consuming and imprecise process. First, DEC staff must ensure that a section 401 request was preceded by at least 30 days by a pre-filing meeting request. Second, DEC staff must ensure that a section 401 request includes the nine specific pieces of information and boilerplate language required by the 2020 Rule. Third, DEC staff must work with their supervisors and program attorneys to ensure that any decision on the section 401 request complies

with the timeframe and content requirements of the 2020 Rule. Meanwhile, DEC staff must continue to process applications for any related permits pursuant to the UPA. At each step of this process, the 2020 Rule requires additional staff and agency resources over and above DEC's historical section 401 process, which had been subject to natural development and streamlining over the preceding 50 years. 34. In addition to these administrative burdens, the Rule significantly impedes DEC's CWA 401 authority by limiting the impacts that DEC can evaluate to point source discharges, and by limiting the types of state law that can be considered in order to protect water quality. Additionally, by giving federal agencies the authority to veto conditions or certifications for ostensibly procedural violations, the Rule raises the possibility that certification conditions and denials will be ignored by federal agencies.

33. The 2020 Rule will also constrain DEC's ability to fully evaluate the water quality impacts of proposed projects. Under the 2020 Rule, the "reasonable period" for DEC's review of a water quality request – 60 days in the case of Army Corps permits, longer in other instances – commences when DEC receives nine specific pieces of information. 40 C.F.R. § 121.5. But the minimum requirements for a section 401 request under the 2020 Rule fails to include information essential to evaluating water quality impacts of a project. For example, the 2020 Rule lacks any requirement that an applicant accurately identify the extent of the waters affected by the proposal, a fundamental component of any project requiring a jurisdictional determination from the Army Corps.

34. The 2020 Rule also fails to require that an applicant wait until an environmental review pursuant to SEQRA or NEPA has been completed prior to applying for a water quality certification, leaving DEC without an important piece of information mandated by statute and regulation. *See* ECL § 70-0105(2); 6 N.Y.C.R.R. § 621.3(a)(7). Also unlike the UPA, 6

N.Y.C.R.R. § 621.4(e)(2), the 2020 Rule does not even provide for DEC to obtain the same information from the applicant that has submitted to the federal licensing agency.

35. Finally, for many non-energy projects regulated by New York State, a stormwater pollution prevention plan is required and essential to determining whether impacts to water quality will be adequately addressed. The 2020 Rule does not require any of this information or provide a method for DEC to obtain it, leaving open the possibility that applicants will trigger the waiver period with barebones requests that comply with the 2020 Rule but do not include sufficient information for DEC to evaluate the project's water quality impacts.

36. Even the provision of the 2020 Rule requiring EPA to determine whether proposed projects will impact neighboring jurisdictions, 40 C.F.R. § 121.12, has been slowing the implementation of 401 certifications. Under that provision, Army Corps or other federal agencies must wait *at least* 30 days before accepting and implementing a water quality certification issued by a certifying authority, to give EPA an opportunity to make a determination regarding impacts to neighboring jurisdictions. *Id.* § 121.12(b). In cases where EPA finds that an impact may occur, implementation of the certification in the federal agency's decision is delayed a further 60 days while the neighboring state reviews the project impacts. *Id.* § 121.12(c). The result is that federal agencies cannot accept and implement a water quality certification for between 30 and 90 days after DEC issues it. This delay is somewhat ironic considering Army Corps generally gives DEC just 60 days to issue, condition, or deny certification.

VII. CONCLUSION

37. The 2020 Rule is harming New York State right now. Leaving it in place until at least early 2023 will exacerbate these harms as DEC tries to comply with a rule EPA has already announced it intends to revise or replace. This Court should vacate the 2020 Rule and return the regulatory status quo in effect for the 50 years prior to promulgation of the 2020 Rule.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 22, 2021.

Signature: Scott E. Sheeley

Printed name: Scott E. Sheeley

Address: New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1750

Phone Number: (518) 402-2125

Paul Andrew Garrahan
Oregon Department of Justice
Natural Resources Section
1162 Court St. NE
Salem, OR 97301-4096
503-947-4593
paul.garrahan@doj.state.or.us

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking	Case: No. 20-cv-04636-WHA (consolidated) Applies to all actions **DECLARATION OF STEVE MRAZIK IN SUPPORT OF PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 A.M. ORAL ARGUMENT REQUESTED

DECLARATION OF STEVE MRAZIK

I, Steve Mrazik, under penalty of perjury, declare as follows:

1. I am currently employed by the Oregon Department of Environmental Quality (ODEQ) as the Watersheds and Section 401 Certifications Manager. In that position, I supervise staff that review applications for certifications described in Section 401 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341, to decide whether to issue or deny the certifications. Previously, I have been employed by the Department in several other positions, including as Technical Services Manager, Technical Services Project Manager, Water Quality Monitoring Coordinator, and Water Quality Specialist. I hold a bachelor's degree in Zoology from the University of Wisconsin – Madison.

2. I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto

3. The primary state policy regarding water quality is stated in Or. Rev. Stat. § 468B.015 as follows:

> Whereas pollution of the waters of the state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution in this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of the state:
>
> (1) To conserve the waters of the state through innovative approaches, including but not limited to the appropriate reuse of water and wastes;
>
> (2) To protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses;
>
> (3) To provide that no waste be discharged into any waters of this state without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters;
>
> (4) To provide for the prevention, abatement and control of new or existing water pollution; and
>
> (5) To cooperate with other agencies of the state, agencies of other states and the federal government in carrying out these objectives.

4. The Department performs the Water Quality Certifications described in Section 401 of the Clean Water Act as part of its work to fulfill the primary state policy stated above in Or. Rev. Stat. § 468B.015.

5. In September of 2020 EPA promulgated a significantly revised Clean Water Act Section 401 Rule (Rule). The Rule introduced significant procedural and substantive changes that impact how ODEQ engages with applicants and develops and enforces certifications intended to protect water quality and in doing so results in harm to the environment and economy.

6. One procedural change included in the Rule is a mandatory 30-day request for a pre-filing meeting prior to an application. This requirement became immediately problematic for Oregon as the Rule went into effect while Oregon was experiencing historic widespread wildfires in the fall of 2020. Once fires were contained and individuals and communities focused on

recovery, the 30-day prefiling meeting request requirement became a regulatory hurdle as the Rule contained no provisions for addressing emergency permitting requests. Even if the agency decides not to meet with the applicant, an application cannot be filed until 30 days following the request from the applicant. As a result, important restoration and recovery projects were delayed so that the new Rule processes could be implemented.

7. The Rule requires federal agencies to set deadlines and dictate limits on the time the state agency has to issue a certification or waive review, which often results in challenges for agency-applicant coordination. Oregon has had an extremely significant increase in the number of certification denials issued under the Rule due to lack of sufficient information provided by applicants to demonstrate compliance, and a subsequent lack of time for applicants to provide additional information to address such deficiencies. From September 2019 to June 2021 Oregon issued approximately 102 denials. In the prior twenty years (1999-2019) Oregon issued approximately five denials. Under the prior rule, DEQ would work with applicants on identifying and resolving outstanding information needs in order to complete review of the project. This new requirement, combined with missing information or unavoidable final changes to project details, is resulting in applicants needing to re-start the clock and re-do the entire certification application process. This need for denials and new applications results in inefficiencies and additional costs for applicants and agency resources.

8. The Rule attempts to limit the state's ability to review impacts to water quality that may arise from the project through the narrowed definition of a "discharge." Limiting the state's review in this way could reduce state's ability to consider important impacts such as those arising from changes to stormwater patterns or increased water temperature resulting from overall project impacts. This aspect of the Rule could result in significant environmental harm to the state of Oregon.

9. The Rule limits state enforcement options by giving the federal action agency the authority and discretion to enforce state requirements. Federal agencies often lack staff capacity and water quality expertise to realistically undertake enforcement or inspection activities beyond their existing inspection and inspection efforts. These changes could undermine states' authority

to enforce the conditions of the state certification and in doing so render the certifications ineffective to protect water quality and cause environmental harm to the state of Oregon.

10. The Rule will require that Oregon expend state resources to update its current Section 401 Water Quality Certifications rules at Oregon Administrative Rules at Chapter 340, Division 48. Oregon's existing rules provide a minimum timeline for review of applications at OAR 340-048-0042 and lists requirements for applications at OAR 340-048-0020 that are now inconsistent with the Federal Rule. These inconsistencies are leading to confusion for applicants and will require that Oregon expend state resources in reviewing and revising the regulations.

11. For the reasons described above the Rule is causing environmental and economic harm to the state of Oregon.

12. I understand that EPA has now announced its intent to revise the Rule. However, EPA has not yet proposed any specific changes to the Rule. Moreover, EPA projects that final revised rule will not be in place until *at least* 2023. I understand that EPA has asked to keep the Rule in place while it is reviewed. If this occurs, the harms and confusion created by the Rule will continue for at least another two years.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 22, 2021.

Signature: _____

Printed name: Steve Mrazik

Address: 1240 SE 12th Ave, Portland, Oregon, 97214

Phone Number: (503) 229-6414

Andrew Hawley (CA Bar No. 229274)
Western Environmental Law Center
1402 3rd Avenue, Ste. 1022
Seattle, Washington 98101
hawley@westernlaw.org
Tel: 206-487-7250

Jason R. Flanders (CA Bar No. 238007)
Aqua Terra Aeris Law Group
4030 Martin Luther King Jr. Way
Oakland, California 94609
jrf@atalawgroup.com
Tel: 916-202-3018

Peter M. K. Frost, *pro hac vice*
Sangye Ince-Johannsen, *pro hac vice*
Western Environmental Law Center
120 Shelton McMurphey Boulevard, Ste. 340
Eugene, Oregon 97401
frost@westernlaw.org
sangyeij@westernlaw.org
Tel: 541-359-3238 / 541-778-6626

Attorneys for Plaintiffs American Rivers, American Whitewater, California Trout, Idaho Rivers United

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re

Clean Water Act Rulemaking

Case No. 3:20-cv-04636-WHA
No. 3:20-cv-04869-WHA
No. 3:20-cv-06137-WHA

(consolidated)

AMERICAN RIVERS' OPPOSITION TO EPA'S MOTION FOR REMAND WITHOUT VACATUR

Courtroom: 12, 19th Floor
Date: August 26, 2021
Time: 12:00 P.M. (via telephone)

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

A. The Court should order vacatur, because EPA has not met its burden of demonstrating that remand without vacatur is warranted. 2

1. The seriousness of the 2020 Rule's errors requires vacatur. 4

a. The 2020 Rule unlawfully limits the scope of Section 401 certification. 5

b. The 2020 Rule unlawfully constrains and interferes with state certification procedures. 7

c. The 2020 Rule unlawfully empowers federal agencies to review, and overturn, certification decisions. 9

2. Granting remand *without* vacatur and leaving the 2020 Rule in effect would have disruptive consequences across the nation. 10

B. In the alternative, the Court should deny EPA's motion for remand. 15

1. Remand is not appropriate because EPA has not demonstrated its commitment to a changed approach. 15

2. Granting EPA's motion would deprive American Rivers of its right to judicial review. 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Artis v. District of Columbia,
138 S. Ct. 594 (2018).....7

Colo. River Water Cons. Dist. v. United States,
424 U.S. 800 (1976).....18

Landis v. N. American Co.,
299 U.S. 248 (1936).....17, 18

Marx v. Gen. Revenue Corp.,
568 U.S. 371 (2013).....7

PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology,
511 U.S. 700 (1994).....5, 6

S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,
547 U.S. 370 (2006).....4, 7, 8

United States Courts of Appeals

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,
988 F.2d 146 (D.C. Cir. 1993).....3, 4

Am. Rivers, Inc. v. F.E.R.C.,
129 F.3d 99 (2d Cir. 1997).....10

Appalachian Voices v. State Water Control Bd.,
912 F.3d 746 (4th Cir. 2019) 8

Cal. Cmties. Against Toxics v. EPA,
688 F.3d 989 (9th Cir. 2012) 3, 14, 15

Cal. Wilderness Coal. v. U.S. Dep't of Energy,
631 F.3d 1072 (9th Cir. 2011) 9

Cannon v. District of Columbia,
717 F.3d 200 (D.C. Cir. 2013).....12

Chlorine Chemistry Council v. EPA,
206 F.3d 1286 (D.C. Cir. 2000).....15, 16

City of Fredericksburg v. F.E.R.C.,
876 F.2d 1109 (4th Cir. 1989) 8

City of Tacoma v. F.E.R.C.,
460 F.3d 53 (D.C. Cir. 2006).....6, 10

Friends of the Earth v. Hintz,
800 F.2d 822 (9th Cir. 1986) 14

Hearns v. San Bernardino Police Dep't,
530 F.3d 1124 (9th Cir. 2008) 17

Humane Soc'y v. Locke,
626 F.3d 1040 (9th Cir. 2010) 2

Idaho Farm Bureau v. Babbitt,
58 F.3d 1392 (9th Cir. 1995) 4, 5, 14

Keating v. F.E.R.C.,
927 F.2d 616 (D.C. Cir. 1991) 4

Lutheran Church-Missouri Synod v. FCC,
141 F.3d 344 (D.C. Cir. 1998) 16

Meeropol v. Meese,
790 F.2d 942 (D.C. Cir. 1986) 16

Nat'l Family Farm Coal. v. EPA,
960 F.3d 1120 (9th Cir. 2020) 10

North Carolina v. EPA,
531 F.3d 896 (D.C. Cir. 2008) 5

Nw. Envtl. Advocates v. EPA,
537 F.3d 1006 (9th Cir. 2008) 8, 9

Pagtalunan v. Galaza,
291 F.3d 639 (9th Cir. 2002) 17

Paulsen v. Daniels,
413 F.3d 999 (9th Cir. 2005) 10, 14

Pollinator Stewardship Council v. EPA,
806 F.3d 520 (9th Cir. 2015) 2, 4

Sierra Club v. U.S. Army Corps of Eng'rs,
909 F.3d 635 (4th Cir. 2018) 4, 13, 14, 17

SKF USA Inc. v. United States,
254 F.3d 1022 (Fed. Cir. 2001).....15

Sugar Cane Growers Coop. of Fla. v. Veneman,
289 F.3d 89 (D.C. Cir. 2002).....10

United States v. Marathon Dev. Corp.,
867 F.2d 96 (1st Cir. 1989).....6

Util. Solid Waste Activities Grp. v. EPA,
901 F.3d 414 (D.C. Cir. 2018).....15, 17

W. Oil & Gas Ass'n v. EPA,
633 F.2d 803 (9th Cir. 1980) 15

United States District Courts

All. for the Wild Rockies v. Marten,
No. CV 17-21-M-DLC, 2018 WL 2943251 (D. Mont. June 12, 2018).....2, 3

ASSE Int'l, Inc. v. Kerry,
182 F. Supp. 3d 1059 (C.D. Cal. 2016) 3, 14

Ctr. for Envtl. Health v. Vilsack,
No. 15-cv-01690-JSC, 2016 WL 3383954 (N.D. Cal. June 20, 2016).....3

Ctr. for Native Ecosystems v. Salazar,
795 F. Supp. 2d 1236 (D. Colo. 2011).....3

Little Lagoon Pres. Soc., Inc. v. U.S. Army Corps of Eng'rs,
No. CIV.A. 06-0587-WS-C, 2008 WL 4080216 (S.D. Ala. Aug. 29, 2008).....14

Nat. Res. Def. Council v. McCarthy,
No. 16-cv-02184-JST, 2016 WL 6520170 (N.D. Cal. Nov. 3, 2016).....12

Nat. Res. Def. Council v. Norton,
No. 1:05-cv-01207-OWW-LJO, 2007 WL 14283 (E.D. Cal. Jan. 3, 2007).....17

N. Coast Rivers All. v. U.S. Dep't of Interior,
No. 1:16-cv-00307-LJO-MJS, 2016 WL 11372492 (E.D. Cal. Sept. 23, 2016) 15, 16

United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.,
No. C–09–4029 EMC, 2011 WL 3607790 (N.D. Cal. Aug. 16, 2011) 15

W. Watersheds Project v. Zinke,
441 F. Supp. 3d 1042 (D. Idaho 2020) 3

State Courts

Arnold Irrigation Dist. v. Dep't of Envtl. Quality,
717 P.2d 1274 (Or. Ct. App. 1986).....6

Bldg. Indus. Ass'n of San Diego Cty. v. State Water Res. Control Bd.,
22 Cal. Rptr. 3d 128 (Cal. Ct. App. 2004).....13

Dep't of Ecology v. PUD No. 1 of Jefferson Cty.,
849 P.2d 646 (Wash. 1993).....6

In re Morrisville Hydroelectric Project Water Quality,
224 A.3d 473 (Vt. 2019).....6

Port of Seattle v. Pollution Control Hearings Bd.,
90 P.3d 659 (Wash. 2004).....12, 13

Federal Statutes

5 U.S.C. § 702 18

5 U.S.C. § 704 18

5 U.S.C. § 706(2) 18

33 U.S.C. § 1251(a) 14

33 U.S.C. § 1251(b) 8

33 U.S.C. § 1341(a)(1) ..... *passim*

33 U.S.C. § 1341(d) 5, 6, 7, 10

Federal Rules and Regulations

33 C.F.R. § 320.4(d) 13

40 C.F.R. § 121.1(f) 5

40 C.F.R. § 121.1(n) 7

40 C.F.R. § 121.3 ..... 5, 6

40 C.F.R. § 121.4 8

40 C.F.R. § 121.5 8

40 C.F.R. § 121.6 8

40 C.F.R. § 121.9(a)(2) 9

40 C.F.R. § 121.9(b) 11

40 C.F.R. § 121.10(a) 9

Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) 1, 6, 16

Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,542 (June 2, 2021) ..... *passim*

Miscellaneous

A Legislative History of the Water Pollution Control Act Amendments of 1972, U.S. GPO No. 93-1 (Jan. 1973) 9, 10

Executive Order 13,868: *Promoting Energy Infrastructure and Energy Growth*, 84 Fed. Reg. 15,495 (April 10, 2019) 11

INTRODUCTION

Plaintiffs American Rivers, American Whitewater, California Trout, and Idaho Rivers United ("American Rivers") hereby respectfully oppose the motion for remand without vacatur of the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) ("2020 Rule"), filed by Defendants U.S. Environmental Protection Agency and Michael S. Regan (collectively "EPA"). Dkt. No. 143. American Rivers has challenged EPA's unlawful rule 2020 Rule because it impinges on the authority of states, tribes, and the public to protect their rivers, lakes, wetlands, and coastal waters, sensitive fish and habitat, and the communities that rely on healthy, functioning ecosystems. EPA promulgated the 2020 Rule under the guise of streamlining processes for state and tribal certification under Section 401 of the Clean Water Act, but went much further than that. The 2020 Rule unlawfully narrows the applicability of Section 401; circumscribes the scope of review of the certifying state or tribe; limits the information on the proposed federal project made available to states and tribes to inform their decision whether to issue certification; restricts the conditions states and tribes may impose to ensure requirements of state or tribal law are met, and; empowers the federal licensing or permitting agency to effectively overrule a state or tribal determination of whether state or tribal laws are met.

EPA essentially admits as much, acknowledging "substantial concerns" that the 2020 Rule does not comply with Section 401 and the principles of cooperative federalism undergirding it—*see Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,542 (June 2, 2021); *and* Dkt. No. 143 at 2[1]—as well as the need to "restore the balance of state, Tribal, and federal authorities" through a new rule, Dkt. No. 141 at 3. And yet, EPA asks the Court to dismiss all plaintiffs' complaints with prejudice, Dkt. No. 143-2, while leaving the 2020 Rule in place for at least 19 more months, Dkt. No. 143-1 at 7, with no guarantee of a new rule by any date certain, no promise of a different rule after

[1] Here and throughout, American Rivers uses internal pagination and not ECF pagination.

rulemaking is complete, and no way for any of the plaintiffs to reopen their cases should EPA fail to comply with its suggested schedule.

In the meantime, projects continue to move forward under the illegal 2020 Rule, leaving states and tribes between a rock and a hard place: follow the 2020 Rule and give up the ability to halt or condition projects in order to protect local communities, waters, and wildlife, or disregard the 2020 Rule and face lawsuits from its industry proponents and a potential veto any certification by the federal licensing agency. The uncertain and likely divergent way states and tribes navigate this dilemma not only creates far greater regulatory confusion than ever existed before the 2020 Rule and unnecessarily opens the door to untold numbers of cases burdening state and federal courts, but also causes concrete and substantial harm to American Rivers' mission advocacy and its members' interests in enjoying and preserving clean waters nationwide.

Because EPA fails to satisfy the standards for a voluntary remand without vacatur, the Court should order remand *with* vacatur. In the alternative, the Court should deny EPA's motion altogether if remand with vacatur is not warranted, so that this litigation may proceed. Either way, the unlawful 2020 Rule should not remain in effect indefinitely while EPA revisits it.

ARGUMENT

A. The Court should order vacatur, because EPA has not met its burden of demonstrating that remand without vacatur is warranted.

The Ninth Circuit has held that vacatur of an agency action ordinarily accompanies remand of that action to the agency. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (courts grant remand without vacatur leaving the remanded rule in place only in "limited circumstances," and "only 'when equity demands' that we do so") (internal quotations and citations omitted)). The exception to this rule arises only in "rare circumstances" where it is "advisable that the agency action remain in force until the action can be reconsidered or replaced[.]" *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010). Where an agency requests voluntary remand without vacatur but fails to show that vacatur is not warranted, courts may grant the motion in part, and order remand with vacatur. *See, e.g., All. for the Wild Rockies v. Marten*, No. CV 17-21-M-DLC, 2018 WL 2943251, *4 (D. Mont. June 12, 2018) (granting in

part and denying in part agency's motion for remand without vacatur, and vacating the decision because the case did not "present the exceptional circumstance where 'equity demands' that the Court exercise judicial restraint by declining to vacate the [challenged action] upon remand.").

The Ninth Circuit has adopted a two-factor test for determining when to remand without vacatur. *Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (adopting the test from *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Under the *Allied-Signal* test, whether remand without vacatur is warranted depends on (1) "how serious the agency's errors are," and (2) "the disruptive consequences of an interim change that may itself be changed." *Id*. (quoting *Allied-Signal*, 988 F.2d at 150–51). This equitable balancing test applies equally where the agency has requested voluntary remand and the court has not yet ruled on the merits. *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016) ("Courts faced with a motion for voluntary remand employ 'the same equitable analysis' courts use to decide whether to vacate agency action after a "rul[ing] on the merits.'") (quoting *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002)); *see also Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011) (because "[v]acatur is an equitable remedy . . . and the decision whether to grant vacatur is entrusted to the district court's discretion . . . vacation of an agency action without an express determination on the merits is well within the bounds of traditional equity jurisdiction.") (quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir. 2010)).

The agency defendant bears the burden of showing "that compelling equities demand anything less than vacatur." *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020); *see also Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, *13 (N.D. Cal. June 20, 2016) ("given that vacatur is the presumptive remedy . . . it is Defendants' burden to show that vacatur is unwarranted."). Here, EPA has failed even to address the *Allied-Signal* factors, and falls short of meeting its burden. Rather, both factors weigh in favor of the ordinary remedy of remand with vacatur.

1. The seriousness of the 2020 Rule's errors requires vacatur.

Under the Clean Water Act, the States are "the 'prime bulwark in the effort to abate water pollution,' and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law." *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991) (quoting *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983)). Thus, when enacting the Clean Water Act Congress expressly sought "to recognize, preserve, and *protect the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 647 (4th Cir. 2018) (quoting 33 U.S.C. § 1251(b), emphasis original). A central pillar of this authority is the requirement that "[a]ny applicant for a Federal license or permit to conduct any activity" that "may result in any discharge into the navigable waters" must "provide the licensing or permitting agency a certification from the State" that "any such discharge will comply" with applicable water quality requirements. 33 U.S.C. § 1341(a)(1). "No license or permit shall be granted if the certification has been denied by the State[.]" *Id*. The 401 certification process is "essential in the scheme to preserve state authority to address the broad range of pollution[.]" *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006). The certification requirement ensures that "'[n]o polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s].'" *Id*. (quoting 116 Cong. Rec. 8984 (1970) (Sen. Muskie)).

In assessing the seriousness of error under the first *Allied-Signal* factor, courts look to "whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand[.]" *Pollinator*, 806 F.3d at 532; *see Allied-Signal*, 988 F.2d at 151 (declining to vacate where there is a "serious possibility that the [agency would] be able to substantiate its decision on remand.").

The flaws in the 2020 Rule are not the kind of mere procedural rulemaking slip-ups that, once corrected, would allow EPA to make the same decision on remand. *See Idaho Farm Bureau*

v. Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (federal agency's procedural error in not providing public with opportunity to review provisional report before comment period's close was unlikely to alter agency's final decision). Rather, fundamental substantive flaws in the 2020 Rule will necessarily prevent EPA from promulgating the same rule on remand. *See North Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir. 2008) (EPA rule "must" be vacated where "fundamental flaws" prevent EPA from promulgating same rule following remand). As established below, EPA acted contrary to the text, structure, and intent of the Clean Water Act, and exceeded its statutory authority, when it placed limits on state and tribal authority under Section 401.

a. The 2020 Rule unlawfully limits the scope of Section 401 certification.

The narrow scope of review for 401 certifications permitted under the 2020 Rule is inconsistent with the Clean Water Act. Under the regulations, the "scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." 40 C.F.R. § 121.3. However, the definitions EPA has provided for what is a "discharge" and what are "water quality requirements" bear little resemblance to how the Clean Water Act defines those terms.

To begin with, the 2020 Rule limits a certifying authority's review to water quality impacts to only "point source" discharges. *See* 40 C.F.R. § 121.1(f) (defining "discharge" to mean "a discharge from a point source into a water of the United States."). In doing so, this provision disregards the plain language of the statute, as well as binding Supreme Court precedent. *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). Section 401(a)(1) requires that "the State in which the discharge originates or will originate" certify that "any such discharge will comply with the applicable provisions of" specified sections of the Clean Water Act. 33 U.S.C. § 1341(a)(1). In turn, Section 401(d) allows the certifying authority to impose conditions in order "to assure that any applicant for a Federal license or permit will comply" with applicable provisions of the Clean Water Act and "any other appropriate requirement" of state or tribal law. 33 U.S.C. § 1341(d). These two provisions establish plainly that "additional conditions and limitations" may be imposed "on the activity as

a whole once the threshold condition, the existence of a discharge, is satisfied." *PUD No. 1*, 511 U.S. at 712.

However, contrary to the statute's plain meaning, and the Supreme Court's explanation in *PUD No. 1*, the 2020 Rule narrows the scope of state and tribal review under Section 401(a), and the range of conditions they may impose under Section 401(d), to the potential environmental impacts from any point source discharges associated with the project. 40 C.F.R. § 121.3. Tellingly, in the preamble to the 2020 Rule, EPA acknowledges its interpretation goes against the Supreme Court's construction in *PUD No. 1*. 85 Fed. Reg. 42,231 (instead adopting the logic of Justice Thomas's dissent).[2] And EPA now admits in its notice that "the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality," and asks "whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the 'discharge' but also from the 'activity as a whole' consistent with Supreme Court case law." 86 Fed. Reg. at 29,543. While American Rivers appreciates EPA's abstract concern, as long as the rule remains in effect, American Rivers and its members continue to be demonstrably harmed. *See* Dkt. No. 75 (First Amended Complaint) ¶¶ 18–39 (describing the harm application of the 2020 Rule will cause the plaintiff organizations and their members).

Similarly, EPA's definition of "water quality requirements" in the 2020 Rule is inconsistent with the text of Section 401(d), which explicitly authorizes states and tribes to use certification to ensure federal projects comply with "other appropriate requirements of State law." 33 U.S.C. § 1341(d). In contrast, the 2020 Rule limits the scope of review to whether the discharges from points sources at a project will comply with "applicable provisions of §§ 301,

---

[2] EPA's interpretation also contravenes the interpretations of numerous state courts, which are the appropriate forum for assessing the proper scope of review under section 401. *See, e.g., Arnold Irrigation Dist. v. Dep't of Envtl. Quality*, 717 P.2d 1274, 1279 (Or. Ct. App. 1986), *rev denied* 726 P.2d 377 (Or. 1986) ("Only if a goal or plan provision has absolutely no relationship to water quality would it not be an 'other appropriate requirement of State law" within the meaning of Section 401(d)); *accord Dep't of Ecology v. PUD No. 1 of Jefferson Cty.*, 849 P.2d 646, 652 (Wash. 1993), *aff'd* 511 U.S. 700 (1994); *accord In re Morrisville Hydroelectric Project Water Quality*, 224 A.3d 473, 492 (Vt. 2019); *see also City of Tacoma v. F.E.R.C.*, 460 F.3d 53, 67 (D.C. Cir. 2006) (state courts are charged with reviewing the legality of certification decisions); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) (same).

302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States." 40 C.F.R. § 121.1(n) (defining "Water quality requirements"). By limiting the scope of Section 401 review to whether the discharges from the points sources will comply with the specific requirements under the Clean Water Act, EPA has unlawfully written state and tribal authority to ensure compliance with "other appropriate requirements of State law" in Section 401(d) out of the statute. EPA's reading of the statute violates the "basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written, giving each word its ordinary, contemporary, common meaning." *Artis v. District of Columbia*, 138 S. Ct. 594, 603 n.8 (2018) (internal quotation marks and punctuation omitted); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (canon against surplusage "is strongest when an interpretation would render superfluous another part of the same statutory scheme").

b. The 2020 Rule unlawfully constrains and interferes with state certification procedures.

The 2020 Rule impermissibly intrudes on the states' and tribes' ability to effectively manage their 401 certification programs and meaningfully review federally licensed projects. To ensure states and tribes are able to fulfill this primary responsibility of protecting water quality, Congress enacted Section 401 to fill a potential gap in the overall regulatory structure of the Clean Water Act—namely, federally licensed activities that may otherwise escape compliance with requirements of state law to protect water quality. *S.D. Warren*, 547 U.S. at 386 ("Changes in the river like these fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns."). Thus, through Section 401, states and tribes have the right to review the potential impacts of proposed federally licensed projects that "may result in any discharge into the navigable waters" and the obligation to "set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable [water quality requirements under the Clean Water Act] and with any other appropriate requirement of State law." 33 U.S.C. §§ 1341(a)(1) & (d). And with respect to how the states and tribes use this

authority, the Clean Water Act defers to states and tribes to establish "the water quality certification process." *City of Fredericksburg v. F.E.R.C.*, 876 F.2d 1109, 1112 (4th Cir. 1989).

The 2020 Rule makes several changes to the certification process that unlawfully circumscribe the certifying authority's control over its process. First, the 2020 Rule purports to establish both the process the certifying agency must follow, and the information a certifying authority can require from an applicant to initiate a "request" for certification. 40 C.F.R. §§ 121.4 & 121.5. The rule then dictates that the timeline for review starts immediately when the applicant submits this package, regardless of what the certifying agency may actually need to initiate its review. *Id.* §§ 121.5 & 121.6. Second, once the timeline for certification begins, it cannot be paused or restarted, even if, for example, the applicant fails to provide necessary or requested information. *Id.* § 121.6(e). Finally, the 2020 Rule authorizes federal licensing and permitting agencies—rather than the state or tribe—to define what constitutes a "reasonable period of time" for a state or tribe to act on a certification request. *Id.* § 121.6(a).

"State Agencies have broad discretion when developing the criteria for their Section 401 Certification." *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019)). Again, the primary goal of the Clean Water Act generally and Section 401 specifically is to preserve state authority over federal projects that may impact their waters, and State autonomy for how to address those concerns, consistent with minimums established in the Act. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"); *S.D. Warren*, 547 U.S. at 386 (Section 401 is "essential in the scheme to preserve state authority to address the broad range of pollution"). To this end, Congress spoke clearly when it instructed that states and tribes—not EPA or federal licensing and permitting agencies—set the procedure for certification. *See* 33 U.S.C. § 1341(a)(1) (states and tribes "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications."). EPA has exceeded its authority by intruding on state and tribal authority to manage the certification processes. *See Nw. Envtl.*

Advocates v. EPA, 537 F.3d 1006, 1019, 1025–26 (9th Cir. 2008) (EPA cannot write regulations in excess of its statutory authority and that are contrary to the statutory scheme).

With respect to these changes, EPA now admits it "is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time." 86 Fed. Reg. at 29,543. And yet despite these numerous serious errors, EPA asks the Court to leave the rule in place indefinitely. The Court should decline. *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) (where agency action fails "to follow Congress's clear mandate the appropriate remedy is to vacate that action").

c. The 2020 Rule unlawfully empowers federal agencies to review, and overturn, certification decisions.

The 2020 Rule unlawfully empowers federal permitting and licensing agencies to overturn a state's or a tribe's denial of certification, or to refuse to include the terms and conditions included in a certification, if the federal agency determines the certifying authority did not comply with the Rule's procedural requirements. 40 C.F.R. §§ 121.9(a)(2) & 121.10(a). Giving federal permitting and licensing agencies that ultimate authority conflicts with the plain language of Section 401.

Section 401 prohibits the issuance of any federal license or permit before certification has either been granted or waived, prohibits the issuance of any federal license or permit where certification has been denied. 33 U.S.C. § 1341(a)(1); *see also* H.R. Rep. 92-911, 122 (March 11, 1972), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, U.S. GPO No. 93-1, Vol. 1, 809 (Jan. 1973) ("Denial of certification by a State, interstate agency, or the Administrator, as the case may be, results in a complete prohibition against the issuance of the Federal license or permit"); S. Rep. 92-414, 69 (Oct. 28, 1971), *reprinted in A Legislative History*, Vol. 2, 487 (Section 401 "continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing . . . should such an affirmative denial occur no license or permit could be issued . . . unless the State action was overturned in the appropriate courts of jurisdiction"). In addition, Section 401

expressly requires that any terms or conditions that the certifying authority includes as part of a certification "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d); Sen. Conf. Committee Rep. (Oct. 4, 1972), *reprinted in A Legislative History*, Vol. 1, 183 (any federal agency granting a license or permit "shall accept as dispositive the determinations" of the states under Section 401, with respect to necessary conditions); *see also Tacoma*, 460 F.3d at 67 (agencies lack authority to second-guess a state's certification determination or the conditions it has imposed).

EPA admits "that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency." 86 Fed. Reg. at 29,543. Yet, allowing for sucha result is atently inconsistent with the "unequivical" plain language and intent of section 401, which does not permit the federal agency to "decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401." *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2d Cir. 1997). This error, like the others, is serious. The first *Allied-Signal* factor militates in favor of vacatur.

2. Granting remand *without* vacatur and leaving the 2020 Rule in effect would have disruptive consequences across the nation.

Again, to determine whether vacatur is appropriate, the Court must "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020) (quoting *Pollinator*, 806 F.3d at 532). Here, vacating the 2020 Rule would expedite the return of the regulatory scheme that governed Section 401 certifications for the past 50 years. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."). While it is true that EPA *may* propose a new regulation in 2023, leaving the 10-month old 2020 Rule in place in the interim is an "invitation to chaos." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). The ongoing frustration of Plaintiffs' efforts to limit the environmental impacts of federally approved projects will only worsen over time if the Court leaves the 2020 Rule in place.

States and tribes subject to the 2020 Rule are facing an impossible choice: (1) comply with EPA's regulations or (2) heed EPA's admissions that the regulations are flawed and comply with their duty under the Clean Water Act. They likely cannot do both. For example, most states and tribes have not updated their regulations to comply with the new standards. As such, if an agency reviews a certification request under its existing regulations, it faces potential lawsuits from the applicant for failing to follow the 2020 Rule. Or, there is a potential that the federal permitting agency may veto any terms or conditions a state or tribe requires in order to protect its water quality and ensure compliance with state or tribal law. *See* 40 C.F.R. § 121.9(b) ("A condition for a license or permit shall be waived upon the certifying authority's failure or refusal to satisfy the requirements of § 121.7(d)"). On the other hand, the certifying agency could decide to change its regulations and policies, to bring them into compliance with a regulation that, according to EPA itself, likely violates the "cooperative federalism principles and Clean Water Act section 401's goal of ensuring that states are empowered to protect their water quality." 86 Fed. Reg. at 29,542. Thus, any changes to a state's or tribe's regulations to conform to the 2020 Rule is effectively an admission that the state or tribe is voluntarily participating in a scheme to limit its statutory authority to prevent harm to its waters. And if a state or tribe makes that choice—notwithstanding the significant environmental consequences it engenders—it will likely face the prospect of revising its regulations in order to comply with new regulations almost as soon as that process is complete.

The federal agencies that license or permit activities subject to state or tribal certification are in no better position. To date, it does not appear that *any* federal agency has amended its regulations to comply with the 2020 Rule. Notably, the executive order that kick-started this rulemaking process—Executive Order 13,868: *Promoting Energy Infrastructure and Energy Growth*, 84 Fed. Reg. 15,495 (April 10, 2019)—directed that once the rule was complete, EPA was to convene an "interagency review, in coordination with the head of each agency that issues permits or licenses subject to the certification requirements of section 401" to evaluate the agency's current regulations and propose rulemakings where necessary "to ensure the[] respective agencies' regulations are consistent with the" 2020 Rule. *Id*. at 15,496. But this never

occurred. Indeed, the Army Corps of Engineers is the only federal agency to announce that it is currently considering such a rulemaking, proposing to issue an advanced notice of proposed rulemaking this fall. OMB, Unified Regulatory Agenda, RIN: 0710-AB27, Clean Water Act Section 401: Water Quality Certification for U.S. Army Corps of Engineers Projects.[3] However, the Corps notes that it "will reevaluate the path forward on this rulemaking action pending future actions by EPA." *Id*. Thus, should the 2020 Rule remain in place, it and other federal agencies will attempt to simultaneously apply two sets of rules: their current regulations and the flawed 2020 Rule.

Moreover, American Rivers—and other members of the public trying to navigate this regulatory morass—will be harmed. EPA suggests that American Rivers and others will be able to mitigate this harm by "challeng[ing] individual 401 certifications or federal actions taken pursuant to the Certification Rule as they arise, to the extent they may threaten imminent, concrete harm to a party or its members in the future." Dkt. 143 at 12. This invitation to add countless new cases to state and federal courts across the country, in fact, misses at least two of the most insidious ways the 2020 Rule may work to harm the public and the environment. First, as noted above, a failure to comply with the 2020 Rule would open the certifying state or tribe to a challenge by an applicant, and the potential that the federal licensing or permitting agency may veto any terms and conditions. As a result, some states or tribes will try to comply with the 2020 Rules and write certifications that fall short of what is necessary to protect water quality and ensure compliance with state or tribal laws. Challenging such a decision would require groups, such as American Rivers, to comply with the state's administrative proceedings and then navigate the state courts, explaining why the agency erred by applying the 2020 Rule. *See, e.g.*, *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 665–67 (Wash. 2004) (*en banc*)

[3] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0710-AB27 (last accessed July 26, 2021). A court may take notice of information found on agency websites. *Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (taking judicial notice of document because it is "available on [an agency] website"); *Nat. Res. Def. Council v. McCarthy*, No. 16-cv-02184-JST, 2016 WL 6520170, at *2 (N.D. Cal. Nov. 3, 2016) (taking judicial notice of documents because "they are matters of public record available on a governmental agency website").

(summarizing the four-year process, beginning with a ten-day administrative hearing, two levels of state judicial appeal and a separate federal lawsuit, to resolve a dispute over the terms and conditions of a 401 certification). This is a near-impossible task in many instances. *Cf. id*. at 672 (noting under Washington law, the courts "must give great weight to [an agency's] interpretation of the laws that it administers"); *Bldg. Indus. Ass'n of San Diego Cty. v. State Water Res. Control Bd*., 22 Cal. Rptr. 3d 128, 137 n.9 (Cal. Ct. App. 2004), *as modified on denial of reh'g* (Jan. 4, 2005) ("under governing state law principles, we do consider and give due deference to the Water Boards' statutory interpretations"). It also vastly overestimates the resources of conservation groups like American Rivers, which simply lack the means to bring countless as-applied challenges. Realistically, many actions by states and tribes taken under the unlawful 2020 Rule are likely to go unchallenged.

Second, other certifying states and tribes, seeing the limited information they will receive at the outset of the process, the narrow scope of review, the limited ability to impose meaningful conditions, the threat of a federal agency veto, and the prospect of being sued by the applicant for failing to follow fundamentally flawed rules, may—understandably—find trying to write a certification not worth the effort. If a state or tribe waives its authority in such a situation, the public may have no recourse to challenge that decision.

Moreover, the 2020 Rule will allow some projects to go forward, escaping meaningful review of their water quality impacts. Indeed, in many instances, a state's or tribe's certification is considered the definitive word on whether a project will impact water quality. For example, the Army Corps of Engineers' regulations governing the scope of its review in deciding whether to grant permits under Section 404 of the Clean Water Act highlights the far-reaching impacts of the 2020 Rule. The Corps' regulations state that "[c]ertification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 . . . will be considered conclusive with respect to water quality considerations unless [EPA], advises of other water quality aspects to be taken into consideration." 33 C.F.R. § 320.4(d). Thus, if a state or tribe certifies a project under the 2020 Rule that requires a Section 404 permit, and consistent with the 2020 Rule does not address the impacts caused by the project, the Corps will not

consider the project's impacts, including those casued by nonpoint source discharges—no matter how dire—as part of its public interest review process. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 834 (9th Cir. 1986); *Sierra Club*, 909 F.3d at 646 ("The plain language of the statute does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps determines that the alternative condition is more protective of water quality.").[4] Such a foreseeable outcome demonstrates the 2020 Rule's disruptive ripple effects across the federal regulatory web.

On the other side of the ledger, no party has argued that vacating the rule will be disruptive. *See ASSE Int'l*, 182 F. Supp. 3d at 1065 (ordering vacatur, after finding "no indication that the [agency] or anyone else would be seriously harmed or disrupted" by vacatur). Vacating the 2020 Rule would merely restore the workable status quo that existed for nearly five decades until the prior presidential administration upended it: the law would revert to the regulations and guidance that predated the Rule. *Paulsen*, 413 F.3d at 1008.

Moreover, no party has argued, or could seriously contend, that vacatur of the 2020 Rule would damage the purpose of the Clean Water Act—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters[,]" and to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution[.]" 33 U.S.C. §§ 1251(a)–(b). Or cause the type of environmental harm or other significant public harm that in the past has lead the courts to leave other rules in place with on remand. *See Idaho Farm Bureau*, 58 F.3d at 1405–06 (declining to vacate the listing of a snail species as endangered under the ESA on account of a procedural error under the APA, because doing might result in the extinction of that species); *Cal. Cmties. Against Toxics*, 688 F.3d at 994 (ordering remand without vacatur because vacating a rule revising a state implementation plan would exacerbate air pollution causing "severe" public harms undermining the goals of the Clean Air Act); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (declining to vacate a

[4] Some courts have also suggested that federal agencies may rely on a state's 401 Certification to satisfy the "hard look" requirement with respect to water quality issues under the National Environmental Policy Act. *See, e.g., Little Lagoon Pres. Soc., Inc. v. U.S. Army Corps of Eng'rs*, No. CIV.A. 06-0587-WS-C, 2008 WL 4080216, at *19 (S.D. Ala. Aug. 29, 2008).

rule because doing so would "thwart[] in an unnecessary way the operation of the Clean Air Act in the State of California"). Here, it is remand *without* vacatur that would accomplish such damage, and the potential environmental harm that will result.

B. In the alternative, the Court should deny EPA's motion for remand.

If the Court decides to not order vacatur, it should deny EPA's motion for remand altogether. The D.C. Circuit has denied voluntary remand where "EPA made no offer to vacate the rule; thus EPA's proposal would have left petitioners subject to a rule they claimed was invalid." *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000). Here, too, remand without vacatur would force American Rivers and the other plaintiffs to live indefinitely with the "harmful effects" of the 2020 Rule. Because remand without vacatur would "prejudice the vindication of [Plaintiffs'] claim[s]," *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018), EPA's motion should be denied. Moreover, granting EPA's request to dismiss this action would abdicate the Court's obligation to exercise the jurisdiction conferred to it by Congress and the Constitution. EPA has failed to identify which of the extremely narrow exceptions to federal jurisdiction allows for involuntary dismissal, or provide any legal basis for the drastic measure of dismissal with prejudice.

1. Remand is not appropriate because EPA has not demonstrated its commitment to a changed approach.

In the Ninth Circuit, courts generally look to the Federal Circuit's decision in *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001) for guidance when reviewing requests for voluntary remand. *See, e.g.*, *Cal. Cmties. Against Toxics*, 688 F.3d at 992; *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. C–09–4029 EMC, 2011 WL 3607790, at *3 (N.D. Cal. Aug. 16, 2011). *SKF* describes five positions an agency may take in response to judicial review of an agency action. *SKF*, 254 F.3d at 1028–29. EPA's request for remand is of the fourth type under *SKF*: "even in the absence of intervening events, the agency may request a remand, without confessing error, to reconsider its previous position." *Id*. at 1029. In this scenario, remand may be denied if the agency fails to demonstrate its request was made in good faith and is not frivolous. *Id*. "[B]ad faith may be demonstrated when an agency's position does

not demonstrate a commitment to a changed approach." *N. Coast Rivers All. v. U.S. Dep't of Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 11372492, at *2 (E.D. Cal. Sept. 23, 2016).

Here, EPA's statements of "substantial concern" over the rule alone do not justify remand without vacatur, because its actions will impermissibly leave plaintiffs "subject to a rule they claimed was invalid." *Chlorine Chemistry Council*, 206 F.3d at 1288. Here, while American Rivers certainly agrees EPA's "substantial concern" is justified, the *process* EPA has laid out to address those concerns does not demonstrate a genuine commitment to a changed rule that will address all of those concerns. Instead, to date, EPA has only commited to an initial process of "initiat[ing] a series of stakeholder outreach sessions and invit[ing] written feedback on how to revise the requirements for water quality certifications under the Clean Water Act." 86 Fed. Reg. at 29,451. This, however, is only the beginning of a lengthy rulemaking progress that EPA expects to run well into 2023. *See* Dkt. No. 143 at 6. During this time, if EPA follows through on the steps it has outlined, it will go through two rounds of public comment and several additional layers of review with the administration. EPA's current goal is to develop a rule "that promotes efficiency and certainty in the certification process, that is well informed by stakeholder input on the 401 Certification Rule's substantive and procedural components, and that is consistent with the cooperative federalism principles central to CWA Section 401." 86 Fed. Reg. at 29,542. Yet, that is virtually the same thing EPA said when promulgating the 2020 Rule, which it stated were "intended to make the Agency's regulations consistent with the current text of CWA section 401, increase efficiencies, and clarify aspects of CWA section 401 that have been unclear or subject to differing legal interpretations in the past." 85 Fed. Reg. at 42,236. There is nothing in EPA's proposed process preventing the agency from landing right back in the same place it started.

If EPA were genuinely committed to a changed approach, it would be reasonable to expect EPA to request vacatur and provide more clarity regarding the steps it will take to address the legal errors that permeate the 2020 Rule. *Cf. Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986) ("what is expected of a law-abiding agency is that it admit and correct error when

error is revealed").[5] Its unwillingness to provide more leaves all involved unable to discern whether, and to what degree, EPA has truly committed to a change in approach.

Moreover, the fact that American Rivers' challenge concerns "the scope of the [agency's] statutory authority" and "is intertwined with any exercise of agency discretion going forward" makes remand without vacatur all the more imprudent. *Util. Solid Waste Activities Grp.*, 901 F.3d at 436–37. A ruling on the merits will provide important guidance to EPA's ongoing and future implementation of the Clean Water Act. As the Fourth Circuit has observed, "remand without vacatur principally is relevant in matters where agencies have 'inadequately supported rule[s]'" and not for situations where the agency "exceeded [their] statutory authority." *Sierra Club*, 909 F.3d at 655 (quoting *Allied-Signal*, 988 F.2d at 150). This is especially true here, because EPA exceeded its statutory authority in a manner that directly impinges on other sovereigns' statutory authority under the Clean Water Act. American Rivers is unaware of *any* case where an agency rule was left in place during remand under such circumstances. For these additional reasons, the Court should decline EPA's request for remand without vacatur.

2. Granting EPA's motion would deprive American Rivers of its right to judicial review.

Even if remand without vacatur were appropriate, the procedural vehicle selected by EPA—dismissal with prejudice—is unwarranted. The Ninth Circuit has held that "[b]ecause dismissal with prejudice is a harsh remedy, our precedent is clear that the district court 'should first consider less drastic alternatives.'" *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1132 (9th Cir. 2008) (quoting *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996)). EPA fails to provide any legal basis for its request for dismissal with prejudice.[6] In fact, EPA does not

[5] Although refusing to formally confess error is not dispositive, *N. Coast Rivers Alliance*, 2016 WL 11372492, at *2, it is a factor courts take into account. *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (noting that the agency refused to confess error, in denying "last second" remand motion).

[6] Involuntary dismissal with prejudice is appropriate only when the following factors favor it: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits." *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002). EPA has not shown, nor can it, that any of these

identify a single case—and American Rivers is not aware of any—where a court dismissed a case with prejudice after determining that remand was appropriate. Nor has EPA demonstrated that less drastic alternatives are unavailable.[7]

EPA's proposed order of dismissal with prejudice would leave American Rivers and the other plaintiffs in this litigation injured by the unlawful 2020 Rule with no recourse if EPA delays its reconsideration, or indeed if EPA never completes its reconsideration of the 2020 Rule at all. It is unclear whether EPA's proposed order would even allow American Rivers to bring as-applied challenges to interim decisions made by federal agencies under the 2020 Rule. EPA's proposed order would render EPA unaccountable to judicial process, and would leave American Rivers' existing injuries unremedied and its future injuries without redress.

American Rivers has a right to judicial review of the 2020 Rule and for relief from the rule following a judgment on the merits. 5 U.S.C. §§ 702, 704, 706(2). Granting EPA's motion for remand without vacatur—whether effectuated through dismissal with prejudice or otherwise—would infringe this right.[8] More fundamentally, EPA seeks an end-run around federal jurisdiction. With its motion, EPA invites the Court to abdicate its "virtually unflagging obligation . . . to exercise the jurisdiction given [it]." *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976). The Court should decline EPA's invitation.

Conclusion.

For these reasons, the Court should either grant in part and deny in part EPA's motion for remand and order that the 2020 Rule be remanded with vacatur, or deny EPA's motion for

---

factors warrant the drastic and extraordinary measure of dismissal with prejudice.

[7] EPA has not attempted to show that even a less drastic measure, such as an involuntary stay, is warranted. *See Nat. Res. Def. Council v. Norton*, No. 1:05-cv-01207-OWW-LJO, 2007 WL 14283, at *13–16 (E.D. Cal. Jan. 3, 2007) (denying agency's request for remand and a stay, because "Plaintiffs are entitled to have their complaint decided on the merits, particularly given the fact that Defendants continue to rely on the challenged [agency rules] as if they were lawfully enacted"); *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936) (a litigant seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.").

[8] Ordering remand with vacatur, as discussed *supra* § I, would effectively grant American Rivers the relief it seeks and render its first amended complaint jurisdictionally moot, and therefore would not infringe its right of judicial review.

remand. If the Court decides to grant EPA's motion for remand without vacatur, it should not dismiss this case with prejudice, but retain jurisdiction.

Date: July 26, 2021.

Respectfully submitted,

/s/ Andrew Hawley
Andrew Hawley
Peter M. K. Frost
Sangye Ince-Johannsen

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to EPA's Motion for Remand Without Vacatur was electronically filed with the Clerk of the Court on July 26, 2021, using the Court's electronic filing system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's system.

/s/ Andrew Hawley
Andrew Hawley

TODD KIM
Assistant Attorney General
VANESSA R. WALDREF (D.C. Bar No. 989692)
Vanessa.R.Waldref@usdoj.gov
LESLIE M. HILL (D.C. Bar No. 476008)
Leslie.Hill@usdoj.gov
ELISABETH H. CARTER (N.Y. Bar No. 5733274)
Elisabeth.Carter@usdoj.gov
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
4 Constitution Square
150 M Street, N.E.
Suite 4.1133 (Waldref)/4.149 (Hill)/4.1406 (Carter)
Washington, D. C. 20002
Telephone: (202) 514-2741 (Waldref)
(202) 514-0375 (Hill)
(202) 514-0286 (Carter)
Facsimile: (202) 514-8865

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Clean Water Act Rulemaking This Document Relates to: ALL ACTIONS	Case No. 3:20-cv-04636-WHA (consolidated) **EPA'S REPLY IN SUPPORT OF MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 a.m. PDT

Pursuant to Civil L.R. 7-2 and this Court's Order of June 21, 2021 (Dkt. No. 142), Defendants, the United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), submit this reply brief in support of their motion to remand the Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (the "Certification Rule" or the "Rule") to EPA without vacatur. *See* EPA's Mot. for Remand, Dkt. No. 143 ("Motion").

The Court should grant EPA's motion for remand without vacatur and decline Plaintiffs' requests for the Court to vacate the Certification Rule or set an expedited schedule for merits briefing. *See* Dkt. No. 146 ("State Plaintiffs Opp'n"); Dkt. No. 145 ("Suquamish Tribe Opp'n"); Dkt. No. 147 ("Am. Rivers Opp'n").[1] Neither vacatur of the Certification Rule nor setting a schedule for merits briefing is warranted in these circumstances. EPA is commencing a new notice-and-comment rulemaking that will allow Plaintiffs' concerns to be addressed in a thorough and transparent process that will be informed by input from all interested stakeholders. On remand, Plaintiffs are free to press forward with their arguments during the notice-and-comment period for the new rulemaking and are likewise free to challenge the new rule once it has been issued.

Conversely, further consideration of the merits in this case would waste the Court's and the parties' resources debating the substance of a rule that is subject to significant change. In addition, further merits proceedings would risk asking EPA to opine about issues that are currently the subject of a new rulemaking, potentially forcing EPA to improperly prejudge

---

[1] For brevity, where the arguments of the plaintiffs in each of the three related cases are referenced separately, EPA refers to the States of Washington, California, Connecticut, Maryland, New Mexico, Oregon, Nevada, Colorado, New York, North Carolina, New Jersey, Rhode Island, Vermont, Minnesota, Michigan, Wisconsin, Illinois, and Maine, the District of Columbia, and the Commonwealths of Virginia and Massachusetts, as the "State Plaintiffs" or "Plaintiff States." EPA refers to Plaintiffs Suquamish Tribe, Pyramid Lake Paiute Tribe, Orutsararmiut Native Council, Columbia Riverkeeper, and Sierra Club as the "Suquamish Tribe." EPA refers to Plaintiffs American Rivers, American Whitewater, California Trout, and Idaho Rivers United as "American Rivers."

substantive aspects of the rule under consideration. EPA's requested remand without vacatur is appropriate because it will enable EPA to complete its issuance of a new rule governing Section 401 certification *before* judicial review on the merits. From a practical standpoint, remand would conserve the parties' limited resources and would best serve the interest of judicial economy because EPA's new rule may resolve or moot some or all of the claims presented in this litigation. For these reasons, this Court should follow the other two district courts in which challenges to the Rule were filed, both of which have already remanded the Certification Rule to EPA without vacatur. *See S.C. Coastal Conservation League v. EPA*, No. 2:20-cv-03062-BHH, Order (D.S.C. Aug. 2, 2021) (Exhibit A to the Declaration of Leslie M. Hill); *Delaware Riverkeeper Network v. EPA*, No. 2:20-cv-03412-MMB, Memorandum re Remand and Order (E.D. Pa. Aug. 6, 2021) (Exhibit B to the Hill Decl.).

ARGUMENT

1. Remand without vacatur is proper because EPA has announced its intention to reconsider and revise the Certification Rule.

Remand without vacatur is proper because EPA has announced its intention to reconsider and revise the Certification Rule. *See Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,541 (June 2, 2021) ("Notice").[2] In *SKF USA Inc. v. United States*, the Federal Circuit described five possible positions that an agency might take when an agency action is reviewed by the courts. 254 F.3d 1022, 1027-30 (Fed. Cir. 2001) ("*SKF USA*"). Relevant here is the fourth category, in which an agency may request a voluntary remand—in advance of a ruling on the merits—without confessing error, "in order to reconsider its previous position." 254 F.3d at 1029. "It might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision or that decision's relationship

[2] To the extent Plaintiffs seek and this Court is inclined to grant nationwide vacatur, EPA would request the opportunity for additional briefing on the scope of the vacatur. *See California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (citation omitted) (remedies "ordinarily 'operate with respect to specific parties.'").

to the agency's other policies." *Id.* In such a situation, the "reviewing court has discretion over whether to remand." *Id*. Such a "remand may be refused if the agency's request is frivolous or in bad faith," but "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id*.

Consistent with *SKF USA*, the Ninth Circuit has recognized that "[g]enerally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *SKF USA*, 254 F.3d at 1029); *see N. Coast Rivers All. v. United States Dep't of the Interior*, No. 11-CV-00307-LJO-MJS, 2016 WL 8673038, at *3 (E.D. Cal. Dec. 16, 2016) (noting that courts in the Ninth Circuit "generally look to the Federal Circuit's decision in *SKF USA* for guidance when reviewing requests for voluntary remand"). Such requests are normally granted as long as the agency's concern is substantial and legitimate. *SKF USA*, 254 F.3d at 1029; *accord United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. C-09-4029 EMC, 2011 WL 3607790, at *3 (N.D. Cal. Aug. 16, 2011); *Amalgamated Transit Union, Int'l v. United States Dep't of Labor*, No. 2:20-CV-00953-KJM-DB, 2021 WL 2003104, at *2 (E.D. Cal. May 19, 2021).

Of the three Plaintiff groups, only American Rivers has suggested that EPA's request is somehow frivolous or not made in good faith, arguing that the Agency's position does not demonstrate a commitment to a changed approach because EPA's "statements of 'substantial concern' over the rule" are insufficient. Am. Rivers Opp'n at 15-16 (quoting *N. Coast Rivers All. v. United States Dep't of Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 11372492, at *2 (E.D. Cal. Sep. 23, 2016)). American Rivers takes issue with EPA's statement of intent to follow the rulemaking process in reconsidering the Certification Rule, arguing that "[i]f EPA were *genuinely committed* to a changed approach, it would be reasonable to expect EPA to request vacatur and provide more clarity regarding the steps it will take to address the legal errors that permeate the 2020 Rule." Am. Rivers Opp'n at 16 (emphasis added). But that position reflects a misunderstanding of administrative rulemaking. Under American Rivers' theory, there is no

scenario under which an agency could demonstrate good faith or a lack of frivolity in its request unless it were to impermissibly prejudge the outcome of its rulemaking process or fail to comply with the Administrative Procedure Act rulemaking process, 5 U.S.C. § 555, *et seq*. *See, e.g., Cal. v. Bernhardt*, 472 F. Supp. 3d 573, 590-91 (N.D. Cal. 2020) (explaining that the "notice and comment requirements likewise apply when an agency seeks to amend or repeal a rule that has previously been promulgated.").

Contrary to American Rivers' suggestion, EPA's detailed notice of its intent to reconsider the Certification Rule and the process laid out in the Goodin Declaration demonstrate both EPA's "substantial concern" regarding the Rule and its express intent to reconsider numerous topics in the Certification Rule, including every challenged aspect of the Certification Rule. EPA Motion at 2-5, 10; *see also* Dkt. No. 143-1, Declaration of John Goodin ¶¶ 9-27 ("Goodin Decl."). Further undercutting American Rivers' suggestion of bad faith is the fact that EPA is already progressing through the reconsideration process. The initial stakeholder outreach period has already concluded, and the tribal consultation period is nearing its end. *See* Goodin Decl. ¶¶ 17-18. EPA is now reviewing stakeholder and tribal input, and in September the Agency will begin drafting a proposed rule based on that review. *See id.* ¶¶ 20-21. In other words, EPA has demonstrated through action that its stated intention to review every challenged aspect of the Certification Rule is in good faith. Thus, where, as here, none of the Plaintiffs has made a showing of bad faith or lack of sufficient commitment to reconsider the Rule, the Court should defer to the administrative process underway to revise the Rule.

Suquamish Tribe Plaintiffs incorrectly assert that EPA's request falls within the fifth *SKF USA* category, i.e., a voluntary remand request associated with a change in agency policy or interpretation. Suquamish Tribe Opp'n at 6. Suquamish Tribe posits that the Agency has already changed its policies or interpretation regarding the Certification Rule. That understanding is incorrect. Instead, as the Goodin Declaration explains in detail, EPA intends to faithfully follow the APA rulemaking requirements and reconsider, without prejudging, every challenged aspect of the Rule raised by Plaintiffs in this litigation. Goodin Decl. ¶¶ 11-14.

Plaintiffs also contend that EPA's request must be resolved on the basis of a two-factor analysis that requires consideration of "how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed,'" referred to as the *Allied-Signal* analysis. *Cal. Communities Against Toxics*, 688 F.3d at 992 (quoting *Allied–Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). This test for whether an agency action should be vacated is inapplicable here because the *Allied-Signal* analysis necessarily requires a determination on the merits. *Allied-Signal*, 988 F.2d at 150 (applying the two-factor test only after holding that the agency actions at issue "cannot be viewed as reasoned decision-making"). Consideration of the first *Allied-Signal* factor, the seriousness of an agency's errors, cannot occur here because there has been no ruling on the merits. And, for the reasons we explain above and below, proceeding to a merits ruling here would be both inappropriate and inefficient.

State Plaintiffs and American Rivers cite *ASSE International, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016), for the proposition that the *Allied-Signal* analysis applies to requests for remand both before and after a ruling on the merits. State Plaintiffs Opp'n at 22; Am. Rivers Opp'n at 3, 14-15. Although *ASSE International* did include such a statement, the proposition is both dicta and, in any event, incorrect. First, the statement is dicta because the *ASSE International* court was considering a motion for remand from an agency after the Ninth Circuit had already identified an error of law and sent the case back to district court. 182 F. Supp. 3d at 1062 (explaining that the Ninth Circuit had found a due process violation and remanded to the district court to make certain determinations). Second, although the *ASSE International* court relied upon *Natural Resources Defense Council, Inc. v. United States Department of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002) ("*NRDC*"), for the proposition that "[c]ourts faced with a motion for voluntary remand employ 'the same equitable analysis' courts use to decide whether to vacate agency action after a 'rul[ing] on the merits,'" *ASSE Int'l,* 182 F. Supp. 3d at 1064, that proposition is a misreading of *NRDC*. In *NRDC*, an agency sought a remand to reevaluate its decision in light of a ruling from another Circuit Court

that cast doubt upon the decision. 275 F. Supp. 2d at 1141-42. The district court in *NRDC* noted that it was not ruling on the merits of the agency action, but concluded that it should apply the "test for whether to remand *an arbitrary and capricious rule*" without vacatur, i.e., the *Allied-Signal* test, in those circumstances. 275 F. Supp. 2d at 1143 (citing *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). The *ASSE International* court's conclusion that the same test applies to voluntary requests for remand before any merits determination or admission of error is misplaced.

Notably, in each of the cases cited by Plaintiffs suggesting applicability of the *Allied-Signal* analysis, there had already been a ruling on the merits, a concession by the agency that an intervening court decision cast doubt on the agency's action, or at least some basis upon which the reviewing court could identify and evaluate the agency's errors such that the court could assess the seriousness of those errors.[3] That is not the case here, so the *Allied-Signal* framework is inapplicable.

---

[3] *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 528 (9th Cir. 2015) (considering whether to vacate after the court "cannot conclude that the unconditional registration [of the challenged pesticide] is supported by the record as a whole"); *Cal. Communities Against Toxics*, 688 F.3d at 992-93 (considering whether to vacate after finding that EPA's rules was both procedurally and substantively invalid); *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d at 1063 (considering whether to vacate sanctions issued by the State Department after remand from a Ninth Circuit panel that found a due process violation); *Idaho Farm Bureau*, 58 F.3d at 1405-06 (declining to vacate the listing of a snail species as endangered after determining that the agency's action was based on a procedural error under the APA); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (declining to vacate EPA air quality designations after finding that EPA had failed to comply with APA notice and comment procedures in issuing the designations); *N. Coast Rivers All. v. United States Dep't of the Interior*, No. 116-CV-00307-LJO-MJS, 2016 WL 8673038, at *5 (E.D. Cal. Dec. 16, 2016) (granting motion for voluntary remand where agency acknowledged that its action would not pass muster under intervening Ninth Circuit decision); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1240 (N.D. Cal. 2015) (considering whether to vacate Endangered Species Act incidental take permits that the court had already determined were issued arbitrarily and capriciously).

Indeed, EPA has presented a classic case for remand without vacatur. The administrative rulemaking process that is already underway, not judicial review, is the appropriate course for EPA to address its concerns with the Certification Rule. Courts "have recognized that '[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.'" *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562-63 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). "Remand has the benefit of allowing agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (internal quotations omitted)). Here, EPA seeks remand because it intends to reconsider and revise the implementing regulations for state certification of federal licenses and permits that may result in any discharge into waters of the United States pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341. To that end, EPA has commenced a new rulemaking, which will allow it to address the alleged legal and policy flaws in the Certification Rule in a comprehensive and transparent manner, with full participation by interested members of the public.

2. <u>Remand without vacatur, and not a merits adjudication, is procedurally appropriate and efficient.</u>

Granting remand and dismissal has the added benefit of conserving both the parties' and the Court's resources because it will resolve the current litigation and allow EPA to focus its limited resources on a new rule that may well address Plaintiffs' concerns, thereby preventing additional litigation. EPA has already commenced the process to promulgate a revised rule. Yet Plaintiffs ask this Court to undertake a burdensome and potentially lengthy merits consideration of a rule that will likely cease to exist in its current form by spring 2023, about one and a half years from the filing of this motion. *See* Goodin Decl. ¶ 27. Continuing with merits proceedings, as Plaintiffs request, would interfere with and undoubtedly delay EPA's new rulemaking. EPA is entitled to commence a new rulemaking to govern Section 401 certification, and the Court should defer to this process. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125

(2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

Remand without vacatur would not unduly prejudice Plaintiffs, who are able to participate in the notice-and-comment opportunities provided by the new rulemaking. Nor would remand serve to deny Plaintiffs judicial review, as they are free to challenge any certification decisions issued under the current Rule, and to challenge the new rule once it has been issued. That the Rule will remain in effect while EPA revises it pursuant to the required process of the Administrative Procedure Act should not be considered "undue" prejudice. Indeed, the rulemaking requirements of the Administrative Procedure Act serve to provide stability and mitigate against the disruptive consequences of frequent changes in regulatory schemes. EPA has set forth a reasoned timeline for a proposed rule in spring 2022 and final rule in spring 2023. Goodin Decl. ¶¶ 23, 27. *Compare with* State Plaintiffs Opp'n at 2 (asserting without support that remand without vacatur would "leav[e] the Rule in place for at least an additional two years"). During the rulemaking period, EPA is committed to providing technical assistance to all stakeholders regarding interpretation and implementation of the Certification Rule and working with its federal agency partners to address implementation concerns raised by Plaintiffs. Goodin Decl. ¶¶ 29-30. In sum, because EPA is commencing a new rulemaking to address Plaintiffs' concerns with the Certification Rule, the Court should grant EPA's motion for voluntary remand without vacatur instead of potentially requiring EPA to litigate the merits of a rule that it has committed to reconsider and revise.

American Rivers and Suquamish Tribe allege they will suffer harm or undue prejudice if the Court does not vacate the Certification Rule.[4] State Plaintiffs present numerous declarations describing the alleged harm that they will suffer and even suggest that it would be appropriate to set an expedited briefing schedule if the Court does not remand the Rule.[5] Plaintiffs filed this

[4] Am. Rivers Opp'n at 10-15; Suquamish Tribe Opp'n at 9-11.
[5] State Plaintiffs Opp'n at 4-14 and Dkt. No. 146-1 to 146-9.

litigation in summer 2020,[6] after the final Rule was issued on July 13, 2020. 85 Fed. Reg. at 42,210. Yet, despite their protestations of alleged harm if the Rule is not quickly vacated now, Plaintiffs took no actions in 2020 to indicate that time was of the essence; in fact, their actions have prolonged the litigation. None of the Plaintiffs sought preliminary relief from the Court in 2020 to maintain the status quo. More than one year has passed; yet, now Plaintiffs suggest that allowing the Certification Rule to remain in place until EPA completes its reconsideration and promulgates a revised rule in the spring of 2023 is too long. *See* Am. Rivers Opp'n at 14 (arguing that "[v]acating the 2020 Rule would merely restore the workable status quo"). Furthermore, Plaintiffs rejected the opportunity to expedite this action by agreeing to file summary judgment briefs based on EPA's administrative record, as EPA requested. *See* Dkt. No. 84 § 17(b) (requesting a schedule that would have provided for a summary judgment hearing as early as February 11, 2021). Plaintiffs instead stalled merits briefing by demanding supplementation of the record, giving rise to a lengthy process that required EPA to review large numbers of internal communications and produce privilege logs and additional documents. Dkt. No. 84, § 17(a). Dkt. No. 115. Against that backdrop of delay, Plaintiffs' allegations that severe harm will occur during the rulemaking period, such that vacatur is the only option, are unconvincing.

CONCLUSION

For the foregoing reasons, and for the reasons identified in EPA's motion to remand, EPA respectfully asks the Court to remand the Certification Rule without vacatur and to dismiss this case rather than requiring EPA to litigate a rule that may be substantially revised or replaced.

Respectfully submitted this 12th day of August 2021.

---

[6] *See* Dkt. No. 1 in Case No. 3:20-cv-4636 (American Rivers); Dkt. No. 1 in original Case No. 3:20-cv-04869 (State Plaintiffs); and Dkt. No. 1 in original Case No. 3:20-cv-06137 (Suquamish Tribe).

TODD KIM
Assistant Attorney General

/s *Elisabeth H. Carter*
ELISABETH H. CARTER (N.Y. Bar No. 5733274)
Elisabeth.Carter@usdoj.gov
LESLIE M. HILL (D.C. Bar No. 476008)
Leslie.Hill@usdoj.gov
VANESSA R. WALDREF (D.C. Bar No. 989692)
Vanessa.R.Waldref@usdoj.gov
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, N.E.
Suite 4.1133 (Waldref)/4.149 (Hill)/4.1406 (Carter)
Washington, D.C. 20002
Telephone: (202) 514-2741 (Waldref)
(202) 514-0375 (Hill)
(202) 514-0286 (Carter)
Facsimile (202) 514-8865

Attorneys for Defendants

Of counsel:
James Curtin
Diane McConkey
Alexander Mullee
Andrea Priest
Office of General Counsel
U.S. Environmental Protection Agency

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking This Document Relates to: ALL ACTIONS	Case No. 3:20-cv-04636-WHA (consolidated) **DECLARATION OF LESLIE M. HILL IN SUPPORT OF EPA's REPLY IN SUPPORT OF EPA's MOTION FOR REMAND WITHOUT VACATUR**

I, Leslie M. Hill, hereby declare as follows:

1. I am a Trial Attorney for the United States Department of Justice and counsel of record for Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), in this action. I am admitted to practice in the District of Columbia. Pursuant to Civil L.R. 6-3(a), I make this declaration in support of the EPA's Reply in Support of its Motion for Remand Without Vacatur. I have personal knowledge of the facts herein, and if called upon to testify, I could and would do so.

2. Attached as Exhibit A is a true and correct copy of an order issued in *S.C. Coastal Conservation League v. EPA*, No. 2:20-cv-03062-BHH (D.S.C.) on August 2, 2021 (Dkt. No. 69).

3. Attached as Exhibit B is a true and correct copy of the memorandum and order regarding remand issued in *Delaware Riverkeeper Network v. EPA*, No. 2:20-cv-03412-MMB, Memorandum re Remand and Order (E.D. Pa.) on Aug. 6, 2021 (Dkt. No. 74 & 75).

//

//

//

//

//

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. Executed on August 12, 2021, at Washington, D.C.

/s/ Leslie M. Hill

LESLIE M. HILL (D.C. Bar No. 476008)
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
4 Constitution Square
150 M Street, N.E.
Suite 4.149
Washington, D.C. 20002
Leslie.Hill@usdoj.gov
Telephone (202) 514-0375
Facsimile (202) 514-8865

Attorney for EPA

aUNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, *et al*.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN,[1] in his official capacity as the Administrator of the United States Environmental Protection Agency,

Defendants,

AMERICAN PETROLEUM INSTITUTE, *et al*.,

Defendant-Intervenors,

NATIONAL HYDROPOWER ASSOCIATION,

Defendant-Intervenors,

STATE OF LOUISIANA, *et al*.,

Defendant-Intervenors.

Civil Action No. 2:20-cv-03062-BHH

ORDER GRANTING EPA'S MOTION FOR REMAND WITHOUT VACATUR

Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), moved to remand the *Clean Water Act Section*

[1] EPA Administrator Michael Regan is automatically substituted for Andrew Wheeler pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (the "Certification Rule"), to the EPA without vacatur. (ECF No. 67.) Having considered the EPA's motion and Plaintiffs' response in opposition, and otherwise being sufficiently advised, the Court hereby GRANTS the EPA's motion. It is therefore ORDERED that the Certification Rule is remanded to EPA without vacatur. All other pending motions are hereby denied as moot and this action is dismissed, with all parties to bear their own attorneys' fees and costs.

IT IS SO ORDERED.

/s/Bruce Howe Hendricks
United States District Judge

August 2, 2021
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE RIVERKEEPER NETWORK, et al. **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.**	**CIVIL ACTION** **NO. 20-3412**

MEMORANDUM RE REMAND

Baylson, J. **August 6, 2021**

I. Introduction

In this case brought by an environmental organization against the United States Environmental Protection Agency (EPA) regarding an environmental regulation, Defendants have filed a Motion to Remand without vacatur arguing that the agency should have the opportunity to review and revise the regulation on its own. For the reasons stated below, Defendants' Motion to Remand without vacatur will be granted. Defendant Intervenors Motion to Strike will be denied.

II. Facts and Procedural History

Plaintiffs are the Delaware Riverkeeper Network (DRN), an environmental and community organization and Maya Van Rossum, the leader of DRN. Defendants are the EPA and Michael Regan, the new EPA Administrator, who has been substituted for Andrew Wheeler as a Defendant. Plaintiffs brought this case seeking the rescission of the "Certification Rule" promulgated during the Trump Administration. The Certification Rule concerns the process for permitting activities that may affect water quality. This Court previously denied Defendants' Motion to Dismiss based on standing. On January 20, 2021, President Biden issued Executive Order 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. 86 Fed.

Reg. 7037 (Jan. 25, 2021). Executive Order 13,990 stated that it is the policy of the new administration:

> to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

Id. at 7037. This Executive Order directs federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." Id. The Biden Administration has specifically stated that the Certification Rule is a regulation which it intends to review for potential revision or rescission. In response to the Administration announcing its intentions to review the Rule, the parties agreed to hold the case in abeyance to provide the EPA more time to determine a course of action. ECF 57, 61, 64. At this point, the EPA has completed its initial review of the Certification Rule and determined that it will undertake a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule. The EPA expects a proposed rule detailing revisions to the Certification Rule will be published in the Federal Register in Spring 2022. Following the public comment period on the proposed rule, EPA plans to review comments and other input, develop the final rule, and submit it to OMB for interagency review, with a final rule in Spring 2023.

Defendants filed the present Motion to Remand without vacatur on July 1, 2021 (ECF 67). Plaintiffs responded on July 22, 2021, arguing that the Court should remand with vacatur, or in the

alternative, that the case should proceed (ECF 68). Defendant Intervenors filed a Joint Motion to Strike on August 4, 2021, seeking to strike the Plaintiffs response to the extent it seeks remand with vacatur (ECF 70). Defendants filed a Reply in support of their Motion (ECF 71), and Plaintiffs filed a response to Defendant Intervenors Motion to Strike on August 5, 2021 (ECF 72).

III. Legal Standard

An "agency may request a remand (without confessing error) in order to reconsider its previous position." SKF USA, Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001). "[T]he reviewing court has discretion over whether to remand." Id. Courts "generally grant an agency's motion to remand so long as the agency intends to take further action with respect to the original agency decision on review" because it "has the benefit of allowing agencies to cure their own mistakes rather than wasting the courts' and the parties' resources." Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414, 436 (D.C. Cir. 2018).

The decision to vacate the Rule or leave it in place while the agency reconsiders its decision is also a matter within the Court's discretion. Checkosky v. SEC, 23 F.3d 452, 465 (D.C. Cir. 1994). The Third Circuit, as well as this Court, has cited the D.C. Circuit's Allied-Signal test when considering whether vacatur is appropriate. See Prometheus Radio Proj. v. Fed. Comm. Comm'n, 824 F.3d 33, 52 (3d Cir. 2016); Comite de Apoyo a los Trabajadores Agricolas v. Solis, 933 F. Supp. 2d 700, 713–16 (E.D. Pa. 2013). Under that test, "[t]he decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

In Allied-Signal, the D.C. Circuit found that "[a]n inadequately supported rule . . . need not necessarily be vacated." Id. at 150. In that case, the deficiencies were the failure of the agency to

adequately state its reasoning, and thus not "serious" because the agency, on remand, might be able to easily provide the necessary explanation. Id. at 151. In addition, the consequences of an interim rule change would have been extremely disruptive as it would have required the agency to refund all the fees that had been collected under the rule at issue. Id.

In SKF USA Inc. v. United States, the D.C. Circuit reviewed five general circumstances in which an agency action is review by the Courts. 254 F.3d 1022, 1028–29 (Fed. Cir. 2001). In its discussion of the circumstance most relevant here, the D.C. Circuit stated:

> [T]he agency may request a remand because it believes that its original decision is incorrect on the merits and wishes to change the result. That is the present situation. Remand to an agency is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations. The more complex question, however, involves a voluntary remand request associated with a change in agency policy or interpretation. If there is a step one Chevron issue - that is, an issue as to whether the agency is either compelled or forbidden by the governing statute to reach a different result - a reviewing court again has considerable discretion. It may decide the statutory issue, or it may order a remand. For example, in Steele v. FCC, No. 84-1176 (D.C. Cir. Oct. 31, 1985) (en banc), as described in Lamprecht v. FCC, 294 U.S. App. D.C. 164, 958 F.2d 382, 385 (D.C. Cir. 1992), the Court of Appeals for the District of Columbia Circuit granted the FCC's motion to remand when the FCC admitted that its decision was contrary to the Communications Act and the Constitution. Although a court need not necessarily grant such a remand request, remand may conserve judicial resources, or the agency's views on the statutory question, though not dispositive, may be useful to the reviewing court.
>
> Where there is no step one Chevron issue, we believe a remand to the agency is required, absent the most unusual circumstances verging on bad faith. Under Chevron, agencies are entitled to formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress." Chevron, 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)). Furthermore, an agency must be allowed to assess "the wisdom of its policy on a continuing basis." Id. at 864. Under the Chevron regime, agency discretion to reconsider policies does not end once the agency action is appealed. See Auer v. Robbins, 519 U.S. 452, 462-63 (1997) (deferring to agency's interpretation of its own regulation advanced in litigation).

Id. at 1029 (citations omitted).

IV. Parties' Arguments

The EPA argues first that remand without vacatur is appropriate because the EPA has publicly announced its intention to reconsider and revise the Rule. It argues that where there is no showing of bad faith, the Court should allow the agency to revise the Rule on its own, relying on SKF USA. It also argues that remand without vacatur conserves the parties and the Court's resources by resolving the current litigation and would not prejudice Plaintiffs who will have the opportunity to participate in the rule making process. It argues that allowing the Rule to remain in place in the process is not undue prejudice to Plaintiffs because going through the rulemaking process is the best way to promote stability under the APA. The EPA states it is committed to providing assistance to stakeholders and working with agency partners to address Plaintiff's concerns in the interim.

Plaintiffs seek remand with vacatur, or in the alternative, for the case to proceed on the merits. Plaintiffs argue that vacatur is appropriate because the Rule has serious deficiencies and would not be disruptive. Plaintiffs also argue that they would be prejudiced by allowing the Rule to remain in place because they will have to continue to suffer the harms alleged under the Rule for at least two years for the new Final Rule is promulgated. They contend that Defendants cannot argue that the harms are too speculative, as this Court struck down such arguments in its opinion on standing.

V. Discussion

To begin, the Court finds that remand to the EPA is appropriate here, where the agency has indicated its clear intent to revise the Rule on its own. It would not serve interests of judicial

economy to continue a case regarding a Rule that will likely no longer be law once the agency makes its revisions. Thus, the key question here is whether vacatur of the Rule is appropriate.

The discussion of remand in SKF USA is most relevant here, as it discusses a situation in which the agency seeks to revise a decision based on its belief that the substance of its prior decision was incorrect, as opposed to a procedural or clerical issue. SKF USA does not concern a Rule but the calculation of a tax by the Department of Commerce. Therefore, the opinion does not discuss vacatur specifically. However, under the principles described by the D.C. Circuit in this case, allowing the agency to use its discretion to revise the Rule here would be appropriate.

This case is somewhat distinct from the other cases which discuss vacatur specifically. In Comite de Apoyo a los Trabajadores Agricolas v. Solis, the Court laid out the usual circumstances in which remand is sought:

> The practical effect of remand without vacatur is that an invalid rule remains in place while an agency works to correct its errors. This approach is often sensible where an agency promulgates a substantively valid rule through an invalid process and the agency will likely promulgate the same rule through a proper process on remand. Nonetheless, remand without vacatur is far less logical where, as here, a court finds that a rule directly contradicts an agency's authority and the agency expresses no intention of timely correcting its error. In such circumstances, to leave an invalid rule in place is for a reviewing court to legally sanction an agency's disregard of its statutory or regulatory mandate.

933 F. Supp. 2d 700, 714 (E.D. Pa 2013) (Davis, J.). The present situation does not fit into either of these circumstances. The Rule is not being remanded based on an invalid process, and it has also not been found to be invalid at this stage in the case. The parties have also not pointed to other specific consequences of vacatur. As the Court has not yet, and will not, make a finding on the substantive validity of the Certification Rule, the principles discussed in SKF-USA support a remand without vacatur.

VI. Motion to Strike

There are several intervenors in this case: the States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming, American Petroleum Institute, Interstate Natural Gas Association of America, and National Hydropower Association. The intervenors have filed a collective Motion to Strike the Plaintiffs' Response to the extent that Plaintiffs request remand with vacatur.

Intervenor Defendants argue that Plaintiffs request that the Court remand without vacatur is procedurally improper because it seeks affirmative relief through a response, as opposed to filing a Motion as required. Intervenor Defendants argue that by filing a response seeking affirmative relief and making arguments which go to the validity of the Rule, they have deprived the Intervenor Defendants of the opportunity to oppose their Motion and make arguments in response. Plaintiffs argue that their response does not seek affirmative relief and is an appropriate response to the Motion by Defendants. Plaintiffs also point out that the Intervenor Defendants were aware of Plaintiffs intention to oppose Defendants' Motion for Remand without vacatur and had the opportunity to file a brief in support.

The Court will deny Defendant Intervenors Motion to Strike because they had the opportunity to present arguments in support of Defendants Motion and/or in opposition to Plaintiffs and chose not to. There is no basis for striking Plaintiffs' Response.

VII. Conclusion

For the reasons stated above, the EPA's Motion to Remand without vacatur is granted. Defendant Intervenors Motion to Strike is denied. An appropriate Order follows.

O:\CIVIL 20\20-3412 Del Riverkeeper v EPA\20cv3412 Memorandum Re Remand.docx

/

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE RIVERKEEPER NETWORK, et al. **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.**	**CIVIL ACTION** **NO. 20-3412**

ORDER RE REMAND

AND NOW, this 6th day of August, 2021, upon consideration of Defendants Environmental Protection Agency and Michael Regan's Motion for Remand without vacatur (ECF 67), Plaintiffs Delaware Riverkeeper Network and Maya Van Rossum's Response (ECF 68), Defendants Reply (ECF 71), Defendant Intervenors Motion to Strike (ECF 70), and Plaintiffs Response (ECF 72), for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that:

1. Defendants Motion for Remand without vacatur is **GRANTED**.

2. For the benefit of all who rely on the Delaware River for business, recreation, and public health, the EPA shall expedite the resolution of this process so that any new rule will become effective as soon as possible.

3. Defendant Intervenors Motion to Strike is **DENIED**.

BY THE COURT:

/s/ MICHAEL M. BAYLSON

MICHAEL M. BAYLSON, U.S.D.J.

O:\CIVIL 20\20-3412 Del Riverkeeper v EPA\20cv3412 Order re Remand.docx

TROUTMAN PEPPER HAMILTON SANDERS LLP
Elizabeth Holt Andrews (SBN 263206)
elizabeth.andrews@troutman.com
Three Embarcadero Center, Suite 800
San Francisco, California 94111-4057
Telephone: 415.477.5700
Facsimile: 415.477.5710

Misha Tseytlin (admitted *pro hac vice*)
misha.tseytlin@troutman.com
Sean T.H. Dutton (admitted *pro hac vice*)
sean.dutton@troutman.com
227 W. Monroe Street, Suite 3900
Chicago, IL 60606-5085
Telephone: 312.759.1920
Facsimile: 312.759.1939

Charles Sensiba (admitted *pro hac vice*)
charles.sensiba@troutman.com
401 9th Street N.W., Suite 1000
Washington, D.C. 20004
Telephone: 202.274.2850
Facsimile: 202.274.2994

Andrea W. Wortzel (admitted *pro hac vice*)
andrea.wortzel@troutman.com
1001 Haxall Point, 15th Floor
Richmond, VA 23219
Telephone: 804.697.1406
Facsimile: 804.697.1339

Attorneys for Intervenor Defendant National Hydropower Association

Additional Counsel listed in signature blocks

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: Clean Water Act Rulemaking

Lead Case No. 3:20-CV-04636-WHA

Related Case Nos.
3:20-CV-04869-WHA
3:20-CV-06137-WHA

INTERVENOR DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE

Hearing Date: August 26, 2021
Time: 12:00 PM
Courtroom: AT&T Conference Line
Judge: The Hon. William H. Alsup

The States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming (collectively the "State Defendants"), American Petroleum Institute ("API"), Interstate Natural Gas Association of America ("INGAA"), and National Hydropower Association ("NHA") (collectively "intervenor defendants") respectfully submit this reply in support of their motion to strike plaintiffs' oppositions, Dkts. 145, 146, and 147, to the extent that plaintiffs request an unmoved-for remand with vacatur in the above-captioned case.

As intervenor defendants explained in their motion to strike, under this Court's rules and practices, if a party seeks relief from this Court—such as vacatur of a rule adopted through notice-and-comment rulemaking—that party must file a motion asking for such relief. *See* Dkt. 148 at 3–5. EPA here properly filed a motion for remand without vacatur. Intervenor defendants do not oppose the relief that EPA sought, and thus had no reason to file a responsive brief by the Court-ordered deadline. *See* Dkt. 148 at 3. Plaintiffs thereafter filed an opposition, but did not limit themselves to arguing that this Court should proceed with this case. Instead, they improperly asked this Court to give them all of the relief that they sought in this case by vacating the Rule, with some plaintiffs making this their lead argument. *See* Dkt. 148 at 3.

In their opposition to the motion to strike, plaintiffs take the remarkable position that intervenor defendants should have anticipated that plaintiffs would seek an unmoved-for vacatur in plaintiffs' upcoming opposition to EPA's motion for remand without vacatur, and then *preemptively* defended the legality of the Rule in response to EPA's motion, before ever seeing plaintiffs' opposition. *See* Dkt. 154 at 4–6 & n.2. That makes no sense. Intervenor defendants had no reason to mount a legal defense of the Rule because they had no objection to the relief that EPA requested. *See* Dkt. 143. Contrary to plaintiffs' claim, Dkt. 154 at 5, intervenor defendants could not have guessed that plaintiffs would implausibly seize upon EPA's statement that it "will undertake a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule," Dkt. 143 at 2, *see* 7–8, essentially to claim that EPA violated the American Procedure Act ("APA") by conceding the illegality of the Rule in discussing a *proposed* rulemaking, during which the agency must consider all relevant issues with an open mind, *see* *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) ("The opportunity for

TROUTMAN PEPPER HAMILTON SANDERS LLP
THREE EMBARCADERO CENTER, SUITE 800
SAN FRANCISCO, CALIFORNIA 94111-4057

comment must be a meaningful opportunity, and we have held that in order to satisfy this requirement, an agency must also remain sufficiently open-minded." (citation omitted)); *accord State of Cal. v. Bureau of Land Management*, 286 F.Supp.3d 1054, 1071 (N.D. Cal. 2018).

If plaintiffs want this Court to vacate the Rule as part of a remand—which would require, at the absolute minimum, consideration of the "seriousness" of the Rule's claimed "deficiencies," *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993), as well as the "disruptive consequences" of vacatur, *id.*; *accord* Dkt. 146 at 18–19 & n.7 (plaintiffs relying upon *Allied-Signal*); Dkt. 147 at 3–4 (same)—there are proper avenues for them to ask for this relief. Most obviously, plaintiffs could file a motion for remand with vacatur and make arguments as to the claimed legal deficiencies in the Rule. Then intervenor defendants could oppose those arguments in an orderly process. Alternatively, if this Court decides to, in plaintiffs' words, "deny EPA's motion for remand outright and allow the parties to proceed to the merits," Dkt. 154 at 2, plaintiffs could file a motion for summary judgment making those same merits arguments against the Rule, and intervenor defendants could oppose those arguments as well. But here, plaintiffs have asked this Court to deprive intervenor defendants of their right to defend the Rule from vacatur, *without this Court ever receiving adversarial briefing on whether there is any basis in law to vacate the Rule*. Although EPA did file a reply brief in support of its motion for remand without vacatur, as plaintiffs note, Dkt. 154 at 6, given that EPA is in the middle of its rulemaking process, EPA did not say anything as to the Rule's merits because such "issues [ ] are currently the subject of new rulemaking," Dkt. 153 at 1.

Rather than citing any rule, local practice, or decision of this Court permitting them to ask for vacatur of a rule without filing a motion, plaintiffs argue that this Court's rules against seeking relief through opposition briefs are subject to an exception for unmoved-for relief "[]tethered from the original motion." Dkt. 154 at 4. There is, of course, no such exception in this Court's rules and plaintiffs do not point to any authority indicating that type of exception exists.

Plaintiffs seek to change the subject to certain decisions from other courts, but those cases do not support plaintiffs' efforts to obtain vacatur of a rule adopted through notice-and-comment rulemaking without adversarial briefing on the Rule's legality. *See* Dkt. 154 at 3–5. None of the

TROUTMAN PEPPER HAMILTON SANDERS LLP
THREE EMBARCADERO CENTER, SUITE 800
SAN FRANCISCO, CALIFORNIA 94111-4057

cases that plaintiffs cite deprived a party opposing vacatur of the opportunity to brief the underlying merits of the rule, over that party's objection. Plaintiffs' lead authority—*North Coast Rivers Alliance v. U.S. Department of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 U.S. Dist. LEXIS 174481 (E.D. Cal. Dec. 16, 2016)—illustrates the point. There, a coalition of environmental organizations alleged that a federal agency had issued a deficient environmental assessment connected to the approval of certain interim contracts. *Id.* at *1–2. Westlands Water District ("Westlands"), a party to one of the contracts at issue, intervened to defend its contract. *Id.* at *3 & n.2. The agency moved for voluntary remand without vacatur, and the environmental organizations opposed through a "parallel request to vacate both the [environmental assessment] and the interim Contracts." *Id.* at *16. The district court then specifically ordered supplemental briefing on "the question of vacatur," including "the seriousness of an agency's errors." 2016 U.S. Dist. LEXIS 130781, at *9–10 (E.D. Cal. Sept. 23, 2016). The other cases that plaintiffs rely upon that involved intervenors in support of the agency's underlying action similarly permitted intervening parties the opportunity to present briefing on the vacatur issue *after* another party made a vacatur request. *See Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1240 (D. Colo. 2011) (federal agency filed a motion seeking remand *with vacatur*, which intervenor defendants then opposed); *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1137–38 & n.27 (C.D. Cal. 2002) (intervenor defendants filed supplemental briefing on the parties' motions for remand and, separately, for vacatur, while supporting vacatur).

Unlike in *North Coast Rivers Alliance*, plaintiffs' circumvention of this Court's rules would leave intervenor defendants without any opportunity to defend the Rule. Intervenor defendants thus respectfully request that this Court strike plaintiffs' opposition to the extent it asks for vacatur of any aspect of the Rule. Alternatively, if this Court does decide to consider vacating the Rule without any motion from plaintiffs, intervenor defendants respectfully ask that this Court provide them with the opportunity to file supplemental briefing to respond to plaintiffs' unmoved-for vacatur request, giving intervenor defendants here the same opportunity as the intervenor defendants received in plaintiffs' lead authority, *North Coast Rivers Alliance*.

TROUTMAN PEPPER HAMILTON SANDERS LLP
THREE EMBARCADERO CENTER, SUITE 800
SAN FRANCISCO, CALIFORNIA 94111-4057

Respectfully submitted,

Dated: August 19, 2021

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: */s/ Elizabeth Holt Andrews*
Elizabeth Holt Andrews*
Misha Tseytlin (admitted *pro hac vice*)
Charles Sensiba (admitted *pro hac vice*)
Andrea W. Wortzel (admitted *pro hac vice*)
Sean T.H. Dutton (admitted *pro hac vice*)

Attorneys for Intervenor Defendant
National Hydropower Association

JEFF LANDRY
ATTORNEY GENERAL OF LOUISIANA

By: */s/ Joseph S. St. John*
Elizabeth B. Murrill, Solicitor General (admitted *pro hac vice*)
Joseph S. St. John, Deputy Solicitor General (admitted *pro hac vice*)
Ryan M. Seidemann, Assistant Attorney General (admitted *pro hac vice*)

Attorneys for State Intervenor Defendants
States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming

HUNTON ANDREWS KURTH LLP

By: */s/ George P. Sibley, III*
Clare Ellis
George P. Sibley, III (admitted *pro hac vice*)
Deidre G. Duncan (admitted *pro hac vice*)

Attorneys for Intervenor Defendants
American Petroleum Institute and Interstate Natural Gas Association of America

* Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other Signatories. */s/ Elizabeth Holt Andrews*

TROUTMAN PEPPER HAMILTON SANDERS LLP
THREE EMBARCADERO CENTER, SUITE 800
SAN FRANCISCO, CALIFORNIA 94111-4057