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 I 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

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN RIVERS, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, et al.,

Defendants.

No. C 20-04636 WHA

ORDER RE MOTION TO RELATE

The parties in the case which plaintiffs move to relate (Dkt. No. 22) have been asked for their comment on the pending motion. *See California v. Wheeler*, No. C 20-04869 KAW, Dkt. No. 42. The court appreciates counsel's assistance in filing any comments on this docket.

IT IS SO ORDERED.

Dated: August 18, 2020.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED

Plaintiffs,

v.

ANDREW R. WHEELER; U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

No. 3:20-cv-4636-JSC

NOTICE OF MOTION AND MOTION TO INTERVENE BY THE STATES OF LOUISIANA, MONTANA, ARKANSAS, MISSISSIPPI, MISSOURI, TEXAS, WEST VIRGINIA, AND WYOMING

Hr'g Date: Oct. 8, 2020
Hr'g Time: 08:00 a.m.
Judge: Hon. William Alsup
Action Filed: July 13, 2020
Dep't: San Francisco Courthouse

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Pursuant to Local Rule 7-1(b), the States of Louisiana, Montana, Arkansas, Mississippi, Missouri, Texas, West Virginia, and Wyoming (collectively, "State Intervenors") respectfully move to intervene as Defendants in the above-captioned litigation without oral argument. Alternatively, the State Intervenors notice that on October 8, 2020, at 8:00 a.m., before the Hon. William Alsup, San Francisco Courthouse, Courtroom 12 – 19th Floor 450 Golden Gate Avenue, San Francisco, CA 94102, or as soon thereafter as the Court may order, the State Intervenors will and do hereby move for the same relief.

This motion is brought pursuant to Federal Rule of Civil Procedure 24. As more fully set forth in the accompanying memorandum, the grounds for the motion are: (a) the motion is timely; (b) the State Intervenors have significant protectable interests, both as sovereigns and as advocates for the challenged rule; (c) the disposition of this action could impede the State Intervenors' ability to protect those interests; (d) the current parties do not adequately represent the interests of the State Intervenors; and (e) the State Intervenors' position in support of the revised regulations plainly involves common questions of law and fact with this action, and their direct opposition to Plaintiffs' claims satisfies the "common question" requirement for permissive intervention. This motion is based on this motion and the supporting memorandum below; the accompanying Declaration of Joseph S. St. John; and any further papers filed in support of this motion, the argument of counsel, and all pleadings and records on file in this matter.

PLEASE TAKE FURTHER NOTICE that counsel for Louisiana emailed counsel for the parties on August 20, 2020. The United States takes no position on this motion. Plaintiffs are "unable to take a firm position" but "likely will oppose the motion."

PLEASE TAKE FURTHER NOTICE that State Intervenors' proposed answer is attached.

MEMORANDUM IN SUPPORT

BACKGROUND

THE CLEAN WATER ACT

Since 1970, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ." Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91, 108 (Apr. 3, 1970). In 1972, Congress enacted a "total restructuring" and "complete rewriting" of the nation's water pollution control laws, including the provision requiring certification. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U.S.C. § 1341). Of particular relevance here, Congress narrowed the requirement from a certification "that such *activity* will be conducted in a manner which will not violate applicable *water quality standards*," 84. Stat. at 108 (emphasis added), to a certification only "that any such *discharge* will comply with *the applicable provisions of sections 301, 302, 306, and 307 of this Act,*" 86 Stat. at 877 (emphasis added).

CERTAIN STATES ABUSE THEIR 401 CERTIFICATION AUTHORITY

Despite the statutory change, the Environmental Protection Agency ("EPA") failed to revise the regulations governing the required certification, which is known as a 401 Certification. As a result, EPA's regulations were incongruent with the new statutory language. *Cf.* NPDES; Revision of Regulations, 44 Fed. Reg. 32,854, 32,856 (June 7, 1979) (indicating need for updated certification rules). Certain states began using the incongruity and ambiguities in EPA's regulations to abuse their certification authority for the purpose of delaying or denying certifications on non-water quality grounds. In February 2019, Louisiana and other State Intervenors wrote to EPA Administrator Wheeler about that abuse and requested that EPA "clarify[y] . . . the process by which federal and state regulatory authorities are expected to implement [Section 401]." Exh. 1. That weighty request was bolstered when, on April 10, 2019, the President issued an Executive Order noting that "[o]utdated Federal guidance and regulations regarding section 401 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the development of energy infrastructure." EO

13868, 84 Fed. Reg. 15,494 (Apr. 15, 2019). The President directed Administrator Wheeler to review EPA's Section 401 regulations, "determine whether any provisions thereof should be clarified," and "publish for notice and comment proposed rules revising such regulations, as appropriate and consistent with law." *Id.* Louisiana and other Intervenor States then submitted additional comments in response to EPA's request for Pre-Proposal Stakeholder Engagement. Exhs. 2, 7.

Louisiana identified the State of Washington's denial of certification for a proposed coal facility, the Millennium Bulk Terminal, as a paradigmatic example of abuse. Exh. 1. The Governor of Wyoming later explained:

> Wyoming has been adversely impacted by the misapplication of other states' CWA Section 401 certifications. Our interest in a streamlined 401 certification process is founded by the fact that a large portion of Wyoming's economy depends on our ability to export our energy products to the markets that demand them, particularly markets located overseas in Asia. In the case of the Millennium Bulk Terminal, Washington State blocked the terminal's construction by inappropriately denying the State's Section 401 certification on account of non-water quality related impacts -- an illegal maneuver based on alleged effects that are outside of the scope of Section 401.

Exh. 4. The permit applicant for the proposed Millennium Bulk Terminal elaborated:

> Millennium sought a Clean Water Act, Section 401 water quality certification from the Washington Department of Ecology ("Washington Ecology") for nearly six years. As part of the 401 certification process, Millennium has spent over $15 million to obtain an environmental impact statement ("EIS"), which originally began as a dual EIS under the National Environmental Policy Act ("NEPA") and the Washington State Environmental Policy Act ("SEPA"), with the US Army Corps of Engineers as the lead agency under NEPA and with the Washington Ecology and Cowlitz County as co-lead agencies under SEPA. In September 2013, the state and federal agencies agreed to separate and prepare both a federal EIS and a state EIS.
>
> The state EIS concluded with respect to the Project that "**There would be no unavoidable and significant adverse environmental impacts on water quality.**"
>
> * * * * *
>
> Washington Governor Jay Inslee, and others in his administration, including Washington Ecology Director Bellon, have expressed their belief that no fossil fuel infrastructure projects should ever be built in the State of Washington. Denying Millennium's 401 water quality certification was the way that they could impose their own personal policy preferences to ensure that no permits would be issued for the Project and they could stop sister states from exporting their products into foreign commerce.

Exh. 8.

Other comments and judicial opinions make clear the Millennium Bulk Terminal denial was not an isolated abuse. *See, e.g.*, Exh. 9. Indeed, the State of Maryland went so far as to seek a multi-

billion dollar "payment-in lieu" of imposing unachievable conditions unrelated to the discharge for which certification was sought – a demand that would ordinarily be considered extortion and which raises constitutional concerns. Ex. 10; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). The Federal Energy Regulatory Commission bluntly summarized the status quo: "[I]t is now commonplace for states to use Section 401 to hold federal licensing hostage." *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

EPA ADOPTS A RULE TO ELIMINATE AMBIGUITY AND ABUSE

Citing the April 2019 Executive Order and Pre-Proposal Stakeholder Engagement, EPA published a proposed rule, Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019), to, *inter alia*, limit the scope of 401 certification to water quality impacts from the discharge associated with the licensed or permitted project; interpret "receipt" and "certification request" as used in the CWA; reaffirm that certifying authorities are required by the CWA to act on a request for certification within a reasonable period of time, which shall not exceed one year; and specify the contents and effect of a certification or denial. Despite the short text of the proposed rule itself—less than four *Federal Register* pages—EPA provided a lengthy statutory and legal analysis.

Louisiana, joined by other states, provided extensive comments in support of the proposed rule. Exhs. 1-3. The Governor of Wyoming even testified before the Senate Committee on the Environment and Public Works in support of EPA's rule and parallel Congressional action. Thereafter, EPA published the final rule, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020). Plaintiffs filed their 32-page complaint a mere eight days later. Louisiana, Arkansas, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming (collectively, "State Intervenors") now timely move to intervene in defense of the final rule.

LEGAL STANDARDS

With respect to intervention as of right, "[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). "An applicant

seeking to intervene as of right under Rule 24 must demonstrate that four requirements are met: (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). "[T]he requirements are broadly interpreted in favor of intervention." *Id.*

With respect to permissive intervention, "[o]n timely motion, the court may permit anyone to intervene who. . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Additionally, "the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . . a statute or executive order administered by the officer or agency." *Id.* at 24(b)(2). Thus, "permissive intervention requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011).

INTERESTS AND GROUNDS FOR INTERVENTION

I. The Court should grant intervention as of right.

A. The motion is timely.

Plaintiffs filed their complaint last month, and this litigation is in its earliest stages. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (finding a motion was timely when filed three months after plaintiff's complaint). Defendants have not yet answered the complaint or submitted any other filings, and the proposed intervention poses no prejudice to the parties. Finally, the State Intervenors have not delayed the proceedings. Upon learning of the lawsuit, they quickly acted to meet and confer with all parties and move for party status to protect their substantial interests. This motion is therefore timely. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (listing considerations for timeliness).

B. The State Intervenors have significant protectable interests, both as sovereigns and as advocates for the challenged rule.

The State Intervenors have clear and substantial protectable interests at stake in this action. The "property" that is the subject of this action — particularly given Plaintiffs' request for nationwide relief — includes the sovereign lands and waters within the State Intervenors' borders, the scope of the State Intervenors' power and duty to regulate use of that property, and the State Intervenors' sovereign right to develop their natural resources without interference from other states. *See Oregon*, 745 F.2d at 551, 553 (reversing denial of intervention where intervening state's natural resources "may be affected" by the litigation). Those interests are reinforced by the expansive interpretation of "waters of the United States" being sought in the co-pending *California v. Wheeler*, No. 3:20-cv-3005-RS (N.D. Cal.), and the unbounded construction Plaintiffs seek for the "appropriate requirement of State law" portion of the certification requirement. Put directly, Plaintiffs seek to permit states to regulate interstate commerce and waters of the United States in excess of the authority delegated by Congress. Plaintiffs do so that states aligned with their interests foist their policy choices on the State Intervenors by indirectly regulating the State Intervenors' development and export of natural resources. *Cf. Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (abrogated on other grounds) ("By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.")

In seeking to protect their sovereign interests through regulatory channels, State Intervenors advocated extensively for the challenged rule. *E.g.*, Exhs. 1-4. Under Ninth Circuit law, such advocates for regulatory action are "entitled as a matter of right to intervene in an action challenging the legality of a measure [they have] supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (collecting cases); *see also Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179-80 (9th Cir. 2011) (en banc). Thus, in addition to their sovereign interests, the States Intervenor's regulatory advocacy entitles them to intervene as of right to defend the rule for which they advocated.

C. The disposition of this action could impede the State Intervenors' ability to protect their interests.

The risk this action poses to the State Intervenors' interests is readily apparent. Many of the intervenors asked EPA to revise its regulations because certain States were abusing their Section 401 Certification authority to delay and obstruct projects affecting other states for policy reasons unrelated to the Clean Water Act. Indeed, certain states are effectively blockading landlocked states from exporting their natural resources. Not surprisingly, the State Intervenors supported and continue to support EPA's promulgation of the clarified regulations to stop that abuse.

Plaintiffs seek to erase the State Intervenors' regulatory victory by way of this action. Plaintiffs allege the revised regulations are "arbitrary, capricious, and not in accordance with law" and "in excess of [EPA's] jurisdiction, authority, or limitations." Compl. ¶¶ 78, 82-85, 91, 98-101, 107-108, 115, 120. Plaintiffs then ask this Court to declare the regulations unlawful, set them aside, and vacate them. Compl. at p.23. Of course, if Plaintiffs obtain that relief, the consequences will extend to the State Intervenors, too, even though the State Intervenors support the revised regulations. Aside from intervening in this case to defend against the challenge, there is no ready recourse for the State Intervenors to combat the relief Plaintiffs seek.

D. The parties do not adequately represent the interests of the State Intervenors.

1. Neither Plaintiffs nor EPA represent the interests of the State Intervenors.

Unlike Plaintiffs, the State Intervenors believe the revised regulations are necessary to comply with the Clean Water Act. Regardless, the revisions are warranted to remedy abusive delays and obstructions imposed by certain States. To that end, the State Intervenors believe the revised regulations strike a reasonable and legally-correct balance between the States' sovereign powers and their obligation not to infringe the Commerce Clause, the sovereign rights of other states, and the Takings Clause rights of applicants for federal permits and licenses. Plaintiffs attacking the revised regulations clearly do not represent the State Intervenors' interests.

EPA does not represent the State Intervenors' interests, either. Although EPA will presumably urge the Court to reject the Complaint, its rationale may differ substantively from the

bases the State Intervenors intend to advance. The State Intervenors' interests unquestionably differ from those of EPA when it comes to proper interpretation of the Clean Water Act's cooperative federalism framework. For example, Intervenor States contemplate arguing that an essentially unbounded definition of "appropriate requirement of State law" in the Clean Water Act would render the act unconstitutional, an argument EPA is unlikely to put forward. EPA also cannot respond to the Plaintiffs' arguments in the same manner the State Intervenors can: as sovereigns in our federal form of government. *See Sagebrush Rebellion*, 713 F.2d at 528 (stating that courts assessing the adequacy of representation consider whether the intervenor offers a necessary element to the proceedings that would be neglected). And if the Court holds the revised regulations unlawful, Plaintiffs will necessarily obtain a remedy that will increase the power of the federal government and some States at the expense of other States, thereby imposing irreparable harms on the State Intervenors.

"In assessing the adequacy of representation, the focus should be on the 'subject of the action,' not just the particular issues before the court at the time of the motion." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). "[T]he burden of showing inadequacy is 'minimal,' and the applicant[s] need only show that representation of its interests by existing parties 'may be' inadequate." *Id.* (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). The Intervenor States and their distinct sovereign interests easily satisfy that standard.

2. The conduct of EPA compellingly reinforces that it is inadequate to represent the interests of the State Intervenors.

In addition to the EPA's legal inadequacy, certain past conduct leaves doubt that it could adequately represent the State Intervenors interests as a factual matter. EPA has repeatedly sought expansive interpretations of environmental statutes vis-à-vis the States. *See e.g.*, *Rapanos v. United States*, 547 U.S. 715, 722 (2006). And EPA has in the past achieved its own policy aims through "sue and settle" tactics, often at the expense of States, which its officials have openly acknowledged. In 2017, then-EPA Administrator Scott Pruitt frankly explained:

> In the past, the U.S. Environmental Protection Agency has sought to resolve litigation through consent decrees and settlement agreements that appear to be the

> result of collusion with outside groups. Behind closed doors, EPA and the outside groups agreed that EPA would take an action with a certain end in mind, relinquishing some of its discretion over the Agency's priorities and duties and handing them over to special interests and the courts. When negotiating these agreements, EPA excluded intervenors, interested stakeholders, and affected states from those discussions.

Exh. 7.

As the Third Circuit has recognized, environmental cases "frequently pit private, state, and federal interests against each other." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998). The Third Circuit thus recognized a real risk of collusive litigation actions that undermine adequacy of representation in such cases. *Id.* at 974. More broadly, where, as here, an agency undertakes an action only reluctantly and after delaying for years, it cannot be trusted to adequately represent the interests of those who advocated for the action. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899-900 (9th Cir. 2011) (reviewing cases). That EPA reportedly has internal resistance to the policies of elected leaders – like the revised regulations at issue – makes clear that EPA cannot adequately represent the Intervenor States' interests in defending those policies. *Cf. Kleissler*, 157 F.3d at 974 (finding inadequacy: "[I]t is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts.").

II. Alternatively, the Court should permit permissive intervention pursuant to Rule 24(b).

Even if this Court does not grant intervention as of right, the Court should permit the State Intervenors to intervene permissively pursuant Rule 24(b). Because the Court's jurisdiction is based on federal questions raised by Plaintiffs and the applicants for intervention do not assert additional claims, the requirement for an independent ground for jurisdiction does not apply. *Freedom from Religion Found.*, 644 F.3d at 844. This application is timely for the reasons argued above. And the State Intervenors' position in support of the revised regulations plainly involves common questions of law and fact with this action, and their direct opposition to Plaintiffs' claims satisfies the "common question" requirement for permissive intervention. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc.*, 630 F.3d at 1178, 1180; *see also, e.g.*, *Missouri v. Harris*, 2014 WL 2506606, at *7 (E.D. Cal. June 3, 2014). Moreover, the State Intervenors experience with having development blocked by abusive 401 Certification practices will provide a

"helpful, alternative viewpoint" to those offered by Plaintiffs that have engaged in those very practices, and EPA, which long-tolerated them, thereby "contribut[ing] to full development of the underlying factual issues and to the just and equitable adjudication of the legal questions presented." *Pickup v. Brown*, 2012 WL 6024387, at *4 (E.D. Cal. Dec. 4, 2012).

CONCLUSION

For the foregoing reasons, the State Intervenors request the Court grant their motion to intervene as a matter of right under Rule 24(a) or, alternatively for permissive intervention under Rule 24(b).

Dated: August 28, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED Plaintiffs, v. ANDREW R. WHEELER; U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendants.	No. 3:20-cv-4636 **ST. JOHN DECLARATION ISO MOTION TO INTERVENE BY THE STATES OF LOUISIANA, MONTANA, ARKANSAS, MISSISSIPPI, MISSOURI, TEXAS, WEST VIRGINIA, AND WYOMING** Hr'g Date: Oct. 8, 2020 Hr'g Time: 08:00 a.m. Judge: Hon. William Alsup Action Filed: July 13, 2020 Dep't: San Francisco Courthouse

DECLARATION OF ATTORNEY JOSEPH SCOTT ST. JOHN

1. I am an attorney employed by the Louisiana Department of Justice. I represent the State of Louisiana in connection with the above-captioned matter. I make this declaration in support of State Intervenors' Motion to Intervene.

2. Attached hereto as Exhibit 1 is a true and accurate copy of correspondence from Attorney General Jeff Landry et al as obtained from the files of the Louisiana Department of Justice.

3. Attached hereto as Exhibit 2 is a true and accurate copy of correspondence from Attorney General Jeff Landry et al as obtained from the files of the Louisiana Department of Justice.

4. Attached hereto as Exhibit 3 is a true and accurate copy of correspondence from Attorney General Jeff Landry et al as obtained from the files of the Louisiana Department of Justice.

5. Attached hereto as Exhibit 4 is a true and accurate copy of correspondence from Governor Gordon obtained from regulations.gov.

6. Exhibits 5 and 6 are intentionally omitted.

7. Attached hereto as Exhibit 7 is what appears to a widely-reported memorandum issued by Administrator Pruitt. This document was obtained from a law firm website.[1]

8. Attached hereto as Exhibit 8 is a true and accurate copy of correspondence from Lighthouse Resources as obtained from regulations.gov.

9. Attached hereto as Exhibit 9 is a true and accurate copy of correspondence from Senator Barasso *et al* as obtained from regulations.gov.

10. Attached hereto as Exhibit 10 is a true and accurate copy of correspondence from Exelon as obtained from regulations.gov.

11. Further declarant sayeth naught.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in New Orleans, Louisiana on this 28th day of August, 2020.

/s/ Joseph Scott St. John

Joseph Scott St. John

[1] https://www.earthandwatergroup.com/wp-content/uploads/2017/10/signed_consent_decree_and_settlement_agreement_directiveoct162017.pdf

EXHIBIT 1

State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE
70804-9005

Jeff Landry
Attorney General

February 26, 2019

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Wheeler.andrew@Epa.gov

Dear Acting Administrator Wheeler:

States are on the front line of protecting the environment, public health, and the welfare of citizens within our respective borders. The cooperative federalism principles that are central to many of our nation's environmental statutes recognize the critical role states play and, when implemented appropriately, encourage partnership between states and the federal government.

Unfortunately, the cooperative federalism principles of the Clean Water Act are sometimes coopted to advance the political agendas of certain state actors. In particular, Section 401 of the Clean Water Act has been manipulated to block infrastructure projects that are in the public interest of other states and the nation generally. This tactic has been implemented to delay or to block vital oil and gas pipeline projects, coal projects, LNG terminal projects, and other fossil energy projects. The actions of individual state actors are disruptions to interstate commerce and negate the intent of providing the consistent and reliable permitting process envisioned by the Clean Water Act.

For example, in 2017, the State of New York unilaterally blocked the approximately $500 million interstate pipeline Northern Access Project when it denied a Water Quality Certificate for the project, notwithstanding the Pennsylvania Department of Environmental Conservation's prior issuance of a Water Quality Certificate and the FERC's prior approval of the project. Similarly, in 2017, the Washington Department of Ecology opaquely denied "with prejudice" a Water Quality Certificate for another project, the Millennium Bulk Terminal, just three business days after receiving 240 pages of additional information it requested. Without these Water Quality Certificates, these projects cannot go forward regardless of their importance to the nation. Individual state actors should not be allowed to unilaterally and negatively impact the economies of multiple other states and the nation as a whole under the guise of implementing federal law.

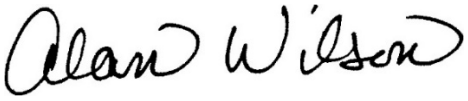
While the cooperative federalism principles of Section 401 may can be maintained through clarification of the process by which federal and state regulatory authorities are expected to implement the law, this clarification should recognize and preserve the states' primary

responsibility over and rights concerning water quality. Congress intended Section 401 as an opportunity for states to evaluate water quality impacts from federally-permitted projects. Instruction from EPA on the respective roles of state and federal authority within the bounds intended by the statute is needed to ensure that Section 401 is used for its intended purpose to protect water quality, to minimize its potential for misuse, and to provide predictability in permitting energy infrastructure.

As Attorneys General, we support an effort by EPA to maintain cooperative federalism and the rule of law to the Section 401 process.

Sincerely,

Jeff Landry
Louisiana Attorney General



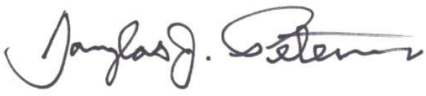
Alan Wilson
South Carolina Attorney General

Steve Marshall
Alabama Attorney General

Ken Paxton
Texas Attorney General

Tim Fox
Montana Attorney General

Patrick Morrisey
West Virginia Attorney General



Doug Peterson
Nebraska Attorney General

EXHIBIT 2

State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
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Jeff Landry
Attorney General

May 24, 2019

The Honorable Andrew Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue
Mail Code 1101A
Washington, D.C. 20460

RE: Pre-proposal recommendation letter
Docket ID: EPA-HQ-OW-2018-0855

Dear Administrator Wheeler:

We write today to support the EPA's rule-making effort in response to the President's Executive Order on Energy Infrastructure and Economic Growth. As states hold the primary responsibility of evaluating and maintaining healthy water quality within our borders, we understand the need for an effective, workable system that enhances cooperative federalism. But without proper checks on centralized programs like the Clean Water Act, the incentive for misuse exists. Section 401 of the Clean Water Act has been manipulated to block infrastructure projects that are in the public interest of individual states and the nation as a whole. Using WQC approvals as a delay tactic to block vital energy infrastructure projects in abuse of the power committed to the States and inconsistent with our shared obligations under the program. These disruptions burden interstate commerce and negate the CWA's intent of providing the consistent and reliable permitting process.

It is encouraging that the President and EPA's calls for action echo the concerns raised in the February 26th letter from a group of Attorneys General. With the stated goals of promoting efficient permitting processes, reducing regulatory uncertainties, and promoting timely Federal-State cooperation, the Executive Order prompting this review provides a clear indication of the problems to be addressed and the solutions employed.[1]

Many of these problems are evidenced in the February 26th letter, which spoke to specific actions obstructing energy infrastructure projects. These actions divert state and federal resources from other important priorities. For example, since that letter was issued, a federal district court

[1] Exec. Order 13868, *Promoting Energy Infrastructure and Economic Growth* (April, 10 2019).

stayed the aggrieved applicant's challenge to Washington State's WQC denial until state proceedings conclude.[2] The applicant appealed to the U.S. Ninth Circuit Court of Appeals in the interim.[3] New York denied a WQC for the $500 million Northern Access Pipeline Project, but that action was subsequently vacated by the Second Circuit.[4] However, the Federal Energy Regulatory Commission (FERC) may have subsequently mooted the case by ruling the State failed to act on the WQC request within the statutory one-year timeframe.[5] The net effect of these orders is unclear at this time. Additionally, New York just denied yet another WQC[6] for the $927 million Northeast Supply Enhancement (NESE) project, would supply improved natural gas to a market that currently faces new gas connection moratoria due to supply shortages.[7] And while applicants for both this project and the $7.5 billion Jordan Cove project Oregon recently denied [8]can resubmit their applications, these resubmissions represent unnecessary regulatory delays that could also be mitigated by improved regulatory clarity.

A few areas are particularly ripe for EPA guidance. First, EPA should update guidance to emphasize the appropriate review standard of "reasonable assurance" to deter states from setting prohibitively higher, standards.[9] EPA should also undertake a substantive review of the CWA's implementing regulations, as many of these have not been updated in nearly four decades.[10] Another area of concern is the tolling provision applied to a presumed waiver of state certification, under which states waive certification if they fail to act on a certification request within one year of receipt.[11] Both the Northern Access and Jordan Cove denials mentioned above were in some way influenced by recent federal interpretation of this provision. Federal appellate courts and the FERC have ruled that this provision has a bright line trigger upon receipt of the application as opposed to the agency's subjective determination of when a "complete" application is submitted.[12] In accordance with the President's Executive Order to restore consistency to the 401 process, EPA should update its guidance to reflect this interpretive clarification.[13]

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[2] *Lighthouse Resources Inc, et al. v. Jay Inslee, et al.*, 3:18-cv-05005 (W.D. Wash) (order granting motion to stay).
[3] *Id*. (notice of appeal).
[4] *Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation*, 17-1164-cv (2d. Cir. 3/29/19) ("[T]he Denial Letter here insufficiently explains any rational connection between facts found and choices made." *See also* n.2 "…the agency appears to have considered a separate application in formulating its decision, or possibly used a boilerplate denial but failed to delete portions that do not relate to the instant application.").
[5] *Federal Energy Guidelines, FERC Reports*, 167 FERC ¶ 61,007 (April 2, 2019).
[6] Press Release, N. Y. State Dep't of Env't Conservation, *DEC Statement on Water Quality Certification for Proposed Northeast Supply Enhancement Pipeline Project* (May 15, 2019)
[7] George Lobsenz, *Despite Asserted Gas Shortages in State, New York Blocks New Pipe*, The Energy Daily (May 17, 2019).
[8]Or. Dep't of Env't Quality, Press Release, *DEQ Issues a Decision on Jordan Cove's Application for 401 Water Quality Certificate* (May 06, 2019).
[9] 33 U.S.C. 1341 (a)(3), (4)
[10] Deidre Duncan and Clare Ellis, *Clean Water Act Section 401: Balancing States' Rights and the Nation's Need for Energy Infrastructure*, 25 Hastings Environmental L.J. 235, at 258 (2019).
[11] 33 U.S.C. 1341.
[12] *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, 868 F.3d 87 (2d Cir. 2017); *New York Dept. of Env'l Conserv. v. FERC*, 884 F. 3d 450; *Federal Energy Guidelines*, *see* n 6; *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (agreement between certifying agency and applicant to withdraw and refile the application constituted impermissible end-run around Congressionally imposed statutory limit.).
[13] *See* U.S. Env't Prot. Agency, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes*, Section 201 Interim Guidance (April 2010).

Without further clarification, WQC abuse will continue delaying projects of great national importance. Individual state actors should be disallowed from unilaterally imposing extra-statutory requirements on applicants to the detriment of other states and the nation as a whole under the guise of implementing federal law. To be clear, any clarification should recognize and preserve the states' primary responsibility over and rights concerning water quality. However, Congress intended Section 401 as an opportunity for states to evaluate water quality impacts from federally-permitted projects, not an opportunity to unilaterally veto those projects.

I support the EPA in its work to streamline and unburden this important program.

Sincerely,

Jeff Landry
Attorney General

Alan Wilson
South Carolina Attorney General

Steve Marshall
Alabama Attorney General

Ken Paxton
Texas Attorney General

Tim Fox
Montana Attorney General

Patrick Morrisey
West Virginia Attorney General

Doug Peterson
Nebraska Attorney General

EXHIBIT 3

State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
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70804-9005

Jeff Landry
Attorney General

October 21, 2019

Administrator Andrew Wheeler
Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via regulations.gov: EPA-HQ-OW-2019-0405-0025

Dear Administrator Wheeler:

This comment provides support and further recommendations to the proposed changes[1] of the Environmental Protection Agency's regulations related to state water quality certifications required under Section 401 of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA).[2] Water quality certifications allow states to evaluate and limit potential impacts to water quality that may result from discharges associated with federally permitted or licensed activities.[3] As part of the State water quality certification scheme, Congress granted State regulators with the authority to veto a proposed project if the applicant fails to demonstrate the project's compliance with applicable water quality standards and effluent limitations.[4] States that fail to provide a certification within a reasonable period, not to exceed one year, waive their certification authority.[5] Projects that fail to obtain State certification or waiver are not eligible to receive a permit.[6]

The sections covered by the certification and the entirety of the CWA seek to preserve the water quality of the nation's navigable waters by curtailing the discharge of pollutants into those

[1] EPA-HQ-OW-2019-0405-0025.
[2] 33 U.S.C. § 1341(a)(1).
[3] 33 U.S.C. § 1341(a)(1).
[4] S. Rep. No. 95-370, at 72-73 (1977).
[5] 33 U.S.C. § 1341(a)(1).
[6] *Id.*

waters.[7] "Pollutants" include chemical and radiological pollutants,[8] physical particulate pollutants like dredge materials,[9] and thermal properties like heat discharge.[10] When unqualified, as in the state certification provisions, the term "discharge" is defined to specifically mean the discharge of pollutants.[11] While the parameters of these certifications seem well bounded, ambiguity exists and has been improperly abused by states wishing to expand their authority under the CWA.

1. The proposed changes would remedy problems arising from statutory ambiguity.

While many states effectively and appropriately discharge their duties as co-regulators under the CWA, ambiguities within the statutory language lead some states to push the limits of their federally recognized authority and even the limits of Congress' commerce authority. This hijacking of the CWA unreasonably increases regulatory burdens, frustrates economic and national security, and, in some cases, thwarts the express will of Congress. Courts have also relied on erroneous, under-supported interpretations of these ambiguities to condone overreach by some state actors.[12] Many of the proposed regulatory changes will restore the proper structure and paradigm to the 401 certification process while encouraging meaningful cooperation amongst all interested parties.

a. Certain states improperly elongate the period of review.

Some states have improperly manipulated the one-year period for review, which is an upper-bound limit expressly provided by Congress.[13] Two tactics of particular favor to these state regulators are: (1) classifying an application as "incomplete" and (2) encouraging improper withdrawal and resubmission agreements to re-start the one-year time period.[14] These tactics have recently been rebuked by courts and federal agencies alike. For instance, when considering whether the New York Department of Environmental Conservation waived its certification authority, the United States Court Appeals for the Second Circuit stated:

> The plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification "shall not exceed one year" after "receipt of such request." It does not specify that this time limit applies only for "complete" applications. If the statute required "complete" applications, states could blur this bright-line rule into a subjective standard, dictating that applications are "complete" only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.[15]

Before this ruling, states relied on improper guidance issued nearly a decade prior for the proposition that they could determine "what constitutes a 'complete application' that starts the

[7] 33 U.S.C. § 1251(a).
[8] 33 U.S.C. § 1362(6); s*ee also* 33 U.S.C. § 1342.
[9] *See* 33 U.S.C. § 1344.
[10] 33 U.S.C. § 1362(6).
[11] *Id.* at § 1362(16).
[12] *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 712-13, 715-19, 114 S. Ct. 1900, 1909, 1911-13, 128 L. Ed. 2d 716, 728, 730-33 (1994) (instances where court cites EPA interpretation in support of their reasonable reading); *see also Id.* at 724, 728-29, 731 (Thomas, J. dissenting) (Justice Thomas' observation of same).
[13] 33 U.S.C. § 1341(a)(1).
[14] *Hoopa Valley Tribe, infra* note 20.
[15] *New York State Dep't of Envtl. Cons. v. FERC*, 884 F.3d 450, 455-56 (2nd Cir. 2018).

timeframe clock…."[16] While rescinding this erroneous guidance was an important step in the right direction, further clarification through regulatory changes is appropriate.

States have also improperly circumvented Congressional intent by encouraging withdrawal-and-resubmission schemes with project proponents in an attempt to reset the certification timeframe. The FERC and the U.S. Second Circuit have viewed this scheme as legally valid.[17] However, the United States Court of Appeals for the D.C. Circuit took at different view in *Hoopa Valley Tribe*.[18] Therein, the D.C. Circuit rejected both FERC's and the Second Circuit's blessing of such withdrawal-and-resubmission schemes, stating:

> Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon's deliberate and contractual idleness defies this requirement. By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters. . . . There is no legal basis for recognition of an exception for an individual request made pursuant to a coordinated withdrawal-and-resubmission scheme, and we decline to recognize one that would so readily consume Congress's generally applicable statutory limit.[19]

In our view, the Court of Appeals for the D.C. Circuit has the right perspective on the matter. Allowing states to extend their time for review by requesting withdrawal-and-resubmission of the same application stands directly in the way of Congressional intent and poses an unacceptable form of regulatory obstructionism.[20] It is clear from these examples that ambiguity as to the tolling provision of this review period exists and has been acted upon to the detriment of otherwise beneficial infrastructure projects.

Avoiding the certification limbo created by the withdrawal-and-resubmission scheme, under the proposed rule, certifying authorities will be required to make a final agency action within a reasonable time not to exceed one year. In lieu of the withdrawal-and-resubmission scheme,

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[16] OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES 11 (2010) (citing *City of Fredericksburg v. Fed. Energy Regulatory Comm'n*, 876 F.2d 1109, 1112 (4th Cir. 1989); 33 USC 1341(a)(1); CWA §401(a)(1); *Del Ackels v. U.S. Envtl. Prot. Agency*, 7 F.3d 862, 867 (9th Cir. 1993)) (replaced by U.S. ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 401 GUIDANCE FOR FEDERAL AGENCIES, STATES AND AUTHORIZED TRIBES (2019)).

[17] *Constitution Pipeline Co.*, 162 F.E.R.C. ¶ 61,014 (2018) ("We reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1). *We continue to be concerned, however, that states and project sponsors that engage in repeated withdrawal and refiling of applications for water quality certifications are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions*") (emphasis added); *New York State Dep't of Envtl. Cons. v. FERC*, *supra* note 17, at 456 ("If a state deems an application incomplete, it can simply deny the application without prejudice—which would constitute "acting" on the request under the language of Section 401. It could also request that the applicant withdraw and resubmit the application.").

[18] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

[19] *Id.* at 1104, 1105.

[20] *Id.* at 1104 ("According to FERC, it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*.") (emphasis in original).

certification denials will likely increase. With the likely increase in denials, we ask that EPA amend the proposed rule to acknowledge that a certifying authority' denial of Section 401 certification may be made with or without prejudice. In other words, due to time constraints and information limitations, a certifying authority may feel the need to deny the certification at that time but may be willing to grant the certification after reviewing additional information. Allowing certifying authorities to signal their willingness to consider additional information through subsequent requests will likely avoid unnecessary litigation. Allowing denials without prejudice will maximize the opportunity for cooperation between the certifying authority, the applicant, and the federal agency, but it will also allow the applicant to immediately challenge an arbitrary or capricious denial. This framework will constitute a vast improvement over the withdrawal-and-resubmission scheme while salvaging opportunities for regulatory cooperation.

b. In conjunction with effective information sharing among regulating agencies, the proposed definitions of "certification request" and "receipt" will effectively curtail timing manipulation.

Rules for how additional information can be requested will help to cure abuse of the certification process.[21] By defining the terms "certification request" and "receipt", EPA will hold certifying authorities accountable to the terms prescribed by Congress. The proposed definition of "certification request" standardizes the request process, and the specific statement requesting certification action removes any ambiguity as to the intent of the request. However, EPA should consider input from state regulatory agencies as well as the specific needs of federal licensing and permitting agencies when formulating the final criteria for "certifying requests". It may come to light that establishing these requirements as a baseline to be built upon is the preferable option. In any event, this information should be considered in light of a more robust information sharing format between federal and state or tribal regulators. Encouraging and facilitating the exchange of relevant, necessary information between regulating parties furthers the goal of establishing an effective standard for certifying requests.

Specifying that a "receipt" occurs on "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures" establishes an intuitive standard for tolling. EPA should also consider requiring project proponents to provide notice and attestation to the lead federal agency that they have submitted their certification requests to the certifying agency in accordance with applicable submission procedures. This requirement will ensure the lead federal agency is notified of the submission and of the proponents' attestation that applicable procedures were followed. Overall, the proposed regulatory changes will significantly curtail the ability of states to misuse or circumvent Congress' explicit directive that certification actions are to be taken within the one-year reasonable period.

c. Without properly defining the scope of certification authority, Congress left ambiguous what conditions or applicable laws are appropriately enforced under state certifications.

As noted above, State certifications under Section 401 are an important piece of Congress' plan to address pollution of the nation's waters through cooperative federalism. However, when read in isolation, state certifications could be seen as including a much broader scope of review than just water quality. Indeed, some certifications greatly overstep the reasonable bounds of the

[21] 33 U.S.C. § 1341(a)(1).

CWA.[22] EPA's historic interpretation of language found in Section 401(d) found that lead certifying agencies were without authority to question or consider specific limitations or conditions contained in a state certification.[23] However, while questioning the expertise and judgment of state regulators is inappropriate when considering the best methods of protecting state water quality standards,[24] it is within EPA's purview, as the agency empowered to enforce the CWA through rulemaking, to properly clarify ambiguities left by Congress.[25] Further, as the Supreme Court's holdings in both *PUD No. 1*[26] and *S.D. Warren*[27] drew upon EPA's interpretation for support of their "most reasonable reading" of Section 401, it follows that the plain language of the statute is not sufficiently exact to foreclose a different, reasonable interpretation to supplant the Court's previous interpretation.[28] This is supported by the Supreme Court's ruling in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[29] Therein, Justice Thomas wrote for the Court, stating in pertinent part:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of

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[22] *Town of Summersville*, 60 F.E.R.C. ¶ 61291, at 61990. Speaking to the requirement that the applicant build recreation facilities, the Commission commented: "We believe that these conditions are beyond the scope of Section 401, and that states should not use their water quality certification authority to impose conditions that are unrelated to water quality. However, since pursuant to Section 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny Summersville's application, and we do not believe it is in the public interest to deny the application."

[23] *Roosevelt Campobello Int'l Park Comm'n v. Envtl. Prot. Agency, et al*, 684 F.2d 1041 (1st Cir. 1982), "'EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law.'" (quoting Envtl. Prot. Agency, Decision of the General Counsel No. 58 (March 29, 1977).

[24] *See Sierra Club v. US Army Corps of Engineers*, 909 F.3d 635 (4th Cir. 2018), citing *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1201 (9th Cir. 2008) (for the proposition that any additional license conditions imposed by a federal agency must allow for compliance with a coordinate state condition).

[25] *U.S. v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2146, 150 L. Ed. 2d 292 (2001) (determining which agencies are due deference under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984)).

[26] *PUD No. 1*, *supra* note 14.

[27] *S.D. Warren Co. v. Me. Bd. of Envt'l Prot., et al.*, 547 U.S. 370, 126 S. Ct. 1843, 164 L. Ed. 2d 625 (2006).

[28] *P.U.D No. 1*, *supra* note 14, at 728 ("Our view of the statute is consistent with EPA's regulations implementing §401."; "EPA's conclusion that *activities* – not merely discharges – must comply with state water quality standards is a reasonable interpretation of §401, and is entitled to deference."; "This interpretation is consistent with EPA's view of the statute.") (emphasis in original); *S.D. Warren*, *supra* note 29, at 377 ("In resort to common usage under § 401, this Court has not been alone, for the Environmental Protection Agency (EPA) and FERC have each regularly read "discharge" as having its plain meaning and thus covering releases from hydroelectric dams. Warren is, of course, entire correct in cautioning us that because neither EPA nor FERC has formally settled the definition, or even set out agency reasoning, these expressions of agency understanding do not command deference from this Court. But even so, the administrative usage of 'discharge' in this way confirms our understanding of the everyday sense of the term.") (Internal citations and quotations omitted).

[29] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

> the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.
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> ****
>
> Some of the respondents dispute this conclusion, on the ground that the Commission's interpretation is inconsistent with its past practice. We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a reversal of policy, "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis," for example, in response to changed factual circumstances, or a change in administrations.[30]

Thus, EPA is well within its Congressional mandate to redefine ambiguous terms, even when that redefinition presents and effects a different interpretation.

EPA's intent to "increase the predictability and timeliness of section 401 certification"[31] is evident in the proposed changes, including the timing provisions discussed previously.

d. While Section 401 alone does not properly define the scope of certification review, its purpose and placement within the CWA clearly limit its scope to discharges affecting water quality.

As noted above, the CWA's aims to protect our nation's waters by prohibiting the unlawful discharge of pollutants is a cooperative endeavor between states and the federal government. A clear statement of the appropriate scope and criteria states consider under their role as certifying authorities is an important piece of maintaining program integrity. As stated in Section 401(a), a state's role is to certify that a "discharge" will comply with section 301, 302, 303, 306, and 307 of the CWA. However, the term "discharge" is not defined in the Act. The agency's proposed definition of "discharge" as those originating from point sources reflects the holistic approach EPA took with this rulemaking effort. As noted by the Senate report on the 1972 amendments were made "to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants."[32] The United States Court of Appeals for the Ninth Circuit considered this when evaluating which discharges trigger the need for 401 certification. In *Oregon Natural Desert Association v. Dombeck*,[33] the court considered whether Section 401 review is triggered by pollutants discharged into the John Day River from federally permitted cattle grazing. In deciding that the discharge did not trigger a

[30] *Id.* at 980-82 (internal citations omitted).
[31] 84 Fed. Reg. at 44,080.
[32] S. Rep. N0. 414, at 69 (1971).
[33] 172 F.3d 1092, (9th Cir. 07/22/1998).

Section 401 review, the court considered Section 401 within the entirety of the CWA and the 1972 amendments. Specifically, the court found "[t]he term 'discharge' in §1341 is limited to discharges from point sources. All of the sections cross-referenced in §1341 relate to the regulation of point sources." EPA's proposal to define discharges as those originating from point sources is consistent with this reasonable reading of the Section 401. Further, specifying that any potential discharge by a federally licensed or permitted project triggers Section 401 review reinforces the states' roles as cooperative regulators. Taken together, these definitions provide a determinable, expanded trigger for Section 401 review.

While the proposed changes concerning discharges will result in a net expansion of state certification opportunities, the changes concerning the scope of a state review will provide appropriate bounds that are consistent with a logical reading of the section and the Administration's goal of streamlining federal permitting processes. EPA's acknowledgement that Congress intended Section 401 to focus on protection of water quality is the proper starting point for defining the scope of state certifications.[34] From that understanding springs many of the changes that will be most effective in curtailing the more egregious instances of obstructionism.

For instance, Section 401(d) provides that the conditions and requirements contained in a state's certification will become conditions in any Federal license or permit, including "any other appropriate requirement of State law." The term "appropriate requirement of state law" is ambiguous and unique to not only this section, but this paragraph. As noted above,[35] states have used this ambiguity to impose conditions unrelated to water quality through water quality certificates, sometimes with judicial approval.[36] This places the lead federal permitting or licensing agency in the precarious position of either forcing improper terms on applicants or denying a project otherwise in the best interests of the United States, a clear imbalance of federalism. And while these ambiguities are ideally addressed by Congress,[37] the EPA's proposed rule would effectively guard against the most unreasonable conditions on certification. Defining "appropriate requirement" as provisions of EPA-approved CWA regulatory provisions that control discharges comports with the structure and purpose of the Act. It also follows Justice Thomas' opinion in *P.U.D. No. 1*, which we believe is the more logical and internally consistent reading of this provision within both Section 401 and the CWA as a whole.[38]

EPA's proposal to enact a definition of the proper scope of Section 401 is also an important development to prevent states' abuse of Section 401, which some have wielded to push improper political stances. Some states have denied certifications based on the downstream effects on

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[34] 84 Fed. Reg. 44,103.
[35] *See*, *supra* note 24.
[36] *P.U.D. No. 1*, *supra* 511 U.S. 711.
[37] The need to address abuses of the 401 process is noted by Senator John Barrasso of Wyoming, who introduced the "Water Quality Certificate Improvement Act of 2019", S. 1087, 116th Cong. (2019). Representative David McKinley of West Virginia has also introduced a similar instrument in the House of Representatives. H.R. 2205, 116th Cong. (2019).
[38] *P.U.D. No. 1*, *supra* 511 U.S. 711 (Thomas, J. dissent) ("The final term on the list -- "appropriate requirement[s] of State law" – appears to be more general in scope. Because this reference follows a list of more limited provisions that specifically address discharges, however, the principle *ejusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions.").

climate by increased fossil fuel usage[39] or opposition to expanded use of fossil fuels generally.[40] As noted in the proposed rulemaking, none of these stances are within the ambit of the CWA.[41] By defining the scope of certifications as "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements[,]" EPA establishes an appropriate framing based on Section 401 and the CWA in its entirety. And while "water quality requirements" were considered in the context of state regulations during legislative deliberations on the program,[42] it is a term that does not appear in Section 401 and is ripe for definition. Its definition as "applicable provisions of 301, 302, 303. 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions" accomplishes two goals. First, it supports EPA's goal of enacting CWA regulations that are based on a reasonable, holistic interpretation of the Act. Second, it embraces the more logical reading of "appropriate requirement of state law[,]" which decreases the opportunity for abuse. This is also consistent with EPA's proposed definition of "condition", which would require any condition imposed through a state certificate be within the proper scope of Section 401. In all, the definitions embrace the proper scope for certifications and conditions allowable thereunder, which create a bulwark against the most egregious and harmful abuses of Section 401 certifications.

e. *Lead federal agency review of state certification conditions should respect the sovereignty and expertise of states while upholding the needed boundaries this proposed rulemaking would set.*

The proposed rulemaking solicits comment on what information or justification is necessary or appropriate to evaluate whether conditions in state certifications are consistent with the proposed scope of 401 certification. While comment on this area is best left to state water quality regulators, we submit comment on the proper boundaries lead federal agencies should respect when evaluating these conditions. First, lead federal agencies should not be required to review certification conditions, especially in view of the timing strains the above-mentioned clarifications to proper state review periods will alleviate. This review should be discretionary and invoked as the lead agency sees fit. Further, lead agencies should not substantively review the specific requirements of a condition once that condition is determined to be within the scope of Section 401. As noted by multiple courts, the efficacy of conditions to protect water quality are beyond the purview of federal agencies[43] and determining whether a certification meets state water quality standards is a question within the purview of state courts.[44] Any review of a state certification condition should be limited to its validity under the proposed changes to the CWA. Any further substantive analysis would improperly curtail a state's proper authority as a co-regulator under the CWA. Additionally, the inclusion of a condition beyond the scope of Section 401 certification should not be fatal to the entire certification or other properly imposed conditions.

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[39] Letter from Thomas S. Berkman, Deputy Comm'r and Gen. Counsel, N.Y. State Dep't of Envtl. Conservation, Re: 3-3399-0071/00001 – Valley Lateral Project Notice of Decision, to Georgia Carter, Vice President and Gen. Counsel, Millennium Pipeline Co. (Aug. 30, 2017).

[40] See Tom Johnson, Move in Congress to Weaken Clean Water Act Could Have Impact in New Jersey, NJ SPOTLIGHT, Aug. 16, 2018 ("' If this bill happens, it will make it extremely difficult to fight these dangerous projects,' said Jeff Tittel, director of the New Jersey Sierra Club. 'It (the Section 401 review) is probably the most effective tool we have to fight these projects.'").

[41] 84 Fed. Reg. 44094.

[42] *See, supra* note 42.

[43] *See, supra* note 25.

[44] *Ackels v. EPA*, 7 F.3d 862 (10/14/1993).

This would unnecessarily thwart valid state enforcement authority while inevitably leading to additional delays in project licensing or permitting. While EPA should empower federal agencies to review conditions in the scope of CWA certification, it should also do so in a manner that respects proper limits of state sovereignty.

2. Conclusion

Section 401 certifications are an important component of the cooperative federalism envisioned by the CWA. Unfortunately, ambiguity in the statutory language has left this program ripe for abuse by some states. The proposed updates reflect a holistic reinterpretation and modernize a program that has not seen a meaningful revision in decades. By properly defining the period for review, the proper scope of the act, and the conditions appropriately included, EPA has proposed effective means of curtailing abuses of Section 401. This proposal to restore a proper balance among sovereigns brings Section 401 in line with Congressional intent and the Administration's goal of streamlining federal permitting and licensing programs. We support the EPA in its rulemaking effort, and look forward to providing further comment on the final rule.

Sincerely,

Jeff Landry
Louisiana Attorney General

Patrick Morrisey
West Virginia Attorney General

Leslie Rutledge
Arkansas Attorney General

Tim Fox
Montana Attorney General

Phil Bryant
Mississippi Governor

EXHIBIT 4

October 21, 2019

United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Wheeler,

Thank you for the opportunity to provide pre-proposal recommendations for updates to the United States Environmental Protection Agency's (EPA) proposed final guidance pertaining to Section 401 certification under the Clean Water Act (CWA). As the EPA has stated in its proposal, "Over the last several years litigation over the section 401 certifications for several high profile infrastructure projects have highlighted the need for the EPA to update its regulations to provide a common framework for consistency with Section 401 and to give project proponents, certifying authorities and federal licensing and permitting agencies additional clarity and regulatory certainty."

In May of this year, I submitted comments to the EPA that detailed Wyoming's interest in a clearer, more modernized approach to Section 401 guidance and implementation. As I have pointed out, Wyoming has been adversely impacted by the misapplication of other states' CWA Section 401 certifications. Our interest in a streamlined 401 certification process is founded by the fact that a large portion of Wyoming's economy depends on our ability to export our energy products to the markets that demand them, particularly markets located overseas in Asia. In the case of the Millennium Bulk Terminal, Washington State blocked the terminal's construction by inappropriately denying the State's Section 401 certification on account of non-water quality related impacts -- an illegal maneuver based on alleged effects that are outside of the scope of Section 401.

My review of the proposed rule is conducted with an eye toward ensuring that no other state's economic vitality is put at risk by the agenda of another. In so doing, I agree that the most challenging aspects of Section 401 guidance concern the scope of review, action on a certification request, and the amount of time available for a certifying authority to act. States, tribes, federal agencies, and project proponents will benefit by knowing what is required and what to expect during a Section 401 certification process. A modernized approach to Section 401 will reduce uncertainty and prevent misuse.

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MARK GORDON
GOVERNOR OF WYOMING

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Section 401 certification should be focused, be efficient, and appropriately balance the federal government's jurisdiction with state autonomy. I applaud the EPA's intent to update its guidance with these goals in mind. However, there still is some work to do. This letter details recommendations on behalf of the State of Wyoming; please also refer to detailed comments submitted separately by the Wyoming Department of Environmental Quality and other Wyoming organizations.

Scope of review *-- Limit Section 401 review to considerations of water quality*

There is no risk of overstating the importance of the Congressional purpose of the CWA: to protect and maintain water quality. Certifying authorities have previously interpreted the scope of Section 401 in a way that resulted in the incorporation of non-water quality related considerations into their certification review processes. Washington Department of Ecology's decision to employ the State's discretionary, policy-based denial of the Millennium Bulk Terminal Section 401 certification is one such example.

In the proposed rule, the EPA concludes that the scope of a Section 401 review or action "must be limited to considerations of water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project." Wyoming adamantly supports this approach. Wyoming also supports the EPA's proposal to tie water quality requirements to "CWA and the EPA-approved state or tribal CWA regulatory programs provisions."

Certification processes *-- Conditions and basis for denials*

As I previously stated in my May 24, 2019 letter to the EPA, I support advance coordination between states and federal agencies to streamline federal permitting actions. Thank you for taking this approach into consideration in the proposed draft rule. Additional recommendations concern two key aspects of certification processes:

Conditions

I support the EPA's proposal to define certification conditions as "a specific requirement included in a certification that is within the scope of certification." This guidance appropriately ties certification approvals back to the purview of Section 401 as previously discussed: water quality requirements.

Denials

Certification denials are a major basis for Wyoming's interest in the EPA's modernization of Section 401 guidance. Again, Washington Department of Ecology's

denial of the Millennium Bulk Terminal Section 401 certification was discretionary and solely policy-based with loose, if not absent, connection to impacts on water quality.

The EPA's proposed rule recommends that a certifying authority may choose to deny a certification if it is "unable to certify that the proposed activity would be consistent with applicable water quality requirements." Wyoming supports this approach as long as the proponent is granted proper channels to supply necessary information. Wyoming also suggests that the EPA consider terms that preclude the use of denials "with prejudice." Such as in the case of the Millennium Bulk Terminal, the Washington Department of Ecology denied the project proponent's 401 certification application "with prejudice," meaning that the proponent could never reapply. It is likely that most certifying authorities would opt to approve certifications with conditions in cases where information is insufficient or design modifications need to be made in order to meet water quality requirements. However, Wyoming is keenly aware that some states may opt instead to use certification denial "with prejudice" as a tool to hamper projects from being implemented. This must be prevented.

Additionally, the proposed rule considers whether or not the EPA could invoke conditions or veto authority under language in Section 401(d). I wholeheartedly support the EPA's general interpretation that the EPA must recognize and preserve state authority over land and water resources within their borders. However, I do not support additional means under which the EPA may elect to overturn a state's certification denial or condition a project after the certifying authority has performed its due diligence. Neither the EPA nor a federal permitting or licensing agency has the authority to directly overturn a state's certification denial. The final determination on whether the state certification denial is within the scope of water quality certification is properly decided through state judicial procedures.

Timeline for review

The CWA and relevant case law articulate that certifying authorities must act on a Section 401 certification within a reasonable period of time, which must not exceed one year. Section 401 certification decisions in Wyoming are entirely water quality-based and easily achieved within one year of receipt of certification requests. I support the one-year maximum time limit, as originally intended under the CWA, to ensure regulatory certainty. In order to guarantee that the required timeline for review is met, the EPA should also consider setting enforcement requirements for the one-year turnaround into its final rule. Please refer to the Wyoming Department of Environmental Quality's comment letter for additional details concerning the reasonable period of time to act on a certification and time extension requests.

Moreover, Wyoming underscores the value of conducting pre-application meetings in order to assure an efficient, timely certification process. However, the process and format for these pre-application meetings should be left up to state discretion.

Overarching comments

The EPA poses several questions in its proposed rule that merit further discussion:

Additional guidance

The EPA requests if there should be additional guidance upon completion of this rulemaking. From a regulatory process point of view, it would be appropriate for the EPA to provide guidance after the final rulemaking and thereby rescind or revise the previous guidance. However, this will depend on how clearly the final rule reads. I suggest that the EPA solicit feedback on the merits for additional guidance after the final rule is issued.

State authority and commerce

The EPA questions if the proposed regulations appropriately balance the scope of state authority under 401 with Congress' goal of facilitating commerce on interstate navigable waters. Wyoming contends that this can be achieved through a better-defined approach to 401 certifications that narrows the scope to keep Section 401 reviews to what Congress intended. The proposed rule, with modifications pursuant to Wyoming's requests, would achieve this goal.

In closing, one last consideration: Wyoming maintains a positive, cooperative working relationship with the EPA national, regional and local personnel. Although Wyoming does not foresee any issues upon implementation of the new Section 401 rule, in the off chance that states and the EPA do not see eye-to-eye on certification decisions, I suggest that the EPA consider building dispute resolution processes into the final rule.

Thank you for taking a hard look at states' positions and taking great care to address the substantive and constructive feedback Wyoming has provided. I look forward to seeing the final rule. Please reach out to Beth Callaway (beth.callaway@wyo.gov; 307-777-8204) in my office should you have any questions in the meantime.

Sincerely,

Mark Gordon
Governor

cc: The Honorable Mike Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Liz Cheney, U.S. House of Representatives
Leslie Rutledge, Arkansas Attorney General
Steve Landry, Louisiana Attorney General
Kevin Stitt, Oklahoma Governor
Doug Burgum, North Dakota Governor
Dr. Troy Thompson, President, Wyoming County Commissioners Association
Bobbie Frank, Executive Director, Wyoming Association of Conservation Districts
Todd Parfitt, Director, Wyoming Department of Environmental Quality

EXHIBIT 7

E. SCOTT PRUITT
ADMINISTRATOR

TO: Assistant Administrators
Regional Administrators
Office of General Counsel

FROM: E. Scott Pruitt
Administrator

DATE: October 16, 2017

SUBJECT: Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements

In the past, the U.S. Environmental Protection Agency has sought to resolve litigation through consent decrees and settlement agreements that appear to be the result of collusion with outside groups.[1] Behind closed doors, EPA and the outside groups agreed that EPA would take an action with a certain end in mind, relinquishing some of its discretion over the Agency's priorities and duties and handing them over to special interests and the courts.[2] When negotiating these agreements, EPA excluded intervenors, interested stakeholders, and affected states from those discussions. Some of these agreements even reduced Congress's ability to influence policy.[3] The days of this regulation through litigation are terminated.

"Sue and settle," as this tactic has been called, undermines the fundamental principles of government that I outlined on my first day: (1) the importance of process, (2) adherence to the rule of law, and (3) the applicability of cooperative federalism. The process by which EPA adopts regulations sends an important message to the public: EPA values the comments that it receives from the public and strives to make informed decisions on regulations that impact the lives and livelihoods of the American people. The rule of law requires EPA to act only within the confines of the statutory authority that Congress has conferred to the Agency, and thereby avoid the uncertainty of litigation and ultimately achieve better outcomes.

[1] When litigants enter into a consent decree, they agree to resolve the litigation through a judicially enforceable court order; if one party fails to abide by the terms of a consent decree, that party risks being held in contempt of court. A settlement agreement generally resolves legal disputes without a court order; if one party fails to abide by the terms of a settlement agreement, the aggrieved party must petition a court for a judicial remedy.

[2] These outside groups often file lawsuits in federal district courts that the litigants believe will give them the best chance of prevailing – not necessarily in the forum where the agency action at issue is most applicable – and ask the court to enjoin the agency action on a nationwide basis. Nationwide injunctions, in general, raise serious concerns about the validity and propriety of these district court actions.

[3] The sue-and-settle phenomenon results in part from statutes that empower these outside groups to file a lawsuit against a federal agency when that agency fails to meet a statutory deadline and then reward these individuals by allowing them to recover attorney's fees for "successful" lawsuits.

E. SCOTT PRUITT
ADMINISTRATOR

Finally, EPA must honor the vital role of the states in protecting the public health and welfare under the principle of cooperative federalism as prescribed by the Constitution and statutory mandate.

* * *

This memorandum explains the sue-and-settle directive that I established within the Agency and also describes how the past practice of regulation through litigation has harmed the American public.

Regulation Through Litigation Violates Due Process, the Rule of Law, and Cooperative Federalism

When an agency promulgates a new regulation or issues a decision, the agency should take that action consistent with the processes and substantive authority that the law permits. An agency, therefore, should ordinarily zealously defend its action when facing a lawsuit challenging that action. If an agency agrees to resolve that litigation through a consent decree or settlement agreement, however, questions will necessarily arise about the propriety of the government's determination not to defend the underlying regulation or decision. Indeed, sue and settle has been adopted to resolve lawsuits through consent decrees in a way that bound the agency to judicially enforceable actions and timelines that curtailed careful agency consideration. This violates due process, the rule of law, and cooperative federalism.

A. The Importance of Process

EPA risks bypassing the transparency and due process safeguards enshrined in the Administrative Procedure Act[4] and other statutes[5] when it uses a consent decree or a settlement agreement to bind the Agency to proceed with a rulemaking with a certain end in mind on a schedule negotiated with the litigants. Congress enacted the Administrative Procedure Act to provide the American public with notice of a potential agency action, to encourage public participation in the rulemaking process, and to afford federal agencies with the framework to perform careful consideration of all the associated issues before taking final agency action. Following the legal processes for agency action provides predictability for all stakeholders, ensures that the agency will receive input from all interested parties, and increases the defensibility of an action when facing a procedural challenge.

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[4] Pursuant to the Administrative Procedure Act, an agency must publish a general notice of proposed rulemaking in the Federal Register and include the following information: "(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). Additionally, the agency "shall give interested persons an opportunity to participate in the rulemaking through a submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c).

[5] The statutes include the Paperwork Reduction Act (44 U.S.C. § 3506), the Regulatory Flexibility Act (5 U.S.C. § 603), and the Unfunded Mandates Reform Act (2 U.S.C. § 1535).

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ADMINISTRATOR

A sue-and-settle agreement, however, undermines these safeguards. Using this tactic, the agency and the party that filed the legal challenge agree in principle on the terms of a consent decree or settlement before the public has the opportunity to review the terms of the agreement.[6] An agency can also use consent decrees and settlement agreements as an end-run around certain procedural protections of the rulemaking process. Even when an agency attempts to comply with these procedural safeguards, the agency typically agrees to an expedited rulemaking process that can inhibit meaningful public participation. This rushed rulemaking process can lead to technical errors by the agency, insufficient time for stakeholders to submit rigorous studies that assess the proposal, the inability of the agency to provide meaningful consideration of all the evidence submitted to the agency, a lack of time for the agency to reconsider its initial proposal and issue a revised version, and the failure to take into account the full range of potential issues related to the proposed rule.

Sue and settle, therefore, interferes with the rights of the American people to provide their views on proposed regulatory decisions and have the agency thoughtfully consider those views before making a final decision. By using sue and settle to avoid the normal rulemaking processes and protections, an agency empowers special-interests at the expense of the public and parties that could have used their powers of persuasion to convince the agency to take an alternative action that could better serve the American people.[7]

B. Adherence to the Rule of Law

As an agency in the executive branch of the United States, EPA must faithfully administer the laws of the land and take actions that are tethered to the governing statutes. The authority that Congress has granted to EPA is our *only* authority. EPA must respect the rule of law. The Agency must strive to meet the directives and deadlines that Congress set forth in our governing environmental statutes. But we must not

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[6] In certain circumstances, the Agency must permit the public to comment on the proposed settlement. *See, e.g.*, Clean Air Act Section 113(g), 42 U.S.C. § 7413(g) (requiring that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the *Federal Register* to persons who are not named as parties or intervenors to the action or matter to comment in writing"). While the Agency has made changes to proposed consent decrees in response to comments receiving during this process, the Agency understands that numerous stakeholders lack faith in the effectiveness of this comment opportunity because the Agency and the settling litigants have already agreed in principle to the proposed settlement.

[7] "The greatest evil of government by consent decree . . . comes from its potential to freeze the regulatory processes of representative democracy. At best, even with the most principled and fair-minded courts, the device adds friction. . . . As a policy device, then, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1136-37 (D.C. Cir. 1983) (Wilkey, J., dissenting).

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ADMINISTRATOR

surrender the powers that we receive from Congress to another branch of government – lest we risk upsetting the balance of powers that our founders enshrined in the Constitution.[8] Sue and settle disrespects the rule of law and improperly elevates the powers of the federal judiciary to the detriment of the executive and legislative branches.[9]

In the past, outside groups have sued EPA for failing to act by a deadline prescribed under the law. EPA would then sign a consent decree agreeing to take a particular action ahead of other Agency actions that the public and other public officials considered to be higher priorities. We should not readily cede our authority and discretion by letting the federal judiciary dictate the priorities of the Administration and the Agency.

Taken to its extreme, the sue-and-settle strategy can allow executive branch officials to avoid political accountability by voluntarily yielding their discretionary authority to the courts, thereby insulating agency

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[8] In The Federalist Number 47, James Madison wrote:

> One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.
>
> No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. *The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.* Were the federal constitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied. *In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the preservation of liberty requires, that the three great departments of power should be separate and distinct.*

The Federalist No. 47 (James Madison) (emphasis added).

[9] "*The leading principle of our Constitution is the independence of the Legislature, Executive and Judiciary of each other.*" Thomas Jefferson to George Hay, 1807. FE 9:59 (emphasis added). "*The Constitution intended that the three great branches of the government should be co-ordinate and independent of each other.* As to acts, therefore, which are to be done by either, it has given no control to another branch. . . . Where different branches have to act in their respective lines, finally and without appeal, under any law, they may give to it different and opposite constructions. . . . *From these different constructions of the same act by different branches, less mischief arises than from giving to any one of them a control over the others.*" Thomas Jefferson to George Hay, 1807. ME 11:213 (emphasis added).

E. SCOTT PRUITT
ADMINISTRATOR

officials from criticisms of unpopular actions. Equally troubling, sue and settle can deprive Congress of its ability to influence agency policy through oversight and the power of the purse. Sue-and-settle agreements can also prevent subsequent administrations from modifying a particular policy priority, approach, or timeline.[10] The founders of our nation did not envision such an imbalance of power among the federal branches of government.

EPA must always respect the rule of law and defend the prerogatives of its separate powers. EPA, therefore, shall avoid inappropriately limiting the discretion that Congress authorized the Agency, abide by the procedural safeguards enumerated in the law, and resist the temptation to reduce the amount of time necessary for careful Agency action.

C. Embracing Cooperative Federalism

Many environmental statutes empower the states to serve as stewards of their lands and environments.[11] Embracing federalism, EPA can work cooperatively with states to encourage regulations instead of compelling them and to respect the separation of powers.[12] Past sue-and-settle tactics, however, undermined this principle of cooperative federalism by excluding the states from meaningfully participating in procedural and substantive Agency actions.

When considering a consent decree or settlement agreement to end litigation against the Agency, EPA should welcome the participation of the affected states and tribes, regulated communities, and other interested stakeholders. This should include engagement even before lodging the decree or agreement, where appropriate. These additional participants to the negotiations can voice their concerns that the

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[10] "The separation of powers inside a government – and each official's concern that he may be replaced by someone with a different agenda – creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. . . . It is impossible for an agency to promulgate a regulation containing a clause such as 'My successor cannot amend this regulation.' But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor." Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 33-34 (1987).

[11] Both the Clean Air Act and the Clean Water Act contain specific provisions that enlist the states to take primary responsibility of environmental protection.

[12] In Federalist Number 51, James Madison wrote:

> *In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.* Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

The Federalist No. 51 (James Madison) (emphasis added).

E. SCOTT PRUITT
ADMINISTRATOR

agreed-upon deadlines will be reasonable and fair, permitting adequate time for meaningful public participation and thoughtful Agency consideration of comments received. EPA must also seek to collaborate with the states and remain flexible when ensuring compliance with environmental protections.

Conclusion

By emphasizing the importance of process, adhering to the rule of law, and embracing cooperative federalism, EPA increases the quality of, and public confidence in, its regulations. Through transparency and public participation, EPA can reassure the American public that the rules that apply to them have been deliberated upon and determined in a forum open to all. Finally, the federal government must continue to improve engagement with the states, tribes, interested stakeholders, and regulated communities, especially when resolving litigation. The steps outlined in my directive today will help us achieve these noble goals and continue to improve us as an Agency.

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EXHIBIT 8

Lighthouse RESOURCES INC

October 21, 2019

Submitted electronically at http://www.regulations.gov

Ms. Lauren Kasparek
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2019-0405 --- Updating Regulations on Water Quality Certification

Lighthouse Resources Inc. ("LRI") and its indirect, wholly-owned subsidiary Millennium Bulk Terminals-Longview, LLC ("Millennium") (collectively, "Lighthouse") jointly submit these comments on EPA's proposed rule: Updating Regulations on Water Quality Certification (Federal Register / Vol. 84, No. 163 / Thursday, Aug. 22, 2019 / Proposed Rules) (the "Proposed Rule").

LRI is a privately held company headquartered in Salt Lake City, Utah. LRI and its subsidiaries own and operate two coal mines, one in Montana and one in Wyoming.

Millennium operates an existing bulk products marine terminal in Longview, Washington on the Columbia River. Millennium has proposed to build a coal export terminal at the bulk terminals site to receive coal from inland coal mines for loading and shipment to customers in northeast Asia—primarily Japan and South Korea (the "Project").

To receive its permits, Millennium sought a Clean Water Act, Section 401 water quality certification from the Washington Department of Ecology ("Washington Ecology") for nearly six years. As part of the 401 certification process,, Millennium has spent over $15 million to obtain an environmental impact statement ("EIS"), which originally began as a dual EIS under the National Environmental Policy Act ("NEPA") and the Washington State Environmental Policy Act ("SEPA"), with the US Army Corps of Engineers as the lead agency under NEPA and with the Washington Ecology and Cowlitz County as co-lead agencies under SEPA. In September 2013, the state and federal agencies agreed to separate and prepare both a federal EIS and a state EIS.

The state EIS concluded with respect to the Project that "**There would be no unavoidable and significant adverse environmental impacts on water quality.**"[1] Lighthouse submits these comments because its experience with Washington Ecology and the Section 401 process has cost tens of millions of dollars, and hundreds of millions of dollars in lost revenues for its export terminal. Millennium's experience with Washington Ecology and the Clean Water Act Section 401 process demonstrates precisely why the Proposed Rule is necessary and should be promulgated in full.

[1] State Environmental Policy Act, Final Environmental Impact Statement, dated April 28, 2017, Section 4.5.8 (emphasis added).

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Washington Ecology has horribly abused the cooperative federalism afforded the State of Washington by Congress in the Clean Water Act by completely ignoring these water quality findings with respect to the Project. Lighthouse believes that by sharing our experience in trying to obtain a 401 water quality certification from Washington Ecology, the Environmental Protection Agency ("EPA") will see an example of a rogue agency using the 401 process as a weapon against disfavored projects. Lighthouse encourages the EPA to promulgate all aspects of the Proposed Rule.

Notwithstanding the unambiguous conclusion on water quality, five months later, Maia Bellon, Director of Washington Ecology denied Millennium's Section 401 water quality certification, "***with prejudice***."[2] Washington Ecology has never before, nor ever since, denied a water quality certification with prejudice.

On Washington Ecology's website discussing the Project, in its Frequently Asked Questions section, it poses and answers the following question: "What does it mean to deny the permit with prejudice? We denied the water quality permit with prejudice – a legal term that means that the decision is final and the applicant cannot reapply."[3] The Proposed Rule would not afford Washington Ecology the authority to grant itself the power to deny a 401 certification with prejudice.

The Section 401 Denial Order is wholly inconsistent with the analysis and conclusions set forth in the EIS. Instead of focusing on water quality for the 401 certification denial, Washington Ecology focused on nine non-water quality impacts, mostly relating to rail transportation. None of these Project impacts relates to water quality.

Washington Ecology's decision to deny the 401 certification was "surprising" to its SEPA co-lead agency, Cowlitz County. "Ecology's decision to deny the 401 water quality certification request was especially surprising to [Cowlitz County officials and staff] because the FEIS unequivocally found no unavoidable and significant adverse impacts—potential or otherwise—on water quality. Based on the FEIS, there is no question the company can satisfy all local and state water quality standards. That is what the FEIS concluded."[4] Instead, Washington Ecology used the Clean Water Act process to kill the Project because it was a fossil fuel infrastructure project.

The co-lead agency for the SEPA EIS, Cowlitz County concluded that Washington Ecology issued the 401 Denial Order in order to further certain policy objectives. "Based on [Cowlitz County's] experience working on the FEIS, [we] can only conclude that those aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the permit denial is to further unstated State policy preferences. I am unaware of any other instance in which Ecology or another state agency denied a permit based on potential impacts similar to those outlined in the FEIS. I believe that if these indirect impacts were truly significant and not mitigable, then state and local agencies would be forced to deny all manner of port, shipping, and transportation permits."[5]

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[2] Order #15417, Corps Reference #NWS-2010-1225, Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington, dated September 26, 2017 ("401 Denial Order").

[3] https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-at-Ecology/Millennium

[4] Sworn Declaration of Elaine Placido, Director of Community Services, Cowlitz County, filed March 8, 2019.

[5] *Id*.

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Said differently, Washington Ecology abused the principles of cooperative federalism established in the Clean Water Act to stop a project that is perfectly legal to build—a project that could meet all water quality standards and requirements. Washington Governor Jay Inslee, and others in his administration, including Washington Ecology Director Bellon, have expressed their belief that no fossil fuel infrastructure projects should ever be built in the State of Washington. Denying Millennium's 401 water quality certification was the way that they could impose their own personal policy preferences to ensure that no permits would be issued for the Project and they could stop sister states from exporting their products into foreign commerce.

Washington officials just wanted to stop the project and thought that they were successful by denying the 401 water quality certification. After denying the 401 certification with prejudice, Millennium continued working with local, state and federal agencies on other permits for the Project, confident that it would eventually secure those permits and the 401 certification. However, when Millennium's consultants engaged Washington Ecology staff, asking for technical assistance and for their cooperation with other regulatory agencies that continued to process Millennium's permit applications, Director Bellon wrote Millennium that its "staff will not be spending time on permit preparation related to Millennium's additional applications for the [Project]."[6]

Director Bellon's letter undermined Millennium's permitting efforts across the board for the Project because much of the requested technical assistance related to permits from other agencies besides Washington Ecology. Washington Ecology refused to provide assistance to these other agencies in an effort to ensure that the Project died. Instead, Washington Ecology told Millennium to direct "questions regarding future permit applications" to the Washington Attorney General's office. This direction was a not-so-veiled message to Millennium that the Project was not going to ever be built, at least with any cooperation from the State of Washington.

Not content with issuing the 401 Denial Order, Washington Ecology even sought to prevent the US Army Corps of Engineers from continuing its work on the NEPA EIS. In September 2018, Director Bellon sent a letter to the Army Corps asking them to shut down its separate federal environmental review process. She twice expressed "deep concern" over the Army Corps' decision to "work on the federal permitting process . . ."[7], especially after Washington Ecology had already done everything in its power to stop the Project.

Washington Ecology's 401 Denial Order with prejudice was remarkable for a number of reasons in that nearly every aspect of the denial is unprecedented. Washington Ecology had never before, and has never since:

- Denied a 401 water quality certification for non-water quality reasons, including any reason resembling those cited in the 401 Denial Order;
- Denied a Section 401 water quality certification with prejudice;
- Denied any permit or certification of any kind based on SEPA's substantive authority to deny permits;
- Issued a denial order signed by the director;
- Required the volume or type of water quality information for a 401 certification application; and

[6] Letter from Maia Bellon to Millennium, October 23, 2017.

[7] Letter from Maia Bellon to Colonel Mark Geraldi, U.S. Army Corps of Engineers, September 10, 2018.

- Told a project proponent that it would not provide any further assistance on a project moving forward, and to contact the state attorney general's office for further questions.

The 401 certification process should not be abused. Accordingly, Lighthouse encourages EPA to promulgate the Proposed Rule in full, in order to keep the 401 certification process consistent with the Clean Water Act.

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EXHIBIT 9

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

October 21, 2019

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue N.W.
Washington, DC 20460

Dear Administrator Wheeler,

We are writing to express our strong support for EPA's commitment to improve implementation of Section 401 of the Clean Water Act. Just over a year ago, we wrote the attached letter asking you to withdraw draft, inaccurate guidance issued in 2010 to implement Section 401. We also asked that "EPA – as the lead federal agency – work with other federal agencies to determine what government-wide direction is needed, including the need for new clarifying guidance or regulations." We appreciate your and President Trump's commitment to prioritizing our request for Section 401 reform under Executive Order 13868, the April 2019 Executive Order titled "Promoting Energy Infrastructure and Economic Growth."

Modernization of the Clean Water Act Section 401 water quality certification process remains a top priority for us. The regulations that you propose to revise are forty-eight years old. As you have noted, the 1971 regulations predate Section 401 itself, which was created through the 1972 amendments to the Federal Water Pollution Control Act of 1948. The long unaddressed need for a rulemaking has only grown more acute since our October 2018 letter. Coastal states opposed to American energy production and use at home and abroad continue to weaponize Section 401. They attempt to wield Section 401 to block large energy projects from moving forward.

Coastal states have denied water quality certifications under Section 401 that prevent the transmission of natural gas and the export of American coal and liquefied natural gas. These states' actions hurt other states' sovereign interests. As state officials have observed, "the actions of individual state actors are disruptions to interstate commerce and negate the intent of providing the consistent and reliable permitting process envisioned by the Clean Water Act."[1]

The economic harm caused by crippling energy projects is real. As the Wall Street Journal reported in July, utilities around New York City will not link up new customers because the State of New York is blocking new natural gas pipelines.[2] As the Journal reported, "With limited

[1] Letter from the Attorneys General of Louisiana, South Carolina, Alabama, Texas, Montana, West Virginia, and Nebraska to Acting Administrator Wheeler (February 26, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0855-0011

[2] Stephanie Yang & Ryan Dezember, "The U.S. Is Overflowing with Natural Gas. Not Everyone Can Get It," Wall Street Journal (July 8, 2019), https://www.wsj.com/articles/the-u-s-is-overflowing-with-natural-gas-not-everyone-can-get-it-11562518355.

pipelines to smooth the distribution of gas around the country, price spikes have become wild. In 2018, natural gas prices in New York City surged as high as $175 during a snowstorm that spurred record heating demand. A week later, they returned to about $3."

Continued abuses of Section 401 will hurt not only American energy consumers, but also hardworking Americans and communities whose livelihoods depend on energy production. The Environment and Public Works Committee held a hearing on Section 401 in August 2018. Brent Booker, Secretary-Treasurer of North America's Building Trades Unions, testified about the Constitution Pipeline in New York— just one of the pipelines for which New York has denied a Section 401 certification. He stated:

> [A] safe, modern, and affordable solution, the Constitution pipeline, was delayed from being built after already receiving [Federal Energy Regulatory Commission] approval. This permit denial is still delaying about 2,400 direct and indirect jobs from the pipeline construction generating $130 million in labor income and economic activity for the region. The decision continues to cost local governments approximately $13 million in annual property tax revenue.

CJ Stewart, a Crow Tribal member and Board Member and Co-Founder of the National Tribal Energy Association, testified about the State of Washington's denial of Section 401 certification for a coal export terminal. He testified:

> The U.S. holds more of the world's coal reserves than any other country, and the coal mined by the Crow Nation is preferred by high efficiency, low emission power plants that are in operation and being built around the world. However, even though our coal resources provide a critical component of U.S. export trade, our ability to get our coal to fast-growing Asian markets is being hindered by states on the West Coast who continue to refuse to grant needed approvals to build state of the art export facilities for political – not water quality – reasons.

We stand ready to support you as your agency moves forward in this rulemaking. This work is critical to America's prosperity and to our standing as an energy leader in the world. Global energy usage is going to grow across all sectors – renewables, petroleum, natural gas, and coal – between now and 2050.[3] Section 401 cannot continue to be used to block America's ability to deliver on that demand. Section 401 of the Clean Water Act must be implemented as Congress intended – a careful scalpel to protect water quality, not a bludgeon for select states to kill critically important projects.

[3] Energy Information Administration (EIA), "EIA projects nearly 50% increase in world energy usage by 2050, led by growth in Asia" (Sept. 24, 2019), https://www.eia.gov/todayinenergy/detail.php?id=41433.

Sincerely,

John Barrasso, M.D.
Chairman
Committee on Environment & Public Works

Shelley Moore Capito
United States Senator

Michael B. Enzi
United States Senator

James M. Inhofe
United States Senator

Kevin Cramer
United States Senator

Steve Daines
United States Senator

Enclosures

EXHIBIT 10

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October 21, 2019

VIA REGULATIONS.GOV

The Honorable Andrew Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: **Updating Regulations on Water Quality Certification**
Comments of Exelon Generation Co., LLC
Docket ID No. EPA-HQ-OW-2019-0405

EXECUTIVE SUMMARY

On August 22, 2019, the Environmental Protection Agency ("EPA") published in the *Federal Register* a notice of proposed rulemaking to revise EPA's water quality certification regulations in 40 C.F.R. Part 121. *Updating Regulations on Water Quality Certification*, Proposed Rule, 84 Fed. Reg. 44080 (Aug. 22, 2019) (the "Proposed Rule"). Exelon Generation Company, LLC—one of the nation's leading energy companies—strongly supports the Proposed Rule and applauds EPA's efforts to update its implementing regulations for Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341.

While the Proposed Rule takes important steps to make EPA's regulations consistent with the underlying statute and to clarify implementation of Section 401 for States and regulated parties, Exelon recommends several changes to make the Part 121 regulations more effective. Specifically, as explained in detail below, Exelon recommends that the Proposed Rule (including the regulatory text) be revised to:

1. clarify that a certification condition is permissible only when it directly addresses a water quality effect caused by the licensee's "activity," and that the burden of establishing the necessity of such a condition rests at all times with the State;

2. encourage States to adopt procedural requirements similar to those that will apply when the Administrator receives a certification request;

3. confirm that States may not use their water quality certification request "submission procedures" to evade Section 401's one-year clock;

4. confirm that Federal licensing or permitting agencies have sole responsibility for enforcement of certification conditions; and

5. expressly state that any modification to a certification—including a modification made pursuant to a so-called "reopener" condition—has no legal effect unless and until it is approved by the relevant Federal licensing or permitting agency pursuant to that agency's own regulations.

BACKGROUND

Exelon Generation Company, LLC is a subsidiary of Exelon Corporation, a Fortune 100 energy company with the largest number of electricity and natural gas customers in the United States. Exelon Corporation does business in 48 States, the District of Columbia, and Canada. Exelon Corporation serves approximately 10 million customers in Delaware, the District of Columbia, Illinois, Maryland, New Jersey, and Pennsylvania through its Atlantic City Electric, BGE, ComEd, Delmarva Power, PECO, and Pepco subsidiaries. Exelon is one of the largest competitive U.S. power generators, with more than 32,000 megawatts of nuclear, gas, wind, solar, and hydroelectric generating capacity comprising one of the nation's cleanest and lowest-cost power generation fleets. Exelon routinely seeks licenses and permits from Federal agencies and water quality certifications from State agencies in connection with the construction and operation of its nuclear, hydroelectric, and natural-gas-fired electric generating assets.

Exelon's views on EPA's Section 401 regulations are informed by its recent efforts to relicense the Conowingo Hydroelectric Project ("Conowingo" or the "Project"), a hydroelectric generating facility on the lower Susquehanna River, about ten miles upstream from the River's confluence with the Chesapeake Bay. With a generating capacity of 500 megawatts, the Project is by far the largest source of renewable energy in Maryland. In 2014, Exelon requested a water quality certification from the Maryland Department of the Environment ("MDE") in connection with its efforts to renew the Project's Federal license. In 2018, MDE issued a purported certification for the Project (the "Certification"). MDE attached conditions to the Certification that vastly exceeded the scope of State authority under CWA Section 401. For example, MDE's Certification requires Exelon to remove pollutants from the Susquehanna River that were released into the water through upstream agricultural runoff, wastewater treatment facilities, and other sources of pollution in New York, Pennsylvania, and a small portion of Maryland. Although it is undisputed that Exelon itself does not introduce these pollutants into the River, the Certification purported to require Exelon to remove 6,000,000 pounds of nitrogen and 260,000 pounds of phosphorus from the River every year for the entire term of the Project's Federal license. The Certification includes a "payment in lieu" provision that would allow the Project to satisfy its obligations by instead paying MDE a fee exceeding $172 million annually, or more than ***$7 billion*** over the term of the Federal license. This amount is orders of magnitude greater than the Project's economic value as an operating asset, and thus Exelon would be forced to abandon the Federal license and discontinue the Project's operation absent a substantial change in the Certification's terms. Exelon and MDE are presently engaged in an ongoing dispute over the legality of the Certification, and that dispute implicates multiple issues discussed in the Proposed Rule.

Following President Trump's issuance of Executive Order 13868 in April 2019,[1] EPA requested pre-proposal recommendations concerning the scope and content of its new regulations and guidance.[2] Exelon submitted comments[3] encouraging EPA to promulgate a rule codifying the D.C. Circuit's recent opinion in *Hoopa Valley Tribe v. FERC*,[4] which confirmed that States waive their opportunity to issue a Section 401 certification when they engage in a "coordinated withdrawal-and-resubmission scheme."[5] Exelon also urged EPA to clarify that certification conditions are permissible under Section 401 only if they relate directly to the licensee's "activity."[6]

On August 22, 2019, EPA published the Proposed Rule in the *Federal Register*. Exelon supports the Proposed Rule and appreciates this opportunity to provide comments, including recommended changes that would further improve EPA's proposed revisions.

DISCUSSION

The remainder of these comments focuses on Exelon's recommendations with respect to the issues discussed in the Proposed Rule, including (1) the permissible scope of water quality certification conditions; (2) the procedures governing the process for requesting a certification; (3) the timeline by which States must act on requests for certifications; (4) the proper roles for State and Federal agencies in enforcing certifications; and (5) the rules governing modification or "reopening" of such certifications.

1. Scope of Water Quality Certification Conditions

Exelon strongly supports the portions of the Proposed Rule that clarify the permissible scope of conditions on Section 401 certifications, making the regulations more consistent with statutory text and Congressional intent. As explained below, Exelon requests that EPA adopt several additional requirements related to the scope of certifications.

The Proposed Rule includes a new provision defining the term "condition" to mean "a specific requirement included in a certification that is within the scope of certification." Proposed Rule § 121.1(f), 84 Fed. Reg. 44120. The Rule goes on to state that "[t]he 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." Proposed Rule § 121.3, 84 Fed. Reg. 44120. The proposed regulations also require at Section 121.5(d) that any conditions imposed in the certification must be accompanied by an explanation of "why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements," *id.* § 121.5(d)(1); a citation to the relevant "federal, state, or tribal

[1] *See* Executive Order 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019).
[2] *See* Memorandum from Lauren Kasparek, Office of Wetlands, Oceans and Watersheds, Envt'l Protection Agency (Docket ID No. EPA-HQ-OW-2018-0855) (Apr. 15, 2019).
[3] *See* Comments of Exelon Generation Co., LLC, Docket No. EPA-HQ-OW-2018-0855 (May 24, 2019) ("*Exelon May 2019 Comments*").
[4] 913 F.3d 1099 (D.C. Cir. 2019).
[5] *Id.* at 1103; *see Exelon May 2019 Comments* at 4–6.
[6] *Exelon May 2019 Comments* at 9–10.

law that authorizes the condition," *id.* § 121.5(d)(2); and a "statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements," *id.* § 121.5(d)(3). *See* 84 Fed. Reg. 44120. Finally, the Proposed Rule clearly states that a Federal agency "shall not" incorporate any condition from a Section 401 certification unless it determines that that the condition "satisf[ies] the definition [of 'condition'] in § 121.1(f) and meets the requirements of § 121.5(d)." Proposed Rule § 121.8(a)(1), 84 Fed. Reg. 44121.

Exelon strongly supports this revised framework, which effectively implements the statutory text and makes clear that States cannot use purported "conditions" as vehicles to impose requirements that exceed States' authority under the CWA. As Exelon explained in its prior comments,[7] States have for years attempted to use certification conditions as a means to achieve general policy goals that, in many instances, bear little or no relation to the actual water quality effects caused by the project at issue. The discussion of this problem in the Proposed Rule's preamble resonates especially strongly with Exelon's experience relating to Conowingo: "EPA is also aware of certification conditions that purport to require project proponents to address pollutants that are not discharged from the construction or operation of a federally licensed or permitted project. Using the certification process to yield facility improvements or payments from project proponents that are unrelated to water quality impacts from the proposed federally licensed or permitted project is inconsistent with the authority provided by Congress." 84 Fed. Reg. 44105. EPA's Proposed Rule, when finalized, will help to eliminate such actions and ensure that the text of Section 401—and not unrelated policy objectives of State administrators—serves as the standard against which new certification conditions are judged.

In addition to the changes in the Proposed Rule, which Exelon supports, we recommend four modifications to strengthen protections against use of the certification process to impose conditions beyond States' proper authority under Section 401.

First and most important, EPA should modify the Proposed Rule to clarify that Section 401 conditions are permissible ***only if they directly address water quality effects caused by the licensee's or permittee's "activity."*** In numerous contexts—including both pipelines and hydroelectric facilities—States recently have sought to use Section 401 conditions to address water quality concerns caused by entities or activities other than those that are the subject of the certification. EPA should take this opportunity to confirm that these efforts are not permitted by the CWA and violate EPA regulations.

The guiding principle for courts tasked with determining the propriety of Section 401 certification conditions in diverse contexts—including ballast-water discharges,[8] construction projects affecting adjacent waterways,[9] and wetland development[10]—has been whether the

[7] *See Exelon May 2019 Comments* at 3–4, 9–10.

[8] *See, e.g.*, *Port of Oswego Auth. v. Grannis*, 897 N.Y.S.2d 736, 738 (N.Y. 3d Dep't 2010) (approving Section 401 conditions addressing discharge of ballast water because conditions were necessary to prevent introduction of invasive species and pathogens into waterways); *In re 401 Water Quality Certification*, 822 N.W.2d 676, 678, 689 (Minn. Ct. App. 2012) (approving conditions directly addressing an activity of shipping vessels that involved discharge of ballast water).

[9] *See, e.g.*, *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 929 (9th Cir. 1988) (affirming decision that conditioned Navy's Section 401 permit to construct a port on acquiring a State shoreline management

condition was designed to directly address water quality effects caused by the licensee's or permittee's activity. Courts have emphasized that State agencies evaluating requests for Section 401 certifications may not consider the effects of activities other than those being licensed. In *Delaware Riverkeeper Network v. Secretary of the Pennsylvania Department of Environmental Protection*, for example, the Third Circuit held that a State agency correctly declined to assess the impacts of "tree clearing activities" before issuing a certification for construction related to a pipeline expansion because there was not a sufficient nexus between the "construction activity" being licensed and the "pre-construction activity" of tree-clearing.[11] A fortiori, water quality effects that are caused by entities and activities entirely distinct from the licensee/permittee are not properly within the scope of Section 401 conditions.

When a certification condition falls on the wrong side of the line—that is, when it does not directly address a water quality effect caused by a licensee's or permittee's activity—courts have not hesitated to invalidate the condition.[12] In *Port of Seattle v. Pollution Control Hearings Board*, for example, the Washington Supreme Court considered a number of conditions that a State agency imposed in a Section 401 certification for construction of an airport runway on wetlands.[13] Although the court approved many of those conditions, it overturned a streamflow condition that would have "required that the Port do more than offset the impact of the third runway."[14] The court explained that the "actual impact" of the runway would be a reduction in stream flow of 0.08 cubic feet per second ("cfs") in the Des Moines Creek, and thus agreed with the Port that the State agency "erred when it required the Port to mitigate low flows … anytime flows fall below 1.0 cfs because this condition requires [the Port] to augment low flows beyond the 0.08 cfs impact of the … runway project."[15] The Federal Energy Regulatory Commission ("FERC") has also confirmed that conditions not directly addressing a water quality effect caused by the licensee's "activity" are improper under Section 401. Indeed, FERC has often noted its opinion that conditions "unrelated" to a project's activities are not proper Section 401 limitations.[16] This principle is not limited to the hydropower context, and States have also sought to use Section 401 to impose unwarranted conditions on pipelines.[17]

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permit that addressed the port's effects on water quality and aquatic life); *Interstate Props. v. Schregardus*, No. 99AP-249, 1999 WL 1267309, at *2 (Ohio Ct. App. Dec. 30, 1999) (approving Section 401 conditions for modification of a waterway that were designed to mitigate effects of construction on erosion and nearby trees).

[10] *Family Dev., Ltd. v. Steuben Cty. Waste Watchers, Inc.*, 749 N.E.2d 1243, 1246, 1260 (Ind. Ct. App. 2001) (approving Section 401 conditions for the construction of landfill that directly addressed mitigation of damages to nearby wetlands); *O'Hagan v. State*, No. 28897–4–II, 2003 WL 22962168 (Wash Ct. App. Dec. 16, 2003) (discussing Section 401 conditions for development of cranberry bog that were designed "to mitigate wetland loss").

[11] 833 F.3d 360, 386 (3d Cir. 2016).

[12] *See Exelon May 2019 Comments* at 8–10.

[13] 90 P.3d 659 (Wash. 2004).

[14] *Id.* at 681.

[15] *Id.*; *see* 17 A.L.R. FED. 2D 309 § 23 (2007) (discussing *Port of Seattle* and noting that conditions are impermissible when they more than "offset[] the expected impact of the project"); *id.* §§ 19, 21, 26 (cataloging other inappropriate conditions).

[16] *See, e.g.*, Order Issuing New License, *Portland Gen. Elec. Co.*, Project No. 2195-011, 133 FERC 62281, at 64620 ¶ 57, 2010 WL 11404139 (FERC Dec. 21, 2010); Order Issuing New License, *Pub. Utility Dist. No. 1 of Snohomish Cty., Wash.*, Project No. 2157-188, 136 FERC 62188, at 64488 ¶ 92,

In the particular context of hydropower, Section 401 does not authorize conditions to regulate pollutants that were not added to navigable waters by the applicant. Put differently, an effect caused by the presence of pollutants in water discharged through a hydroelectric facility, where the presence of those pollutants is not attributable to the federally licensed or permitted activity, falls outside the scope of certification.

The Proposed Rule takes a step in the right direction by stating that conditions are only appropriate if they are "within the scope of certification," Proposed Rule § 121.1(f), 84 Fed. Reg. 44120, and that conditions must be "necessary to assure that the discharge from the proposed project will comply with water quality requirements," *id.* § 121.5(d)(1). Exelon commends the additions in Section 121.8(a)(1), which clarify that a Federal agency may not incorporate conditions into a Federal license or permit if those conditions do not satisfy the new Sections 121.1(f) and 121.5(d). Moreover, Exelon strongly supports EPA's clarification that Congress did not intend for States to be able to impose "one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed [project]." 84 Fed. Reg. at 44094.[18]

To better implement the clear text of Section 401, however, Exelon respectfully recommends that EPA revise the text of Proposed Rule Section 121.5(d) to read as follows, with suggested modifications underlined: "Any grant of certification with conditions shall be in writing. Any condition must directly address a water quality effect caused by the particular activity for which the applicant is seeking a license or permit. Any grant of certification with conditions shall for each condition include, at a minimum . . . . "

Second, EPA should modify the Proposed Rule to clarify that the certifying authority—not the applicant—bears the burden of establishing that any conditions are necessary to assure compliance with water quality requirements. As Exelon explained in its prior comments,[19] the States' power under Section 401 is a narrow exception in a federally occupied field, and thus the burden of showing that a Section 401 condition is "necessary to assure" compliance with water quality standards necessarily rests at all times with the State.[20] This principle follows from the

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2011 WL 13045891 (FERC Sept. 2, 2011); Order Issuing New License, *Pub. Utility Dist. No. 1 of Douglas Cty., Wash.*, Project No. 2149-152, 141 FERC 62104, at 64270 ¶ 53, 2012 WL 12372998 (FERC Nov. 9, 2012); *see also Mitchell Cty. Conservation Bd., Project No. 11530-000—Iowa*, 77 FERC 6202, 64458 n.4 (FERC Dec. 27, 1996) (refusing to require a hydropower licensee to spend project revenues on improvements at county parks that were "unrelated to the project" being licensed).

[17] *See, e.g., Delaware Riverkeeper Network*, 833 F.3d at 386.

[18] Exelon also believes that Section 121.13(b) of the Proposed Rule—which applies only to certifications made by the Administrator—correctly recognizes that it would be inappropriate for the Administrator to request additional information from an applicant unless that information is "directly related to the discharge from the proposed project and its potential effect on the receiving waters." 84 Fed. Reg. at 44122.

[19] *See also Exelon May 2019 Comments* at 7.

[20] *See, e.g., California v. FERC*, 495 U.S. 490, 506 (1990); *First Iowa Hydro-Elec. Coop.*, 328 U.S. 152, 180 (1946) (Federal Power Act establishes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation"); *see also PUD No. 1 of Jefferson Cty.*

fact that, when Congress has preempted a field (as Congress did with hydropower regulation in the Federal Power Act), the burden to show that some State action should be permissible under a purported exception to Federal preemption rests with the party seeking to establish the exception.[21] To implement this recommendation, Exelon respectfully suggests that EPA modify the existing text of Section 121.5(d)(1) of the Proposed Rule to state that the writing articulating the certification conditions must include "[a] statement explaining why the certifying authority has carried its burden to demonstrate that the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements" (suggested modification underlined).

Third, EPA should further clarify that, if a less stringent condition could satisfy the applicable water quality requirements, a more stringent condition is—by definition—not "necessary to assure" compliance. 33 U.S.C. § 1341(d). Therefore, the more stringent condition should not be included in the Federal license or permit. This conclusion is already implied by Section 121.5(d)(3), which requires a "statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements." 84 Fed. Reg. 44120. But the Proposed Rule should take the next step, by concluding that if a less stringent condition in fact would satisfy applicable water quality requirements, the more stringent condition cannot be imposed on the project proponent.

Fourth, EPA should clarify that a Federal licensing or permitting agency need not incorporate or enforce conditions in a State certification that the Federal agency, after due consideration, concludes are unlawful because they violate ***any*** provision of the CWA, of EPA's CWA regulations, or of a statute the agency is charged with implementing (or its implementing regulations). As noted above, Exelon applauds the addition of Proposed Rule Section 121.8(a)(1), which clarifies that a Federal agency shall not incorporate license or permit conditions if those conditions do not satisfy the new Sections 121.1(f) and 121.5(d). That said, the existing language in Section 121.8(a) may be read to suggest that Federal agencies would be required to incorporate certification conditions that they believe are unlawful under any provision of the CWA or its implementing regulations ***other than*** Sections 121.1(f) or 121.5(d) of the Proposed Rule.

To implement this suggestion, Exelon respectfully requests that EPA modify the text of Proposed Rule Section 121.8(a)(1) to read: "If the Federal agency determines that a condition does not satisfy the definition of § 121.1(f), does not meet the requirements of § 121.5(d), or otherwise fails to comply with any provision of the Clean Water Act, of regulations promulgated pursuant to the Clean Water Act, or of any Federal law that the Federal agency is charged with

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v. Wash. Dep't of Ecology, 511 U.S. 700, 722 (1994) (noting State's inability to impose conditions on a Federal hydroelectric license "pursuant to state law").

[21] *See, e.g., Tran Enters., LLC v. DHL Exp. (USA), Inc.*, 627 F.3d 1004, 1009–10 (5th Cir. 2010) (holding that "the party asserting … an exception" to a Federal statute's preemptive scope would "bear the burden of proof at trial"); *see also New England Health Care Employees Union, Dist. 1199, SEIU/AFL-CIO v. Rowland*, 204 F. Supp. 2d 336, 343 n.7 (D. Conn. 2002) (noting that, when there exists a "rebuttable presumption that Congress intended to preempt state law," "the defendants have the burden of production for any exception to preemption or evidence of congressional intent not to preempt").

administering, such condition shall not be incorporated into the license or permit" (suggested modifications underlined).

2. Certification Request and Receipt

Exelon supports the Proposed Rule's clarification of the process for requesting a water quality certification from a certifying authority. However, as explained below, Exelon suggests that EPA consider stronger incentives for States to adopt clear *ex ante* rules governing what information is required to support approval of a certification request and what procedures apply to any subsequent information requests by the State, to help ensure that certification requests can be approved within one year or less after receipt.

Section 121.4 of the Proposed Rule provides that, when a State agency is the certifying authority, the proponent of the project will begin the application process by submitting a certification request to the State and then contacting the Federal licensing or permitting agency to provide notice of the request, which triggers the Federal agency's duty to provide the certifying State the "applicable reasonable period of time to act on the certification request." Proposed Rule § 121.4(b)–(c), 84 Fed. Reg. at 44120. The Proposed Rule states that the Federal agency may not establish a "reasonable period of time" that "exceed[s] one year from receipt" of the request, and in turn defines "receipt" to mean "the date that a certification request is documented as received by a certifying authority." Proposed Rule §§ 121.4(e), 121.1(o), 84 Fed. Reg. at 44120.

A separate provision of the Proposed Rule at Subpart D governs certifications made by the Administrator rather than by a State. The Proposed Rule requires that the project proponent request a pre-filing meeting with the Administrator at least 30 days prior to submitting the certification request, *see id.* § 121.12(a); that the Administrator must hold such a meeting and "discuss the nature of the proposed project and potential water quality effects" with the applicant, *id.* § 121.12(b)–(c); that the Administrator may request additional information from the applicant within 30 days of receiving the request, *see id.* § 121.13(a); that the Administrator "shall only request additional information that is within the scope of certification" and "that can be collected or generated within the established reasonable period of time," *id.* § 121.13(b)–(c); and that the Administrator must provide public notice of the certification request within 20 days and may schedule a public hearing in his or her discretion, *see id.* § 121.14(a)–(b).

Exelon commends EPA's efforts to bring clarity to the process through which applicants request certifications and certifying authorities receive them. Exelon is particularly supportive of the provisions of the Proposed Rule that govern certification by the Administrator. *See* Proposed Rule Subpart D, 84 Fed. Reg. 44122. Those provisions contemplate a timely and efficient process and recognize that it would be unfair to an applicant, and inconsistent with the statute, to require studies or other information that cannot be completed or generated within the established "reasonable period of time" (or even within the year following the submittal of the request). Proposed Rule § 121.13(c), 84 Fed. Reg. 44122.

To ensure that regulated parties can benefit from the transparent and effective process contemplated by Subpart D of the Proposed Rule, Exelon recommends that EPA encourage the

States to adopt procedural requirements for their certification processes that are similar to Subpart D's process governing certifications by the Administrator. Moreover, Exelon respectfully suggests that EPA establish stronger incentives for States to adopt clear procedural rules that (1) provide that requests for additional information from applicants can be made only pursuant to regulations or policies adopted by the States *in advance of the certification process*; and (2) clearly identify in advance what information applicants should provide in support of a request. Clear *ex ante* rules would avoid placing an unfair burden on the applicants to guess what must be included, to allow the State to approve a request within one year.[22] Absent such rules, there is an appreciable risk that States will take the position that additional information is required to evaluate a certification but cannot be provided within one year, and that States will seek to deny certification requests on this basis. EPA should underscore in its final rule preamble that denial of certification based on inadequate information—where the state did not clearly identify the need for such information through *ex ante* regulations—is likely to be vulnerable to reversal on judicial review.

The recommendations outlined above could be implemented by adding a provision at the end of Section 121.5 of the Proposed Rule—designated Section 121.5(g)—providing:

> Each certifying authority should adopt fair and clear procedural rules for the process governing requests for certifications, including rules governing pre-request consultations, requests for additional information made by the certifying authority after the request is received, and the provision of public notice and hearings. Such rules should clearly identify the specific information applicants must provide in support of their requests. States may at their election model their procedural rules on EPA's rules governing certification by the Administrator, *see* 40 C.F.R. Part 121, Subpart D.

In the alternative, EPA could promulgate guidance including similar language or otherwise providing States with a list of "best practices" that should be followed in the certification process.

3. Timeframe and Waiver

Exelon strongly supports EPA's proposal to codify the D.C. Circuit's recent holding in *Hoopa Valley* that "the withdrawal-and-resubmission of water quality certification requests does not trigger new statutory periods of review."[23] Section 121.4(f) of the Proposed Rule clearly states that the "certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time." 84 Fed. Reg. 44120.[24] Section 121.4(e) of the Proposed

[22] *See Exelon May 2019 Comments* at 5.
[23] 913 F.3d at 1103; *see Exelon May 2019 Comments* at 4–6.
[24] Similarly, Section 121.7(a)(2) provides that the certification requirement will be waived upon the certifying authority's "failure or refusal to act on a certification request." 84 Fed. Reg. 44121. The phrase "[f]ail or refuse to act" is defined in the Proposed Rule to mean that the "the certifying authority actually or constructively fails or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time." Proposed Rule

Rule defines the time limit for action on a request as being no longer than "one year from receipt." *Id.* And Section 121.1(o) in turn defines the term "receipt" as "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures." *Id.*

As Exelon explained in its prior comments,[25] EPA's approach is consistent with recent decisions from courts and Federal agencies that have rejected the notion that the one-year clock begins to run when the State says it is ready to process the request, rather than when it receives the request from the applicant.

That said, Exelon recommends one change to further clarify these requirements. Specifically, Section 121.1(o) and the preamble should further clarify that States may not use their "applicable submission procedures" to introduce an unreasonable delay between the time that an agency receives a request and the time that the request is deemed "received." The phrase "applicable submission procedures" in the Proposed Rule could be interpreted by States to allow them to adopt "submission procedures" under which a request is not deemed "received" even though it is in the State's possession—*e.g.*, by specifying that a State will take six months to consider the request before deeming it received (or some other similar rule) or by deeming an application not "received" if it does not meet certain completeness criteria. States have tried that approach before, as by deeming received requests "incomplete" to avoid triggering the one-year clock Congress mandated in Section 401(a).[26]

To implement this recommendation, Exelon suggests that EPA modify Section 121.1(o) to provide simply that "*Receipt* means the date that a certification request is received by a certifying authority." Alternatively, at a minimum, EPA should include language in the final Rule preamble confirming that its reference to "applicable [State] submission procedures" refers only to ministerial procedures, not substantive or "completeness" criteria, and may not be read as an invitation for States to adopt rules that would prevent the one-year clock from beginning to run as soon as the request is in the certifying agency's possession.

4. Enforcement

The preamble to the Proposed Rule correctly notes that Section 401 "does not provide an independent regulatory enforcement role for certifying authorities for conditions included in federal licenses or permits." 84 Fed. Reg. 44116. EPA has also recognized that Section 401 "does not provide an . . . ongoing role for certifying authorities to enforce certification conditions under federal law" and that this "role is reserved to the federal agency issuing the federal license

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§ 121.1(h), 84 Fed. Reg. 44120. Likewise, Section 121.2 of the Proposed Rule should be revised to acknowledge the possibility of waiver: "Any applicant for a license or permit to conduct any activity which may result in a discharge shall provide the Federal agency either a certification from the certifying authority in accordance with this part or a written notice that the certification requirement has been waived" (suggested modifications underlined). 84 Fed. Reg. 44120; *see also* Proposed Rule 121.7(c), 84 Fed. Reg. 44121 ("A written notice of waiver from the Federal agency shall satisfy the project proponent's requirement to obtain a certification.").

[25] *See Exelon May 2019 Comments* at 7.

[26] *See id.* (discussing *City of Fredericksburg v. FERC*, 876 F.2d 1109, 1111–12 (4th Cir. 1999)).

or permit." *Id.* EPA has sought comment on "whether clarification on this point may be appropriate to include in the regulatory text." *Id.* The text of the Proposed Rule states that "[t]he Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit," but does not otherwise comment on State enforcement authority. Proposed Rule § 121.9(c), 84 Fed. Reg. 44121.

Exelon encourages EPA to include a provision within the text of the Proposed Rule itself that confirms the agency's conclusions concerning the scope of State enforcement authority. That could be accomplished by modifying the text of Section 121.9(c) of the Proposed Rule to read as follows (with suggested modifications underlined):

> (c) The Federal agency shall be <u>solely</u> responsible for enforcing certification conditions that are incorporated into a federal license or permit. <u>A certifying authority has no independent enforcement role with respect to any condition included in a federal license or permit and has no ongoing role in enforcing any certification condition under federal law once the condition has been incorporated into a federal license or permit</u>.

5. Modification

The Proposed Rule seeks comment on potential modifications to the regulation currently codified at 40 C.F.R. § 121.2(b), which provides that "[t]he certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator." EPA has proposed "to remove this provision from the regulatory text as it is inconsistent with [EPA's] role for new certifications." 84 Fed. Reg. 44117. EPA requests comment on whether it should maintain this oversight provision or serve some other "more involved oversight role." 84 Fed. Reg. 44117. EPA also requests comment on the related issue of so-called "reopener" provisions, which are certification "conditions that authorize certifications to be re-opened." 84 Fed. Reg. 44107. As EPA has correctly recognized, reopener provisions "may create regulatory uncertainty." *Id.*

Exelon appreciates EPA's approach to the issue of modifications and reopeners, and respects EPA's efforts to recognize the limits on its own authority under Section 401. Exelon agrees with EPA that the portion of Section 121.2(b) that requires the Regional Administrator to approve modifications to certifications should be deleted, as it is not grounded in the text of Section 401.

Exelon respectfully suggests that, rather than deleting 40 C.F.R. § 121.2(b) outright, this provision be revised to clarify that any modification of a certification—including any modification made pursuant to a reopener condition in an existing certification—has no effect unless and until it is approved by the Federal licensing or permitting agency pursuant to its own regulations. As one State Supreme Court explained, States do "not have statutory, regulatory, or federal authority to suspend or revoke a 401 Certification after it has been granted."[27] Based on

[27] *Triska v. Dep't of Health & Envt'l Control*, 355 S.E.2d 531, 533–34 (S.C. 1987); *see also Exelon May 2019 Comments* at 6.

Exelon's experience, an express provision of this nature would help clarify existing limits on States' authority and avoid potential abuses.

To implement these changes, Exelon respectfully requests that EPA add a new provision to the Proposed Rule, which would be designated Section 121.8(c). That subsection would provide as follows (with modifications against the existing 40 C.F.R. § 121.2(b) underlined):

> The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency and the licensing or permitting agency, but no modification of a certification will take effect or be enforceable unless and until it is approved by the licensing or permitting agency pursuant to its own regulations.

The proposed final clause is necessary because, absent such a clarification, the proposed subsection could be read as suggesting that State certifying authorities retain unilateral discretion to modify certification conditions without seeking sign-off from the appropriate Federal agency. This would make little sense, given that the licensing or permitting agency would have had the opportunity to assess the lawfulness of the modification had it been added to the certification during the initial certification process and that the licensing or permitting agency has sole responsibility for the enforcement of certification conditions. Indeed, the rules currently codified at 40 C.F.R. Sections 121.25 and 121.28 may be misread to suggest that Section 401 authorizes a State to engage in ongoing oversight, for the entire term of the license or permit, rather than serving a one-time "gating" function at the point when a Federal license or permit is first being sought or is being renewed. The language suggested above would confirm for States and regulated parties that this is not the case.

CONCLUSION

Exelon appreciates EPA's careful work in crafting the Proposed Rule and believes that the changes proposed by the agency will better align implementation of Section 401 of the CWA with the text of the statute and Congressional intent. As explained above, Exelon recommends that EPA adopt several specific changes, which it believes would make the revised regulations even more effective. Exelon would be glad to discuss these changes with you in additional detail or to provide any further assistance that EPA may find useful as it works to finalize revisions to its Part 121 regulations.

Respectfully submitted,

/s/ Joel Beauvais

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED Plaintiffs, v. ANDREW R. WHEELER; U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendants.	No. 3:20-cv-4636 **ANSWER OF STATE INTERVENORS LOUISIANA, MONTANA, ARKANSAS, MISSISSIPPI, MISSOURI, TEXAS, WEST VIRGINIA, AND WYOMING**

STATE INTERVENORS' ANSWER TO COMPLAINT

Intervenors Louisiana, Montana, Arkansas, Mississippi, Missouri, Texas, West Virginia, and Wyoming ("State Intervenors"), make this Answer to Plaintiffs' Complaint in the above-captioned case. Pursuant to Federal Rule of Civil Procedure 8(b), State Intervenors deny each and every allegation contained in Plaintiffs' Complaint except for those expressly admitted herein. For the avoidance of doubt, State Intervenors deny (a) all summations, characterizations, etc. of legal authorities on the basis that such allegations state a legal conclusion as to which no response is required and that legal authorities speak for themselves and (b) all headings.

INTRODUCTION

1. Admitted that Congress passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (Oct. 16, 1972). Otherwise denied.

2. Admitted that 33 U.S.C. § 1251(a) states, in part: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Admitted that states retain primary authority to abate water pollution. Admitted that 33 U.S.C. § 1251(b) states, in part: "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, 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 chapter." Intervenor States further answer that the statutory text speaks for itself. Otherwise denied.

3. Denied.

4. Admitted that 33 U.S.C. § 1341(a)(1) states, in part: "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be." Admitted that, as a result, state certification is required for a range of projects that require federal approval. Otherwise denied.

5. Admitted that 33 U.S.C. § 1341(a)(1) states, in part: "Such State or interstate agency

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." Otherwise denied.

6. Admitted that on July 13, 2020, Defendant Andrew R. Wheeler and Defendant U.S Environmental Protection Agency ("the EPA"), published a final rule revising the regulations implementing Section 401, and that the final rule was published as Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("Final Rule"). Otherwise denied.

7. Admitted that Plaintiffs seek an order declaring the Final Rule, in whole or in part, unlawful, and setting it or its provisions aside. Otherwise denied.

JURISDICTION & VENUE

8. Admitted that the Final Rule constitutes final agency action. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of Plaintiffs' standing and, on that basis, deny that this Court has authority to grant the requested relief. Otherwise denied.

9. Admit that the EPA has an office within this district. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remaining factual allegations; they are therefore denied.

INTRADISTRCT ASSIGNMENT

10. Denied.

PARTIES

11. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

12. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

13. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

14. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

15. The Intervenor States lack knowledge or information sufficient to form a belief about

the truth of this allegation; it is therefore denied.

16. Denied that Plaintiffs are directly injured by the Final Rule. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remainder of this allegation; it is therefore denied.

17. Denied that the Final Rule will undercut any state's authority. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remainder of this allegation; it is therefore denied.

18. Denied.

19. Admitted that the Final Rule limits the use of Section 401 to impose unlawful and unconstitutional conditions. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remainder of this allegation; it is therefore denied.

20. Denied.

21. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

22. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

23. Admitted.

24. Admitted.

LEGAL BACKGROUND

I. The Clean Water Act

25. Admitted that Congress passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (Oct. 16, 1972). Admitted that 33 U.S.C. § 1251(a) states, in part: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Admitted that states retain authority to abate water pollution. Otherwise denied.

26. Admitted that 33 U.S.C. § 1251(b) states, in part: "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, 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 chapter." Admitted that 33 U.S.C. § 1370 states, in part: "Except as expressly provided in this chapter, nothing in this chapter shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

27. Admitted that 33 U.S.C. § 1377(e) states, in part, "The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if" certain conditions are met.

28. Admitted.

II. Section 401 of the Clean Water Act

29. Admitted that 33 U.S.C. § 1341(a)(1) provides, in part: "Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." Further admitted that 33 U.S.C. § 1341(a)(1) states, in part "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence" and "No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be." Otherwise denied.

30. Admitted that 33 U.S.C. § 1377(e) provides, in part: "The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if [certain conditions are met]." Further admitted that 33 U.S.C. § 1341(a)(1) provides, in part: "In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator."

31. Denied as written.

32. Admitted that 33 U.S.C. § 1341(a)(1) provides, in part: "Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it[.]"

33. Admitted that 33 U.S.C. § 1341(a)(1) states, in part: "If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."

34. Admitted that 33 U.S.C. § 1341(d) states, in part: "Any certification provided under this section shall 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 effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

III. The Administrative Procedure Act

35. Admitted that 5 U.S.C. § 702 states, in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

36. Admitted that 5 U.S.C. § 704 states, in part: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Admitted that promulgation of a final rule is a final agency action under the APA.

37. Admitted.

FACTS

I. **Application of Section 401**

38. Admitted that for the past 50 years, certain states have exercised the certification

authority provided in Section 401 for activities that require a federal license or permit. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remainder of this allegation; it is therefore denied.

39. Admitted that certain states have considered and addressed impacts unrelated to water quality in making certifications under Section 401. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remaining factual allegations; they are therefore denied.

40. Admitted that certain states have imposed a broad array of conditions on activities subject to the Section 401 certification requirement—including conditions not related to the triggering discharge. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remaining factual allegations; they are therefore denied.

41. Admitted that certain states have denied certification based on requirements that were not promulgated pursuant to the Clean Water Act. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remaining factual allegations; they are therefore denied.

42. Admitted that certain states have enacted laws and regulations establishing rules and processes for public notification and participation in determinations concerning requests for certification under Section 401.

43. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

44. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

45. Admitted that on April 10, 2019, President Trump issued Executive Order 13, 868. The text of the executive order speaks for itself. Otherwise denied.

46. Admitted that Executive Order 13868 states, in part:

> Purpose. The United States is blessed with plentiful energy resources, including abundant supplies of coal, oil, and natural gas. Producers in America have demonstrated a remarkable ability to harness innovation and to cost-effectively unlock new energy supplies, making our country a dominant energy force. In fact, last year the United States surpassed production records set nearly 5 decades ago and is in

> all likelihood now the largest producer of crude oil in the world. We are also the world's leading producer of natural gas, and we became a net exporter in 2017 for the first time since 1957. The United States will continue to be the undisputed global leader in crude oil and natural gas production for the foreseeable future.
>
> These robust energy supplies present the United States with tremendous economic opportunities. To fully realize this economic potential, however, the United States needs infrastructure capable of safely and efficiently transporting these plentiful resources to end users. Without it, energy costs will rise and the national energy market will be stifled; job growth will be hampered; and the manufacturing and geopolitical advantages of the United States will erode. To enable the timely construction of the infrastructure needed to move our energy resources through domestic and international commerce, the Federal Government must promote efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment. Enhancing our Nation's energy infrastructure, including facilities for the transmission, distribution, storage, and processing of energy resources, will ensure that our Nation's vast reserves of these resources can reach vital markets. Doing so will also help families and businesses in States with energy constraints to access affordable and reliable domestic energy resources. By promoting the development of new energy infrastructure, the United States will make energy more affordable, while safeguarding the environment and advancing our Nation's economic and geopolitical advantages.

Admitted that the executive order states, in part: "Outdated Federal guidance and regulations regarding section 401 of the Clean Water Act, however, are causing confusion and uncertainty and are hindering the development of energy infrastructure."

47. Admitted that on June 7, 2019, the EPA issued guidance titled "Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes." On its face, the guidance addressed "1. Statutory and regulatory timelines for review and action on Section 401 certifications; 2. The appropriate scope of Section 401 certification review and conditions; and 3. Information within the scope of a state or tribe's Section 401 certification review." Otherwise denied.

48. Admitted that in August 2019, the EPA published an economic analysis of existing section 401 processes, and its proposed Section 401 rulemaking. Admitted that in its economic analysis, the EPA summarized four "denials and other high-profile section 401 certification cases." Admitted that EPA stated "recent section 401 certification denials on large infrastructure projects, such as natural gas pipelines and export terminals, highlighted the potential for section 401 certification denials to have broader economic impacts" and "[w]hile data to quantify these effects are limited, studies have noted that recurring section 401 certification denials of FERC-approved natural gas pipelines affects transportation of natural gas and could jeopardize the reliability of gas-

fired electric generators." Admitted that in its economic analysis, EPA stated "[r]ecent New York State natural gas pipeline case studies . . . demonstrate that the 'complete application' standard for starting the clock has caused confusion and delays" and "[e]xtended delay while waiting for a certification decision is an opportunity cost to the project proponent." Admitted that in its economic analysis, EPA stated that "[b]ased on recent survey results (ACWA, 2019), incomplete requests are the most common cause of section 401 review delay." Admitted that the economic analysis references a "'withdrawal and resubmit' process which allowed for a project timeline to be informally extended beyond one year." Otherwise denied.

49. Admitted that the EPA's economic analysis recounts the outcome of a survey given to 50 states about their section 401 certification processes, but the State Intervenors further answer that the survey was not performed by EPA, only 31 states provided responses, and EPA stated that the survey data do not adhere to the EPA's requirements regarding data and information quality. Admitted that according to the EPA's economic analysis, responses to this survey "indicate that the average length of time for states to issue a certification decision once they receive a complete request is 132 days," and the survey responses indicate "denials are uncommon, with 17 states averaging zero denials per year and other states issuing denials rarely." Admitted that according to EPA's economic analysis, "[a]dditional summary survey information was made available by the Western States Water Council," and "[t]his survey further suggests that denials are uncommon, and most decision are made between 40-90 days," but Intervenor States further answer that EPA stated that the survey data does not adhere to the EPA's requirements regarding data and information quality. Otherwise denied.

II. The EPA's Rulemaking

50. Admitted.

51. Admitted.

52. Admitted that regulations.gov states that 125,097 comments were received in Docket EPA-HQ-OW-0405 as of August 10, 2020. Admitted that Docket EPA-HQ-OW-0405-0803 appears to be a letter dated October 21, 2019, and submitted by the Hydropower Reform Coalition. Admitted that Docket EPA-HQ-OW-2019-0405-0783 appears to be a letter submitted by American Whitewater.

53. Admitted that the EPA received numerous critiques of the proposed rule, including from states and tribes. Admitted that EPA received critiques of the proposed rule purporting to be on behalf of Plaintiffs. Denied that the critiques "detailed the many flaws" in the proposed rule.

54. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

55. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

56. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

57. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

58. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

59. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of this allegation; it is therefore denied.

60. Intervenors States answer that the text of the EPA's explanation of or justifications for the Final Rule speak for themselves. The Intervenor States lack knowledge or information sufficient to form a belief about the truth of the remainder of this allegation; it is therefore denied.

61. Denied.

III. The Final Rule

62. Admitted.

63. Admitted the Final Rule provides that Section 401 "Certification is required for any license or permit that authorizes and activity that may result in a discharge," with "discharge" defined as "a discharge from a point source into a water of the United States."

64. Admitted that the Final Rule provides that "[t]he Federal agency shall establish the reasonable period of time either categorically or on a case-by-case basis," and "[i]n either event, the reasonable period of time shall not exceed one year from receipt." Further admitted that "certification request" is defined as "a written, signed, and dated communications that satisfies the

requirements of § 121.5(b) or (c)" and "receipt" is defined as "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures." Admitted that the Final Rule states, in part:

> (b) A certification request for an individual license or permit shall:
> (1) Identify the project proponent(s) and a point of contact;
> (2) Identify the proposed project;
> (3) Identify the applicable federal license or permit;
> (4) Identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
> (5) Include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;
> (6) Include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
> (7) Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
> (8) Contain the following statement: 'The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief'; and
> (9) Contain the following statement: 'The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.'
>
> (c) A certification request for issuance of a general license or permit shall:
> (1) Identify the project proponent(s) and a point of contact;
> (2) Identify the proposed categories of activities to be authorized by the general license or permit for which certification is requested;
> (3) Include the draft or proposed general license or permit;
> (4) Estimate the number of discharges expected to be authorized by the proposed general license or permit each year;
> (5) Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
> (6) Contain the following statement: 'The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief '; and
> (7) Contain the following statement: 'The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.'

65. Admitted that the Final Rule provides that "[t]he 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."

66. Admitted.

67. Admitted.

68. Admitted that the Final Rule provides, in part: "The Federal agency shall establish the

reasonable period of time either categorically or on a case-by-case basis," and "[i]n either event, the reasonable period of time shall not exceed one year from receipt."

69. Admitted that the Final Rule provides, in part: "The certifying authority is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time other than specified in § 121.6(d)."

70. Admitted that the Final Rule provides, in part: "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." Further admitted that the Final Rule defines "certifying authority" as "the agency responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401." Further admitted that the Final Rule defines "water quality requirements" as "applicable provisions of §§ 301, 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."

71. Admitted that the Final Rule provides, in part: "The certification requirement for a license or permit shall be waived upon . . .

> (2) The certifying authority's failure or refusal to act on a certification request, including:
> (i) Failure or refusal to act on a certification request within the reasonable period of time;
> (ii) Failure or refusal to satisfy the requirements of § 121.7(c);
> (iii) Failure or refusal to satisfy the requirements of § 121.7(e); or
> (iv) Failure or refusal to comply with other procedural requirements of section 401.

72. Admitted that the Final Rule provides, in part: "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)" and "All certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit."

FIRST CLAIM FOR RELIEF

Violation of the Clean Water Act

73. The State Intervenors reallege their answers to all previous paragraphs.

74. Admitted that 33 U.S.C. § 1361(a) provides that "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."

75. Admitted that 33 U.S.C. § 1370 provides, in part: "Except as expressly provided in this chapter, nothing in this chapter shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

76. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

77. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

78. Denied.

SECOND CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule's unlawful provisions concerning the timeline for certification)

79. The State Intervenors reallege their answers to all previous paragraphs.

80. Admitted that 33 U.S.C. § 1341(a)(1) provides, in part: "Such State or interstate agency 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."

81. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

82. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

83. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

84. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

85. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

THIRD CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully limits Section 401's applicability to activities that may result in point source discharges)

86. The State Intervenors reallege their answers to all previous paragraphs.

87. Admitted that 33 U.S.C. § 1341(a)(1) provides, in part: "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate" unless certification is waived.

88. Admitted that 33 U.S.C. § 1362(16) provides: "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."

89. Admitted that 33 U.S.C. § 1362(12) provides: "The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

90. Admitted that the Final Rule provides, in part: "Certification is required for any license or permit that authorizes an activity that may result in a discharge," and "discharge for purposes of this part means a discharge from a point source into a water of the United States."

91. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

FOURTH CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully limits the scope of—and permissible conditions on—certification to impacts of point source discharges on water quality)

92. The State Intervenors reallege their answers to all previous paragraphs.

93. Admitted that 33 U.S.C. § 1341(a) provides, in part: "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or

permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."

94. Admitted that 33 U.S.C. § 1341(d) provides:

> Any certification provided under this section shall 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 effluent limitations and other limitations, under sections 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

95. Admitted that the Final Rule provides, in part: "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."

96. Admitted that the Final Rule provides, in part: "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." Further admitted that the Final Rule provides, in part: "Water quality requirements means applicable provisions of §§ 301, 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."

97. Admitted that the Final Rule provides, in part: "Any grant of certification with conditions shall be in writing and shall for each condition include, ant a minimum [specified provisions]." Further admitted that the Final Rule provides, in part: "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)." Further admitted that the Final Rule provides, in part: "All certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit."

98. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

99. This paragraph states a legal conclusion as to which no response is required. To the

extent a response is required, it is denied.

100. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

101. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

FIFTH CLAIM FOR RELIEF

Violation of the Clean Water Act

(*The Final Rule unlawfully prohibits the certifying authority from considering or relying on State law in making a certification decision.*)

102. The State Intervenors reallege their answers to all previous paragraphs.

103. Admitted that 33 U.S.C. § 1341(d) provides:

> Any certification provided under this section shall 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 effluent limitations and other limitations, under sections 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

104. Admitted that the Final Rule provides, in part: "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."

105. Admitted that the Final Rule provides, in part: "Water quality requirements means applicable provisions of §§ 301, 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."

106. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

107. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

108. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

SIXTH CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully authorizes federal permitting and licensing agencies to review and overrule certification decisions)

109. The State Intervenors reallege their answers to all previous paragraphs.

110. Admitted that 33 U.S.C. § 1341(a)(1) provides, in part: "If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."

111. Admitted that 33 U.S.C. § 1341(a)(1) provides, in part: "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be."

112. Admitted that 33 U.S.C. § 1341(d) provides:

> Any certification provided under this section shall 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 effluent limitations and other limitations, under sections 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

113. Admitted that the Final Rule provides, in part:

> The certification requirement from a license or permit shall be waived upon . . .
> (2) The certifying authority's failure or refusal to act on a certification request, including:
> (i) Failure or refusal to act on a certification request within the reasonable period of time;
> (ii) Failure or refusal to satisfy the requirements of § 121.7(c);
> (iii) Failure or refusal to satisfy the requirements of § 121.7(e);
> (iv) Failure or refusal to comply with other procedural requirements of section 401.

114. Admitted that the Final Rule provides, in part: "All certification conditions that satisfy the requirements of § 121.7(d) shall be incorporated into the license or permit." The remainder of

this paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

115. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

SEVENTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act

116. The State Intervenors reallege their answers to all previous paragraphs.

117. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

118. Denied.

119. Denied.

120. This paragraph states a legal conclusion as to which no response is required. To the extent a response is required, it is denied.

REQUEST FOR RELIEF

States Intervenors deny that Plaintiffs are entitled to the relief requested, or any relief whatsoever. State Intervenors respectfully ask that the Court enter judgment against Plaintiffs and grant Defendants and State Intervenors such additional and further relief as the Court may deem just, proper, and necessary, including their costs and attorneys fees as provided by law.

DEFENSES

Pursuant to Fed. R. Civ. P. 8(c), State Intervenors state the following defenses:

121. This Court lacks jurisdiction over some or all of Plaintiffs' claims.

122. Plaintiffs have failed to state a claim on which relief can be granted.

123. The Complaint does not state facts or claims upon which relief may be granted under the legal authority cited or under any other law.

124. Plaintiffs have not been harmed, nor are they in danger of harm, due to the Final Rule.

125. There is neither factual nor legal support for injunctive or equitable relief.

126. Any claim for injunctive or equitable relief is barred by Plaintiffs' unclean hands.

127. Plaintiffs' theories would render the Clean Water Act unconstitutional in whole or part.

128. The State Intervenors reserve the right to assert additional defenses.

Dated: August 28, 2020

Respectfully submitted,

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/s/ Bradley A. Benbrook

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED

Plaintiffs,

v.

ANDREW R. WHEELER; U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

No. 3:20-cv-4636

[PROPOSED] ORDER

[PROPOSED] ORDER

The Motion to Intervene filed by the States of Louisiana, Montana, Arkansas, Mississippi, Missouri, Texas, West Virginia, and Wyoming ("State Intervenors") is GRANTED. Their Answer is deemed timely FILED as of this date.

SO ORDERED.

HON. WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN RIVERS, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, et al.,

Defendants.

No. C 20-04636 WHA

ORDER RELATING CASE

On plaintiffs' motion, and given the relevant parties' statement of non-opposition, case no. C 20-04869 KAW, *California v. Wheeler*, is **RELATED** to the above captioned case. The undersigned understands that Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming have moved to intervene in both cases. These states need not re-notice their motion upon reassignment of case no. C 20-04869. To streamline events, both of the states' motions shall be heard on **OCTOBER 8 AT 8:00 A.M.** The briefing schedules, already aligned, remain unchanged.

IT IS SO ORDERED.

Dated: September 2, 2020.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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American Petroleum Institute and
Interstate Natural Gas Association of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

AMERICAN RIVERS, et al.;

Plaintiffs,

v.

ANDREW R. WHEELER, et al.,

Defendants.

First Filed Case: No. 3:20-cv-04636-WHA
Related Case: No. 3:20-cv-04869-WHA

DECLARATION OF ROBIN RORICK, FOR THE AMERICN PETROLEUM INSTITUTE, IN SUPPORT OF THE COALITION'S MOTION TO INTERVENE IN SUPPORT OF DEFENDANTS

CASE NO.: 3:20-CV-04636-WHA

Date:	October 8, 2020
Time:	8:00 a.m.
Courtroom:	TBD
Judge:	Hon. William H. Alsup

STATE OF CALIFORNIA, et al.; Plaintiffs, v. ANDREW R. WHEELER, et al., Defendants.	CASE NO.: 3:20-CV-04869-WHA

Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco. CA 94111

1. My name is Robin Rorick. I am Vice President of Midstream and Industry Operations for the American Petroleum Institute (API). My business address is 200 Massachusetts Ave., NW, Suite 1100, Washington, DC 20001.

2. I am offering this declaration in support of the "Motion by American Petroleum Institute and Interstate Natural Gas Association of America to Intervene as Defendants" (collectively the "Coalition") in the above captioned case.

3. API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's nearly 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. API's members provide most of the nation's energy. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

4. API's members engage in exploration, production, construction, operation, and maintenance projects that routinely involve federal permits or licenses that require state water quality certification under Clean Water Act (CWA) section 401. Within the past five years, several of API's members have relied on federal authorizations certified under section 401 to construct hundreds of miles of oil pipelines, natural gas pipelines, refined product pipelines, and natural gas liquids pipelines, which traverse the States of Montana, Oklahoma, Texas, Colorado, Louisiana, Missouri, Mississippi, Kansas, Wisconsin, Illinois, Utah, North Dakota, Arkansas, Minnesota, West Virginia, Ohio, Pennsylvania, Indiana, Kentucky, New Hampshire, and Maine.

5. The safe and reliable supply of energy to consumers, at an affordable cost, requires the construction and maintenance of thousands of lines of linear pipelines. The need to deliver energy over long distances to neighborhoods and communities across the country often means that pipelines and linear structures must, at times, unavoidably cross wetlands and other waters of the United States as they extend from supply to market areas. API's members rely on a consistent, efficient, and reasonable permitting process to obtain required federal approvals for the construction and

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maintenance of these critical elements of our nation's energy supply infrastructure.

6. Of the various sectors of the energy industry that are subject to Section 401 certification requirements, the midstream sector is perhaps impacted to the greatest degree. With the advent of the shale revolution and advanced technologies, America's energy landscape has transformed. In just the last decade, as U.S. oil production has doubled and natural gas production has risen by 46 percent, the U.S. has gone from being a net importer of crude oil and petroleum products as well as liquefied natural gas to being a net exporter. Energy infrastructure connects the dots to make this economic prosperity and energy security possible and brings benefits of its own. For example, federal safety data shows that pipelines are the safest way to deliver large volumes of oil, petroleum products, and natural gas.

7. The importance of pipeline projects necessary to connect production sites with processing plants, refineries and associated facilities, and ultimately to consumers has also increased. In the significant majority of instances in which companies seek state certifications for such projects, states dutifully approach their Section 401 certification obligations with a genuine interest in identifying and addressing discharges with potential adverse impacts on water quality. At times, however, some states have viewed their Section 401 authority as a means to thwart or invalidate projects as a whole, to extract concessions unrelated to water quality, or to promote state-specific energy policies or political goals.

8. Consistent with the cooperative federalism structure of the CWA, and the important role of States in protecting water quality within their borders, section 401 requires applicants for a federal license or permit anticipated to result in a discharge to navigable waters to obtain certification from the appropriate State or Tribe that the discharge will comply with applicable state water quality standards. States or Tribes can waive this requirement, and if they do not act within "a reasonable period of time (which shall not exceed one year) after receipt" of the request for the certification, waiver is automatic. 33 U.S.C. § 1341(a)(1).

9. In enacting section 401, Congress preserved an important role for States in evaluating the water quality impacts of federal infrastructure projects, but it did not prescribe that role without limit

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or to the detriment of federal licensing or permitting authority.

10. API has a substantial interest in ensuring that the CWA section 401 certification process preserves the important role of States in protecting water quality, while at the same time providing appropriate limits where States use their certification authority to achieve policy goals or outcomes unrelated to water quality. API also has an interest in the consistent application of the section 401 certification process.

11. Certain States have relied on ambiguities in the water quality certification application process to block energy infrastructure projects proposed by API members and approved by federal agencies. API member projects have been significantly delayed when States ignore the statutory one-year time limit on certification or manipulate the process to exceed this timeframe. Certain States have also denied certification for API member projects for reasons unrelated to water quality, such as downstream impacts of the project or general political opposition.

12. For example, on August 22, 2013, one of API's members submitted a certification request for the Constitution Pipeline, a $683 million, 124-mile natural gas pipeline designed to connect natural gas production in Pennsylvania to demand in northeastern markets. The New York State Department of Environmental Conservation (NYSDEC) requested additional information and deemed the request complete in December 2014. In April 2015, NYSDEC requested that the API member withdraw and resubmit its request in order to restart the waiver period. In April 2016, nearly three years after the project's initial request for certification, NYSDEC denied water quality certification. Following litigation over NYSDEC's determination, FERC determined in August 2019 that NYSDEC had waived its section 401 authority. Nevertheless, after years of delay, the project's sponsor halted investment in the pipeline and cancelled the project in February 2020.

13. In November 2015, the Millennium Pipeline Company submitted a certification request to NYSDEC for the Millennium Valley Lateral project, a 7.8-mile pipeline connecting a natural gas mainline to a new natural gas-fueled combined cycle electric generation facility in New York. In August 2017, nearly two years after the project's initial request for certification, NYSDEC denied certification on the grounds that FERC's environmental review of the project lacked an adequate

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analysis of the potential downstream greenhouse gas emissions, not water quality concerns. In September 2017, FERC concluded that NYSDEC's 21-month delay constituted waiver of the certification requirement, and the U.S. Court of Appeals for the Second Circuit (Second Circuit) affirmed FERC's determination in March 2018. *New York State Dep't of Envtl. Conservation v. Fed. Energy Regulatory Comm'n*, 884 F.3d 450 (2d Cir. 2018).

14. In December 2017, the Commonwealth of Virginia approved a water quality certification for the Atlantic Coast Pipeline, a $5.1 billion pipeline project that would transport gas produced in the Marcellus Shale region to the Mid-Atlantic region of the United States. In an unprecedented step, Virginia included conditions regulating activities in upland areas that may indirectly affect state waters, beyond the scope of federal CWA jurisdiction and the project's direct discharges to navigable waters. According to Virginia, "all proposed upland activities associated with the construction, operation, maintenance, and repair of the pipeline, any components thereof or appurtenances thereto, and related access roads and rights-of-way," are subject to the stringent conditions of the certification.

15. In August 2020, the State of North Carolina denied water quality certification for Mountain Valley Pipeline Southgate for reasons other than water quality. Although FERC has determined that the public convenience and necessity requires approval of the $468 million, 75-mile natural gas pipeline project, North Carolina denied water quality certification to one of API's members because the State determined that the purpose of the project was "unachievable" due to the "uncertainty" of completion of a different pipeline project.

16. Given the significant ramifications to oil and gas pipeline projects from state misuse of the section 401 certification process, API members have a significant interest in how the procedures and substantive requirements established by the U.S. Environmental Protection Agency (EPA) clarify the certification authority's role in the federal permitting process.

17. API's commitment toward clear and consistent compliance under section 401 is reflected in its engagement on this issue. On October 18, 2017, API asked the U.S. Army Corps of Engineers (Corps) to modify its section 401 rules at 33 C.F.R. § 325.2(b)(1) to more clearly reflect statutory

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requirements relating to review periods for States to issue certifications, to provide direction in its regulations to States and other authorities as to conditions that trigger the review period, and to strictly and consistently enforce compliance with Corps regulations. *See* API Comments on Corps; Subgroup to the Department of Defense Regulatory Reform Task Force, Review of Existing Rules, 82 Fed. Reg. 33,470 (July 20, 2017) (Docket ID No. COE-2017-0004).

18. API also supported the policy goals described in the President's April 2019 Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, which directed EPA to review CWA section 401 and the EPA's existing certification regulations and propose new section 401 regulations. This support was reflected in API's May 24, 2019, comments filed in response to EPA's solicitation of recommendations for reforming its section 401 regulations. API Comments on Clean Water Act Section 401 Water Quality Certification Pre-proposal Recommendations (May 24, 2019) (Docket ID No. EPA-HQ-OW-2018-0855).

19. To protect its significant interests in the water quality certification process, API joined two separate coalitions of industry representatives to file comments in response to EPA's Proposed Rule, *Updating Regulations on Water Quality Certification*, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Docket ID Nos. EPA-HQ-OW-2019-0405-0935 and EPA-HQ-OW-2019-0405-0025) (Oct. 21, 2019). These comments are part of the administrative record that was before EPA when it promulgated the final 401 Rule. *Final Rule, CWA Section 401 Certification Rule,* EPA, 85 Fed. Reg. 42,210 (July 13, 2020) (the "401").

20. Because the certification process can be integral to the overall viability of API member Projects, API invested significant time and resources to join with other industry organizations in Andrea: October 2019 comments filing an *amici curiae* brief in *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d Cir. 2017) and an *amici* brief in support of Constitution Pipeline Co.'s petition for *writ of certioarari*, which was ultimately denied by the U.S. Supreme Court. *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation,* 138 S. Ct. 1697 (2018). API and the other coalition members filed *amici* briefs to provide the perspective of the broader impacts of certification denials on the development of much-

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needed natural gas infrastructure and to defend their interests in an efficient, transparent, and predictable permitting process.

21. API members continue to engage in the exploration, production, and transportation of oil and natural gas and their products. Such projects routinely involve both state and federal water permitting and are, and will continue to be, affected by CWA section 401. As a result, API members will have a number of projects that will soon request certification, and those certifications would likely be subject to EPA's new regulations.

22. If Plaintiffs obtain the relief that they request here – i.e., a judgment declaring that the 401 Rule violates the Administrative Procedure Act or CWA, and applicable regulations, API members' projects would not realize the benefits the 401 Rule and could face years of additional delays and substantial additional costs, without any commensurate benefit to the aquatic environment. States would be able to continue to condition or deny certification for API member projects on basis of policy considerations unrelated to water quality.

23. The process of applying for and obtaining federal authorizations is time consuming, expensive, and subject to regulatory uncertainty. Accordingly, many important activities associated with oil pipelines, natural gas pipelines, and natural gas liquids pipelines may be delayed or otherwise encumbered if the 401 Rule is declared to be unlawful, and States can return to a patchwork of various interpretations under a regulatory process established before the CWA. This will significantly harm API's members as well as impede their ability to safely deliver natural gas, oil, and related products through pipelines. The cost of these services to customers may also increase if API's members cannot rely on timely 401 certifications.

24. API's participation in litigation would likely aid the Court in understanding the ramifications of this litigation on the natural gas and oil industry as a whole. API will make legal arguments that will aid the Court's understanding and disposition of the issues, and which may not be made by other parties to the litigation.

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I, Robin Rorick, certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 4, 2020.

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American Petroleum Institute and
Interstate Natural Gas Association of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

AMERICAN RIVERS, et al.;

Plaintiffs,

v.

ANDREW R. WHEELER, et al.,

Defendants.

First Filed Case: No. 3:20-cv-04636-WHA
Related Case: No. 3:20-cv-04869-WHA

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

CASE NO.: 3:20-CV-04636-WHA

Date: October 8, 2020
Time: 8:00 a.m.
Courtroom: 12
Judge: Hon. William H. Alsup

STATE OF CALIFORNIA, et al.; Plaintiffs, v. ANDREW R. WHEELER, et al., Defendants.	CASE NO.: 3:20-CV-04869-WHA

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1. My name is Joan Dreskin. I am Senior Vice President and General Counsel of the Interstate Natural Gas Association of America (INGAA). My business address is 20 F Street, NW, Suite 450, Washington, DC 20001.

2. I am offering this declaration in support of the Motion by American Petroleum Institute and Interstate Natural Gas Association of America (collectively the "Coalition") to Intervene as Defendants in the above captioned case.

3. INGAA is a non-profit trade association representing interstate natural gas transmission pipelines ("interstate pipelines") operating in the United States. INGAA is comprised of 25 members, representing the vast majority of the interstate natural gas pipeline companies in the U.S. INGAA members operate approximately 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

4. U.S. natural gas production is expected to increase to 130 billion cubic feet per day by 2035, spurred by growing markets, if available supplies are developed, and it is estimated that investment in new oil and gas infrastructure will total $791 billion from 2018 through 2035, averaging $44 billion per year. Natural gas also will serve as a backstop to help firm up variable renewables, like wind and solar, which are expected to grow. This translates to the need for thousands of miles of new and replacement pipe to meet market demand or to modernize existing pipeline facilities.

5. INGAA members construct and operate interstate natural gas pipelines in response to demonstrated public need for the delivery of natural gas, requiring infrastructure that typically spans multiple state boundaries. The Federal Energy Regulatory Commission (FERC) must issue a certificate of "public convenience and necessity" based on this demonstrated need before INGAA members may construct and operate these pipelines. As documented by statistics compiled by FERC, INGAA members construct hundreds of miles of new and expanded interstate pipelines each year.

6. Due to the public need to transport natural gas long distances, projects developed by INGAA

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members unavoidably cross wetlands and other waters of the United States regulated by the Clean Water Act (CWA). Where a proposed pipeline project may result in a discharge into waters of the United States, CWA section 401 requires the project applicant to provide the federal agency with the certification of the state that the discharges in the state comply with applicable water quality standards. If the state fails or refuses to act on the request for certification within a reasonable time not to exceed one year, the applicant's duty to provide the certification is waived. The federal agency (such as FERC or the U.S. Army Corps of Engineers (Corps)) is precluded from authorizing the activity resulting in the discharge unless the certification is provided or waived. 33 U.S.C. § 1341.

7. Section 401 establishes an important balance in the respective roles and responsibilities of federal and state/tribal authorities. Like other statutes built on the principle of cooperative federalism, section 401 defines the State's role within the context of a uniform federal framework. The language of section 401, however, is ambiguous with regard to the scope of the certifying authority's review, determination, and condition-setting.

8. Ambiguities in a draft non-binding guidance document issued by the U.S. Environmental Protection Agency (EPA) on implementation of section 401 exacerbated the statute's ambiguities. Relying on that document, some States and Tribes expanded their section 401 review to include considerations unrelated to water quality requirements. Certain States have denied certification for INGAA member projects for reasons unrelated to water quality, such as the project's perceived climate change impacts or general political opposition to hydraulic fracturing or fossil fuels. This manner of implementation of section 401 frustrates the CWA's federal-state balance and has resulted in delays to interstate natural gas pipeline projects that the federal government has determined to be in the public interest.

9. FERC-approved energy infrastructure projects proposed by INGAA members also have been significantly delayed when States evade the statutory time limit on certification or have relied on this draft EPA section 401 guidance document as a basis to exceed this timeframe.

10. For example, on August 22, 2013, one of INGAA's members submitted a certification

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request for the Constitution Pipeline, a $683 million, 124-mile natural gas pipeline designed to connect natural gas production in Pennsylvania to demand in northeastern markets. The New York State Department of Environmental Conservation (NYSDEC) requested additional information and deemed the request complete in December 2014. In April 2015, NYSDEC requested that the INGAA member withdraw and resubmit its request in order to restart the waiver period. In April 2016, nearly three years after the project's initial request for certification, NYSDEC denied water quality certification. Following litigation over NYSDEC's determination, FERC determined in August 2019 that NYSDEC had waived its section 401 authority. Nevertheless, after years of delay, the project's sponsor halted investment in the pipeline and cancelled the project in February 2020.

11. In November 2015, an INGAA member submitted a certification request to NYSDEC for the Millennium Valley Lateral project, a 7.8-mile pipeline connecting a natural gas mainline to a new natural gas-fueled combined cycle electric generation facility in New York. In August 2017, nearly two years after the project's initial request for certification, NYSDEC denied certification on the grounds that FERC's environmental review of the project lacked an adequate analysis of the potential downstream greenhouse gas emissions, not water quality concerns. In September 2017, FERC concluded that NYSDEC's 21-month delay constituted waiver of the certification requirement, and the U.S. Court of Appeals for the Second Circuit (Second Circuit) affirmed FERC's determination in March 2018. *New York State Dep't of Envtl. Conservation v. Fed. Energy Regulatory Comm'n*, 884 F.3d 450 (2d Cir. 2018).

12. On March 2, 2016, an INGAA member submitted a request for water quality certification to the NYSDEC for the $500 million Northern Access project. The project includes approximately 99 miles of new pipeline facilities, the majority of which will be co-located within existing rights-of-way. The project received water quality certification from the Pennsylvania Department of Environmental Conservation in January 2017 and FERC's approval of the project in February 2017 after 31 months of environmental review. On April 7, 2017, however, NYSDEC denied water quality certification. On August 6, 2018, FERC issued an order concluding that NYSDEC waived its authority to act on the certification because it exceeded the statutory deadline. Both NYSDEC

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and Sierra Club filed rehearing requests, which FERC subsequently denied on April 2, 2019. Sierra Club filed an appeal with the Second Circuit challenging the FERC waiver order and subsequent order denying rehearing; this case is currently pending. On February 5, 2019, the Second Circuit found that NYSDEC's denial letter lacked sufficient information to show any rational connection between the facts found and choices made. The Second Circuit vacated and remanded the denial with instructions for NYSDEC to more clearly articulate the basis for the denial and how that basis is connected to the existing administrative record. In August 2019, NYSDEC issued a second denial of Norther Access's certification request. The pipeline appealed this decision to the Second Circuit; this case has been stayed, pending a decision in the FERC waiver and rehearing case.

13. In December 2017, the Commonwealth of Virginia approved a water quality certification for the Atlantic Coast Pipeline, a $5.1 billion pipeline project proposed by INGAA members that would transport gas produced in the Marcellus Shale region to the Mid-Atlantic region of the United States. In an unprecedented step, Virginia included conditions regulating activities in upland areas that may indirectly affect state waters, beyond the scope of federal CWA jurisdiction and the project's direct discharges to navigable waters. According to Virginia, "all proposed upland activities associated with the construction, operation, maintenance, and repair of the pipeline, any components thereof or appurtenances thereto, and related access roads and rights-of-way," are subject to the stringent conditions of the certification.

14. In August 2020, the State of North Carolina denied water quality certification for Mountain Valley Pipeline Southgate for reasons other than water quality. Although FERC has determined that the public convenience and necessity requires approval of the $468 million, 75-mile natural gas pipeline project, North Carolina denied water quality certification to one of INGAA's members because the State determined that the purpose of the project was "unachievable" due to the "uncertainty" of completion of a different pipeline project.

15. Given the significant ramifications to interstate pipeline projects, INGAA has a substantial interest in ensuring that the CWA section 401 certification process preserves the important role of States in protecting water quality, while at the same time providing appropriate limits on the scope

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of and time period for review and the bases for denying or conditioning certification.

16. Consistent with its members' interests in the implementation of the CWA section 401 water quality certification process, INGAA has participated in various administrative actions seeking clarification of that process. On October 18, 2017, INGAA asked the Corps to clarify that the CWA section 401 review process starts upon the State's receipt of the original written request for certification, and to enforce Corps regulations regarding when state waiver occurs. *See* INGAA Comments on Corps; Subgroup of the Department of Defense Regulatory Reform Task Force, Review of Existing Rules, 82 Fed. Reg. 33,470 (July 20, 2017) (Docket ID No. COE-2017-0004).

17. INGAA supported the policy goals described in the President's April 2019 Executive Order 13868, *Promoting Energy Infrastructure and Economic Growth*, which directed EPA to review CWA section 401 and the EPA's existing certification regulations and propose new section 401 regulations. This support was reflected in INGAA's May 24, 2019, comments filed in response to EPA's solicitation of recommendations for reforming its section 401 regulations. Comments in Response to EPA's Request for Pre-Proposal Recommendations, Docket ID No. EPA-HQ-OW-2018-0855-0043.

18. To protect its significant interests in the water quality certification process, INGAA filed comments in response to EPA's Proposed Rule, *Updating Regulations on Water Quality Certification*, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Docket ID No. EPA-HQ-OW-2019-0405-0918). These comments are part of the administrative record that was before EPA when it promulgated the final 401 Rule. *Final Rule, CWA Section 401 Certification Rule,* EPA, 85 Fed. Reg. 42,210 (July 13, 2020) (the "401 Rule").

19. Due to the importance of the certification process to INGAA members, INGAA invested significant time and resources to join with other industry organizations in filing an *amici curiae* brief in *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d Cir. 2017) and an *amici* brief in support of Constitution Pipeline Co.'s petition for *writ of certioarari*, which was ultimately denied by the U.S. Supreme Court. *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 138 S. Ct. 1697 (2018). INGAA and the other

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coalition members filed *amici* briefs to provide the perspective of the broader impacts of certification denials on the development of much-needed natural gas infrastructure and to defend their interests in an efficient, transparent, and predictable permitting process.

20. The extent of interstate pipeline construction and maintenance, and INGAA members' corresponding requests for state water-quality certification, are likely to increase based on current and projected domestic and global demand for natural gas. The abundant supply of natural gas from domestic shale gas supplies in the U.S. has resulted in stable, affordable natural gas prices. This has increased demand for affordable natural gas and for new gathering, transmission and distribution pipelines to bring the domestic natural gas to customers.

21. In addition, INGAA members are involved in ongoing efforts to modernize the pipeline system that may trigger section 401 requirements. Interstate natural gas pipeline construction and maintenance activities are typically conducted on tight schedules designed to ensure the safety, security, and reliability of the natural gas pipeline network, and to meet the growing demands of natural gas consumers, which makes the predictability and efficiency of the section 401 process critical. Delays and/or certification denials can prevent INGAA members from upgrading vital natural gas infrastructure and from performing these critical and time-sensitive maintenance activities.

22. As a result of increased demand for natural gas and efforts to modernize the natural gas pipeline network, INGAA members will have a number of projects that will soon request certification, and those certifications would likely be subject to EPA's 401 Rule.

23. However, if Plaintiffs obtain the relief that they request here – i.e., a judgment declaring that the 401 Rule violates the Administrative Procedure Act or CWA – INGAA members' upcoming projects would not realize the benefits of timely and appropriately focused section 401 reviews. A predictable permitting process is necessary to develop infrastructure that provides reliable, clean, and affordable energy to the public. If the 401 Rule is set aside, INGAA's members would be forced to operate under a regulatory structure that is unpredictable and lacks regulatory certainty. These projects could face years of additional delays and substantial additional costs, without any

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commensurate benefit to the aquatic environment. States would be able to continue to condition or deny certification for INGAA member projects on the basis of policy considerations unrelated to water quality and delay making certification decisions in an effort to prevent projects from moving forward.

24. The process of applying for and obtaining federal authorizations is time consuming, expensive, and subject to regulatory uncertainty. Accordingly, many important maintenance, construction, and improvement activities may be delayed or otherwise encumbered if the 401 Rule is declared to be unlawful, and States can return to a patchwork of various interpretations under a regulatory process established before the CWA. This inconsistency and lack of regulatory certainty will significantly harm INGAA's members as they try to plan projects that costs millions, if not billions of dollars, while also potentially impeding their ability to make improvements necessary to safely and reliably deliver natural gas to their customers. The cost of these services may also increase if INGAA's members cannot rely on timely section 401 certifications.

25. Based on INGAA's participation in the rulemaking process, and its members' extensive experience with the water quality certification process throughout the United States, INGAA's participation in litigation would likely enhance the Court's understanding of the history, purpose, development, and implementation of the program. In addition, INGAA's participation as an intervenor would likely aid the Court in understanding the ramifications of this litigation on the interstate natural gas industry, and, by extension, on the national economy. As part of a coalition with other industry interests, INGAA will make legal arguments that will aid the Court's understanding and disposition of the issues.

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I, Joan Dreskin, certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 4, 2020.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED,

Plaintiffs,

v.

ANDREW R. WHEELER, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

No. C 20-04636 WHA
No. C 20-04869 WHA

ORDER GRANTING MOTION TO INTERVENE

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

In these Administrative Procedure Act suits against the Environmental Protection Agency and its administrator, Andrew Wheeler, the states of Louisiana, Montana, Arkansas, Mississippi, Missouri, Texas, West Virginia, and Wyoming move to intervene as defendants. Neither set of plaintiffs opposes. The motions are **GRANTED**. In an effort to consolidate hearings with the administrator's motion to dismiss on November 4, the intervenor states shall please either answer or move to dismiss the complaints by September 30.

IT IS SO ORDERED.

Dated: September 17, 2020.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN RIVERS, *et al.*,

Plaintiffs,

v.

ANDREW R. WHEELER, *et al.*,

Defendants,

and

STATE OF LOUISIANA, *et al.*,

Defendant-Intervenors.

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

FIRST AMENDED COMPLAINT

Administrative Procedure Act Case

INTRODUCTION

1. This lawsuit concerns the public's right to clean water, free-flowing rivers, abundant fish and wildlife, and properly functioning aquatic systems. When Congress passed the Clean Water Act amendments of 1972, it confirmed a national effort to reverse the rampant degradation and destruction of the Nation's oceans, rivers, lakes, watersheds, and wetlands. The Clean Water Act establishes a comprehensive regulatory framework that protects these waters that all Americans rely on for drinking water and to support activities like boating, swimming, and fishing.

2. Congress declared a single objective for the Clean Water Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end, although Congress intended an integration of both state and federal authority, states retain primary authority to abate water pollution. 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 . . . .").

3. The states' authority to protect and manage their waters to benefit their citizens and all Americans is replete throughout the Act. An essential component of this structure is the states' and authorized tribes' authority under Section 401 of the Clean Water Act to determine whether and how a prospective federally-permitted or -licensed activity complies with requirements of state law. 33 U.S.C. § 1341. Section 401 empowers states and tribes to protect the people, fish, wildlife, and ecosystems that rely on clean, healthy, and resilient rivers, lakes, wetlands, oceans, and other waters.

4. Under Section 401, no federal permit or license may be issued for any activity that may result in a discharge into waters of the United States, unless the state or authorized tribe where the discharge would originate either certifies the discharge will comply with state water quality requirements, or waives certification. 33 U.S.C. § 1341(a)(1). As a result, state or tribal certification is required for a range of projects that require federal approval, including natural gas pipelines, hydropower development and relicensing, industrial plants, municipal facilities, and wetland development.

5. Notably, the Section 401 certification process allows the public to participate meaningfully in decision-making concerning activities that may result in discharges to our nation's waters, through the public notice and comment procedures implemented by the states and tribes. 33 U.S.C. § 1341(a)(1). This allows people to have a voice in the decisions that will affect how they may use and enjoy their waters for the many recreational, spiritual, aesthetic benefits they provide.

6. On July 13, 2020, Defendant Andrew R. Wheeler and Defendant U.S. Environmental Protection Agency ("the EPA") published a final rule revising the regulations implementing Section 401. Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("Final Rule"). Among the many flaws in the Final Rule, the EPA 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, tribes, and the public to inform the certification determination; restricts the conditions the state or tribe may impose to ensure state or tribal laws are met; and empowers the federal licensing or permitting agency to effectively overrule a state or tribal determination of whether such laws are met.

7. When it promulgated the Final Rule, the EPA violated the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. ("APA") and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. As a result, Plaintiffs seek an order declaring the Final Rule, in whole or in part, unlawful, and setting it or its unlawful provisions aside, because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A) & (C).

JURISDICTION & VENUE

8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). The Final Rule constitutes final agency action subject to judicial review. 5 U.S.C. § 704. This Court has authority to grant the requested relief pursuant to 28 U.S.C. §§ 2201, 2202; and 5 U.S.C. §§ 706(2)(A) & (C).

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) because Defendants are officers or agencies of the United States, and one or more Plaintiffs has its principal place of

business within this district. Venue is also proper in this district pursuant to 28 U.S.C. § 1391(e)(1)(A), because Defendant U.S. Environmental Protection Agency resides in the district within the meaning of 28 U.S.C. § 1391(c)(2).

INTRADISTRICT ASSIGNMENT

10. Assignment to the San Francisco Division is appropriate because the Final Rule will affect numerous federal projects or activities located within the division, and because one or more plaintiffs is headquartered or has an office within the division, and has diverted its resources in response to the Final Rule. Civil L.R. 3-2(c).

PARTIES

11. Plaintiffs, along with their members, are committed to protecting the chemical, physical, and biological integrity of the Nation's waters.

12. Plaintiff American Rivers works to protect wild rivers, restore damaged rivers, and conserve clean water for people and nature. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through education and advocacy efforts, on-the-ground projects, and an annual America's Most Endangered Rivers® campaign. Headquartered in Washington, D.C., American Rivers has offices across the country, including in Berkeley, and Nevada City, California, and has approximately 355,000 members, supporters, and volunteers, including approximately 10,000 in California. American Rivers works in 11 priority river basins across the nation (Puget Sound and Columbia, Sacramento/San Joaquin, Northern Rockies, Colorado River, Upper Mississippi, Great Lakes, Apalachicola-Chattahoochee-Flint, Southern Appalachians and Carolinas, Chesapeake Bay, Delaware River, Connecticut River) and there are numerous projects requiring federal permits in each of those which are potentially impacted by the Final Rule.

13. Plaintiff American Whitewater is a national nonprofit organization, founded in 1954, whose mission is to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely. American Whitewater is a membership organization with approximately 6,000 members, representing a broad diversity of individual whitewater enthusiasts, river conservationists, and more than 100 local paddling club affiliates across

America. American Whitewater is a primary advocate for preserving and protecting whitewater rivers throughout the United States, and connects the interests of human-powered recreational river users with ecological and science-based data to achieve the goals within its mission. As a national river conservation nonprofit, American Whitewater's mission is to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. American Whitewater's vision is that our nation's remaining wild and free-flowing rivers stay that way, our developed rivers are restored to function and flourish, that the public has access to rivers for recreation, and that river enthusiasts are active and effective river advocates.

14. Plaintiff California Trout was founded in 1971 and is a nonprofit conservation organization that strives to solve the state's resource issues while balancing the needs of wild fish and people. California Trout is driven by science to restore vibrance and abundance to California's freshwater ecosystems by working to ensure resilient wild fish thrive in healthy waters. California Trout believes that abundant wild fish indicate healthy waters and healthy waters benefit all Californians. Through strong partnerships in key geographies where wild fish influence the community, California Trout drives innovative, science-based solutions that work for the diverse interests of fish, farms, commerce, and people. California Trout is headquartered in San Francisco, California, with a field office in Arcata, California. California Trout has approximately 10,000 members in California. For more than 20 years, California Trout has participated in the hydropower relicensing process through the Federal Energy Regulatory Commission and through the state water quality certification process. California Trout's goal in these instances has been to represent the public interest in minimizing the environmental impact of hydropower generation on rivers and watersheds, including but not limited to aquatic habitat, fisheries, recreational use, and access.

15. Plaintiff Idaho Rivers United is a conservation organization founded in 1990, with a mission to protect and restore Idaho's rivers on behalf of all who love the freedom, adventure, and solitude they provide. Idaho Rivers works to safeguard Idaho's imperiled wild steelhead and salmon, protecting and enhancing stream flows and riparian areas, and defending and promoting the wild and scenic qualities of our wild rivers. Idaho Rivers involves its 5,000 volunteers and

members to protect wild rivers, keep drinking water clean, defend at-risk populations of fish, establish in-stream flows, and minimize the impacts of dams on Idaho's rivers.

16. Plaintiffs are national, regional, and state public-interest environmental organizations with a combined membership numbering thousands of members. On behalf of these members, Plaintiffs advocate to protect rivers and streams, and for the people and animal and plant species that depend on clean and abundant water. Plaintiffs frequently participate in state certification determinations under Section 401, and are directly injured by the Final Rule's attempt to narrow the applicability, scope, and outcome of Section 401 certifications.

17. Plaintiffs as organizations monitor and comment on projects requiring federal licenses or permits that may affect water quality across the country.

18. American Rivers is concerned about the impact the Final Rule will have on 401 Certification processes and decisions on numerous rivers throughout California. For example, on August 29, 2019, Federal Energy Regulatory Commission ("FERC") accepted an application for modifications at the Camp Far West Hydroelectric Project on the Bear River in Yuba, Nevada, and Placer Counties, California. This project has the potential to impact the Bear River significantly, and thus American Rivers' members' use and enjoyment of the river and the surrounding area. The project proponent has not applied for a 401 Certification for this project. As a result, the Final Rule will apply to any 401 Certification of this project, and American Rivers is concerned that it and its members will not be able to advocate for and protect their interests in the Bear River through that process because of the limitations found in the Final Rule.

19. American Rivers also is participating in the ongoing review of the Goldendale Energy Storage Project, a closed-loop pumped storage project, in Washington State close to the Columbia River near the John Day Dam. There, the Washington Department of Ecology recently began the 401 Certification review process. American Rivers is concerned that the state, FERC, or both will apply the Final Rule to the review project in a manner that will limit both the time and information available to the public as part of the process and circumscribe the scope of review or terms and conditions the state may prescribe as part of Certification. Consequently, the

Final Rule frustrates American Rivers' mission of protecting wild rivers, restoring damaged rivers, and conserving clean water for people and nature.

20. Similarly, over the last 30 years, American Whitewater has participated in the hydropower relicensing process at well over 100 projects through FERC and through the state water quality certification process, with the goal of representing the public interest in those proceedings. American Whitewater has participated in FERC licensing proceedings throughout the country, including but not limited to the following projects in California: Pit 1 (P-2687); Pyramid Lake (P-2426); Tuolumne (P-2299); Kern 3 (P-2290); Yuba Bear Drum Spalding (P-2266,2310); Middle Yuba (P-2246); Merced (P-2179); Chili Bar (P-2155); Piru Creek (P-2153); McCloud Pit (P-2106); UARP (P-2101); Oroville (P-2100); South Feather (P-2088); MF American River (P-2079); Big Creek 4 (P-2017) Rock Creek Cresta/NF Feather (P-1962)' Kaweah (P-298); Pit 3 4 5 (P-233); Mokelumne (P-137); Kerckhoff (P-96); Eel (P-96).

21. Through its work on hydroelectric projects, American Whitewater has seen how the Final Rule has already been used, and will be used, to prevent states from using their authority under Section 401. For example, the project proponent of the Morrisville Hydroelectric Project, which impacts the Lamoille River, Elmore Brook, and the Green River in Vermont, recently cited the new regulations in support of its motion to stay the State of Vermont Superior Court's consideration of the state-issued 401 Certification of the project—a certification which requires the release of water to allow whitewater boating, the result of American Whitewater's advocacy on behalf of its members. The requested stay, which the court did not grant, was meant to allow FERC additional time to consider a petition arguing that the State of Vermont had waived its 401 Certification authority over the project. FERC has yet to make a decision on that petition, but American Whitewater is concerned FERC will rely on the Final Rule to find waiver and ignore the terms and conditions enumerated in the state's 401 Certification.

22. American Whitewater and its members have a significant ongoing interest in the relicensing of the hydropower projects on the Mongaup River, a tributary to the Delaware River in southern New York. There, the licensee, Eagle Creek Renewable Energy, has filed the final license application, and American Whitewater anticipates that FERC will file a Notice of Ready

for Environmental Analysis by the end of the year. The licensee will then file an application for water quality certification with the State of New York within 60 days of the notice. From American Whitewater's perspective, the major issues in relicensing are recreation, minimum flows, lake levels, fish passage, and endangered species, all of which must be considered in the 401 Certification review process. American Whitewater has a particular interest in the boating opportunities associated with this project because it is one of the closest whitewater reaches to New York City and supports paddlers of wide-ranging abilities. American Whitewater is concerned that under the Final Rule it, and its members, will lose an important opportunity to advocate for appropriate scheduled whitewater releases and boating access at the project. The Final Rule thus frustrates American Whitewater's mission of protecting and restoring America's whitewater rivers and enhancing opportunities to enjoy them safely.

23. California Trout is one of the FERC project applicants for the Potter Valley Project. The Potter Valley Project is located on the Eel River and the East Branch Russian River in Mendocino and Lake Counties, California. The existing facilities include Lake Pillsbury, a 2,300-acre storage reservoir impounded by Scott Dam; the 106-acre Van Arsdale Reservoir, impounded by the Cape Horn Diversion Dam; and a tunnel and penstock across a natural divide to the powerhouse located in the headwaters of the Russian River Basin. The Project was built to store, then divert, Eel River water to a powerhouse located on the Russian River. In June 2019, California Trout submitted a Notice of Intent to File an Application for the Potter Valley Project, along with four other entities, and has subsequently taken steps towards implementing a plan for a project that would remove of Scott Dam, which blocks access for salmon and steelhead to nearly 300 miles of prime spawning and rearing habitat, and create new facilities to enable continued diversion of water from the Eel to the Russian River. Therefore, as an applicant for the Potter Valley Project License, California Trout will be directly affected by the 401 Certification process necessary to acquire the license from FERC and a CWA permit from the Corps of Engineers.

24. California Trout and its members have provided oral and written comments to state resource agencies for the inclusion of conditions in state water quality certifications of

hydropower projects that would assure the protection of designated and existing uses, including but not limited to the protection of aquatic habitat, threatened and endangered species, river access, improvement to the flow regime that has been altered by project operations. In order to provide a meaningful opportunity for the states to determine whether a hydropower project meets state water quality standards, California Trout asserts that the states must have sufficient time and information to complete their environmental review of all project impacts. Absent a meaningful and robust review of project impacts on rivers, hydropower projects will fail to protect designated and existing uses, including but not limited to angling. California Trout believes this is true for all projects, Potter Valley included. California Trout has expended a significant amount of staff time analyzing and discussing the impact of new EPA regulations limiting states' ability to assure that federally licensed energy projects meet state water quality standards. Based on these efforts, California Trout believes Final Rule thus frustrates its mission of restoring California's freshwater ecosystems so that they may support resilient wild fish populations.

25. Idaho Rivers United regularly relies on the process related to state-issued 401 Certifications to advocate of its interests, and its members' interests. First, Idaho Rivers United is regularly involved in the licensing of hydroelectric projects. For example, the Felt Hydroelectric Project, a 7.45-megawatt, located on the Teton River near the City of Tetonia, in Teton County, Idaho, is currently undergoing relicensing FERC. Idaho Rivers United is actively participating in this process. It indents to rely on the section 401 Certification process to ensure the impacts of the project on important issues, such as the Yellowstone cutthroat trout and boating access, are addressed during the licensing process. However, Idaho River United believes that the restrictions placed on the state's review of the project will limit that process's effectiveness.

26. Second, EPA is the permitting authority under section 402 of the CWA, 33 U.S.C. § 1342, in Idaho. While some elements of the permitting program have been delegated to the state, EPA retains the permitting authority over federal facilities, general and individual stormwater permits, and biosolids until July 1, 2021. As a result, before EPA may issue any such permit, the applicant must request that the state certify the project under section 401. Idaho River United

routinely comments such permits and the corresponding section 401 Certifications. Currently, EPA is taking public comment on four stormwater permits—namely, the City of Nampa municipal separate stormwater sewer system (MS4), the Canyon Highway District No. 4 MS4, the Ada County Highway District MS4, and Idaho Transportation Department District #3 MS4—all of which will require 401 Certifications from the state. These MS4 systems discharge into rivers and waterbodies used and enjoyed by Idaho River United members, and but for the restrictions place on the state's review by the Final Rule, the necessary 401 Certification could provide a means for those members to advocate for greater protections for those waters.

27. Because the Final Rule undercuts the states' authority to review these projects, many projects will pollute and fill more waters than they would under the prior rule, and many would-be permit applicants will dredge, fill, and pollute without undergoing a meaningful review of their impacts. This will undercut the Plaintiffs' ability to, on behalf of and for the benefits of their members, protect water quality, cripple their ability to monitor the development of harmful projects and participate in the permitting process of such projects, and deprive the organizations of information they rely on to educate their members, propose legislation, and consider litigation. As a result, the Final Rule will stymie Plaintiffs' ability to provide these vital services to their members, and frustrates their organizational missions.

28. As a result, Plaintiffs have been forced—and will continue to be forced—to divert limited resources from core mission programs to assess the Final Rule's harms and develop new strategies to defend the waters their members use and enjoy. For example, under the restrictions the Final Rule places on the information that an applicant must provide to support the initiation of a review under Section 401, and the limited time the state has to complete its review, in order to continue carrying out their missions the organizations must now obtain, organize, and provide additional information on the impacts of proposed projects necessary to allow the state to make a reasoned decision on whether the project complies with state law. Collecting, organizing, and submitting this information, which otherwise should be provided by the project proponent, requires significant time and resources.

29. The Final Rule undermines how states and tribes use Section 401 to impose the terms and conditions necessary to comply with the state or tribal laws. The plaintiffs thus will be left to rely on other state and federal laws and permitting programs to advocate for similar protections. Determining if, and how, that will be accomplished has required, and will continue to require, the reallocation of staff time and resources to research the potential local, state, and federal laws that address the impacts to local waters, and understand the procedures, requirements, and limitations of these laws in order to assess how they might be used to replace the process and protections offered under Section 401. However, based on the organizations' experience and belief, these mechanisms will likely prove to be inadequate substitutes.

30. Since the Final Rule was promulgated, staff members at American Whitewater have spent numerous hours analyzing the Final Rule and its implications, and sharing this analysis with state resource agencies in California, New York, Massachusetts, Oregon, Washington, and Vermont. American Whitewater has expended and is continuing to expend a significant amount of time analyzing, discussing, educating its members and the public, and advising resource agencies, tribes, and other environmental organizations on the Final Rule. These activities include, but are not limited to, publishing articles in American Whitewater's journal, website, and social media channels describing the new EPA regulations and their impact on whitewater boating. This work is in addition to the considerable efforts made before the passage of the Final Rule to analyze, understand, and share information on the steps the administration took leading up to the Final Rule. But for the actions of the EPA in promulgating these new regulations, the time spent on these activities, which collectively is over 400 hours of staff time, would have been devoted to other activities in furtherance of the organization's mission.

31. American Rivers has redirected resources toward educating, empowering, and advocating on behalf of its members as a result of the Final Rule. American Rivers created a website (www.defendcleanwater.org) to provide information and raise awareness about the EPA rule changes. American Rivers created informational materials, analyses, and briefing papers to explain the EPA rule change to members of the Hydropower Reform Coalition, a coalition of conservation and recreation organizations that track and participate in hydropower licensing

proceedings. American Rivers has spent resources developing education and outreach materials to educate the public and elected officials about the rule changes and to explain what EPA has done in a way that is understandable to people unfamiliar with Section 401 of the Clean Water Act and its importance to the hydropower licensing process. In support of these efforts, American Rivers has spent over $18,000, which would have been spent on other organizational priorities if not for EPA's actions.

32. Plaintiffs will be required to expend additional time and resources on educating and engaging their members on how to participate in the state process under the new regulations. This work will require the organizations to educate their members on both the new federal rules and any changes to the states' rules that may occur as a result. In addition, at the same time, the organizations will be working to educate and inform their members on how best to use alternative processes, under federal, state, and local laws, that may be used to fill in the gap in protections for waterbodies left by the Final Rule.

33. California Trout has expended a significant amount of staff time analyzing and discussing the impact of new EPA regulations limiting California's ability to ensure that federally licensed energy projects meet state water quality standards. California Trout has four staff members devoting a significant amount of staff time participating in the active FERC processes for the Klamath Dams Hydropower Project and the Potter Valley Project. As a result, of EPA's actions, these staff members have participated in countless with nonprofit partners and state and federal resource agencies regarding the guidance, proposed and final Section 401 Certification Rule. Specifically, since the publication of the Final Rule, California Trout staff have spent numerous hours discussing the new rule and its implications with state resource agencies California. But for the actions of the EPA in promulgating these new regulations, the time expended on these activities would have been devoted to other activities in furtherance of the organization's mission.

34. Idaho Rivers United also has diverted a significant amount of staff time analyzing and discussing the impact of new EPA regulations, including significant time analyzing Executive Order 13868, Clean Water Act Section 401 Guidance for Federal Agencies, States and Tribes,

Proposed Rule Updating Regulations on Water Quality Certification, and final Clean Water Act Section 401 Certification Rule. Specifically, Idaho Rivers United participated in numerous discussions with other members of the Hydropower Reform Coalition and state and federal resource agencies regarding the guidance, proposed and final Section 401 Certification Rule. Since the publication of the final rule by the EPA "Updating Regulations on Water Quality Certification," Idaho River United's staff have worked with state and tribal resource agencies in Idaho, Oregon, and Washington, as well as other environmental organizations, to understand the impact of the rule on federal relicensing of hydropower projects in Idaho. In addition, Idaho Rivers United has written or contributed to several articles and editorials in the Idaho Rivers United newsletter, website, and social media channels describing the new EPA regulations and their impact on recreational activities in Idaho. This additional work would not have been required if EPA had not developed and issued the Final Rule.

35. The Final Rule will also harm the Plaintiffs' members' aesthetic, recreational, educational, spiritual, and financial interests. Plaintiffs' members regularly visit local rivers, streams, and wetlands for birding, wildlife observation, fishing, paddling, kayaking, hiking, and photography. Some of the Plaintiffs' members regularly travel through the country to participate in these activities. Some of Plaintiffs' members rely on clean water for their livelihoods, including for businesses that provide kayak tours, paddleboard rentals, and boat charters.

36. Steve Rothert is a member of American Rivers. Mr. Rothert spends his time fishing, boating, viewing wildlife, and exploring the well-known and lesser-known public jewels along the Bear River, in addition to regularly visiting the Feather River and Yuba River. As a result of his countless indelible experiences on the Bear River from its headwaters to its confluence with the Feather River, Mr. Rothert has devoted considerable time to working to protect these places, in part, by participating in the 401 Certification process for various federal projects. For example, Mr. Rothert provided numerous comments and recommendations to the California State Water Resources Control Board's 401 certification proceeding on PG&E's Drum Spaulding and Nevada Irrigation District's Yuba-Bear project, focusing on: 1) maintaining adequate flows to support healthy fish populations and riparian habitat; 2) ensuring the projects

are adequate to adapt to the changing climate conditions, and 3) ensuring the projects maintained conditions to support recreation (boating, fishing, wildlife viewing) in the project-affected reaches. Mr. Rothert believes the Final Rule unlawfully narrows the applicability of Section 401 and prevents states and tribes from protecting the full array of water quality standards and beneficial uses of our waterways, limits the scope of review of the certifying state or tribe, limits the information on proposed FERC hydropower projects made available to states, tribes, and the public to inform the certification determination, restricts the conditions the state or tribe may impose to ensure state or tribal water quality laws are met, and improperly empowers the federal licensing or permitting agency to effectively overrule a state or tribal determination of whether such laws are met. As a result, Mr. Rothert believes the Final Rule will harm him because it will remove an important tool to protect the flows that support the fly fishing, boating, swimming, and wildlife viewing that means so much to him, and could halt and even reverse the progress made in the Bear, Yuba, Feather and many other rivers in California toward restoring the incalculable value healthy rivers provide the public.

37. Robert Center is a member of American Whitewater. Mr. Center regularly paddles on rivers throughout California, including the Yuba, American, Feather, Tuolumne, Kern, and Pit rivers, as his primary means to access the natural landscape. As a result, protecting the health of these rivers has been Mr. Center's primary pursuit over the past twenty years. Yet, many of the rivers where Mr. Center engages in whitewater boating are affected by dams that are licensed by FERC, including but not limited to the following hydropower projects: Yuba Bear/Drum Spaulding Yuba River Development Project, Upper American River Project, Chili Bar Project, Pit #1, Pit 3 4 5, Kern River #3, Don Pedro. Mr. Center is concerned that the Final Rule will limit his ability to engage in whitewater boating on these rivers because it will restrict states' ability to protect whitewater boating as a use.

38. A member of California Trout, who is the field and lab director for UC Davis Center for Watershed Sciences, where he works to understand better how watersheds and the rivers that flow through them work, to ensure that future generations will have the same opportunities that he has been lucky to have, is concerned about the impact the Final Rule will have on his ability

to fish on rivers in California. Over the past 20 years, he has engaged in angling on the Yuba, American, Feather, Tuolumne, McCloud, Pit, Fall, Klamath, and Trinity Rivers in California. These rivers are each impacted by federally-licensed hydroelectric projects. Many of these projects, such Yuba Bear/Drum Spaulding Yuba River Development Project, Upper American River Project, Pit #1, Pit 3 4 5, Kern River #3, and the Klamath Hydroelectric Project, either are or will soon go through relicensing, which will require a state-issued 401 Certification. Given his significant interest in continuing to fish and otherwise use and enjoy these waters, he is concerned that the Final Rule will limit his ability to participate in a public process to assure that FERC-licensed hydropower projects meet state water quality standards.

39. By restricting the applicability, scope of review, the scope of permissible conditions, and finality of state certifications, the Final Rule restricts the Plaintiffs' and their members' participation in certification determinations. By restricting the applicability, scope of review, the scope of permissible conditions, and finality of state certifications, the Final Rule restricts Plaintiffs' and their members' access to information about federally-permitted or -licensed activities. The Final Rule deprives the Plaintiffs and their members of information critical to their organizational missions by severely limiting the information required for a valid certification request. By accelerating the certification process and limited the range of actions that state and tribes may take to respond to a request for certification, the Final Rule threatens to deprive the Plaintiffs and their members of the opportunity to participate in full and complete state certification decisions.

40. Defendant Andrew R. Wheeler is the Administrator of the U.S. Environmental Protection Agency. Mr. Wheeler is sued in his official capacity. Mr. Wheeler oversees the EPA's implementation of the Clean Water Act.

41. Defendant U.S. Environmental Protection Agency is an agency of the U.S. Government that has primary responsibility for implementing the Clean Water Act.

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LEGAL BACKGROUND

I. The Clean Water Act

42. In 1972, Congress adopted comprehensive amendments to the Clean Water Act in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

43. In the Clean Water Act, Congress stated its policy "to recognize, preserve, and protect the primary responsibilities of the States … to plan the development and use … of land and water resources … ." 33 U.S.C. § 1251(b). Congress added further, that "[e]xcept as expressly provided in this Act, nothing in this Act shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370.

44. Federally-recognized Indian tribes may be authorized by the EPA under Section 518 of the Clean Water Act to carry out certain of the same functions as states, including Section 401 certification authority. 33 U.S.C. § 1377(e).

45. The EPA administers the Clean Water Act, and is authorized to promulgate "such regulations as are necessary to carry out [its] functions" under the Act. 33 U.S.C. § 1361(a).

II. Section 401 of the Clean Water Act

46. Under Section 401 of the Clean Water Act, no federal permit or license may issue for any activity that may result in a discharge into waters of the United States, unless the state or authorized tribe ("certifying authority") where the discharge would originate either certifies that the discharge will comply with state water quality requirements, or waives certification. 33 U.S.C. § 1341(a)(1).

47. The EPA acts as the certifying authority on behalf of tribes it has not authorized to administer Section 401, and where the discharge would originate on lands under exclusive federal jurisdiction.

48. Section 401 applies broadly to any proposed federally licensed or permitted activity that may result in any discharge into a water of the United States. 33 U.S.C. § 1341(a)(1).

49. Section 401 instructs states and authorized tribes to establish procedures for public notice of all certification applications. 33 U.S.C. § 1341(a)(1).

50. If the certifying authority fails or refuses to act on a request for certification "within a reasonable period of time (which shall not exceed one year) after receipt of" a request for certification, certification is deemed waived. 33 U.S.C. § 1341(a)(1).

51. Section 401 mandates that any certification issued pursuant thereto "shall 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 effluent limitations, … and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d). Any such limitation or requirement "shall become a condition on any Federal license or permit subject to the provisions of this section." *Id.*

III. The Administrative Procedure Act

52. The APA provides a private cause of action to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

53. Final agency actions are reviewable under the APA. 5 U.S.C. § 704. Promulgation of a final rule is "final agency action" under the APA. 5 U.S.C. § 551(13).

54. Under the APA, a court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

FACTS

I. Application of Section 401

55. For the past 50 years, states have exercised the certification authority preserved by Section 401 for activities that require federal approval, such as hydropower licenses and relicensing, natural gas pipelines, fossil fuel plants and export terminals, industrial and municipal facilities, and the development of wetlands.

56. These reviews consider and address impacts from such activities in making certification determinations under Section 401, including impacts to water quality and quantity, ecosystems, sensitive species and their habitat, watershed hydrology, water and non-water related recreation, and aesthetic value.

57. States have imposed a broad array of conditions on activities subject to the Section 401 certification requirement—including conditions not related to the triggering discharge—that are necessary to ensure compliance with state law requirements.

58. States have denied certification for activities that would cause violations of state law requirements, including state law requirements that were not promulgated pursuant to the Clean Water Act.

59. States have enacted laws and regulations establishing the rules and processes for public notification and participation in determinations concerning requests for certification under Section 401.

60. Plaintiffs and their members have participated and intend to continue participating in state certification determinations, including in areas within the Northern District of California.

61. Plaintiffs and their members rely on information obtained through state certification procedures to understand better proposed projects and activities that may impact their interests.

62. On April 10, 2019, President Trump issued Executive Order 13,868, directing EPA to review Section 401; issue new guidance to states, tribes, and federal agencies; and propose new regulations implementing Section 401. Executive Order No. 13,868: Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15,495 (April 10, 2019).

63. The stated purpose of Executive Order 13868 was to "fully realize th[e] economic potential" of the United States' coal, oil, natural gas, and other energy resources, by "promot[ing] efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment." 84 Fed. Reg. at 15,495. According to the executive order, "[o]utdated Federal guidance and regulations regarding section 401 … are causing confusion and uncertainty and are hindering the development of energy infrastructure." 84 Fed. Reg. at 15,496.

64. On June 7, 2019, the EPA issued its "Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes." This guidance offered the EPA's opinion on the time within which a state or tribe must make a certification decision; the grounds for denying or conditioning a certification to water quality requirements; and the type of information that the state needs to make its certification decision.

65. In August 2019, the EPA published an economic analysis of existing Section 401 processes, and its proposed Section 401 rulemaking. EPA, *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking*, NEPIS 810R19001A (Aug. 2019). In its economic analysis, the EPA summarized four "denials and other high-profile section 401 certification cases." The EPA relied on these four "case studies," which were based on the proponent's failure to address significant water resource impacts, failure to adequately mitigate impacts to water quality, and unavoidable adverse impacts to the local environment as a result of not meeting state water quality standards, to highlight the cost of certification denial on project proponents. In particular, the EPA stated in its economic analysis that denial could delay proposed projects increasing costs above original estimates, cause the project proponent to forego a project after investing funds and staff time, and entail legal costs and further resources in challenging a denial in court. The EPA stated further that recent denials of large infrastructure projects have "highlighted the potential for certification 401 certification denials to have broader economic impacts," suggesting that such denials "could jeopardize the reliability of gas-fired electric generators." In its economic analysis, the EPA suggested that requiring a "complete application" before starting the clock for 401 certification "has caused confusion and delays," and represents "an opportunity cost to the project proponent." According to a Western States Water Council report cited by the EPA in its economic analysis, "incomplete requests are the most common cause of section 401 review delay." The EPA further suggested that certifying authorities and project proponents engage in a "withdrawal and resubmit" process, effectively extending the project timeline beyond one year.

66. The EPA's economic analysis recounts the outcome of survey given to 50 states about their section 401 certification processes. According to the EPA's economic analysis, responses to

this survey "indicate that the average length of time for states to issue a certification decision once they receive a complete request is 132 days," and that "denials are uncommon, with 17 states averaging zero denials per year and other states issuing denials rarely." Information from another survey made available to EPA by the Western States Water Council "further suggests that denials are uncommon, and most decision [sic] are made between 40-90 days."

II. The EPA's Rulemaking

67. On August 22, 2019, the EPA published in the Federal Register a proposed rule entitled "Updating Regulations on Water Quality Certification" ("Proposed Rule"). 84 Fed. Reg. 44,080–44,122 (Aug. 22, 2019).

68. The Proposed Rule provided the public with an opportunity to file comments until October 21, 2019.

69. Over 125,000 public comments were submitted on the proposed rule. Plaintiffs American Rivers, American Whitewater, and Idaho Rivers United submitted comments on the Proposed Rule during the public comment period, including in a letter dated October 21, 2019, and submitted electronically to EPA Docket No. EPA-HQ-OW-2019-0405 on behalf of the Hydropower Reform Coalition and its member organizations. EPA-HQ-OW-2019-0405-0803. In addition, American Whitewater commented separately. EPA-HQ-OW-2019-0405-0783.

70. The EPA received numerous extensive critiques of the proposed rule, including from states, tribes, and Plaintiffs, detailing the many flaws in it.

71. For example, numerous comments, including from the states and tribes, explained that the delay in processing 401 certification requests, when they occurred, often were the result of a lack of information provided by the project applicant. Many of these comments explained that the limited information required under the proposed rule would exacerbate these problems by limiting the information that must be provided to the certifying entity. Other comments noted that by failing to require more, detailed information in a certification application, or allowing the states to decide what information should be required, is inconsistent with the Clean Water Act and some state laws.

72. Similarly, many commenters noted that the proposal process would allow project proponents to dictate the timing of a certification review, potentially beginning the process before the certifying agency is able (because of resources, staffing, or available information) to properly review the application, and upsetting the long-standing relationships between states and federal agencies on how applications are noticed and processed. In addition, many commenters noted that proposed regulations would lead to more uncertainty, not less, on when an application was received.

73. Other comments noted the Clean Water Act authorizes the certifying authorities, not the federal agencies, to set the reasonable period of time for a review of an application. These comments highlighted that the proposed rule did not account for the suite of factors that the certifying authority would need to consider in making these decisions, included but not limited to: requirements of state law; the need for administrative review; the underlying license or permit; agency resources; and individual project needs such as studies that require seasonal field work.

74. Several commenters also objected to the limitations placed on the certifying authorities' ability to manage the time for review, noting that the proposed rule did not account for significant projects, changes in the project, and other factors that may require the state to adjust the time necessary to review a project.

75. Other comments noted that the additional justifications and documentation requirements imposed for granting certification with conditions and denials would be burdensome and add to the complexity of and time required for decisions. Many commenters noted that the provisions allowing the federal agencies to review these decisions and effectively "veto" a certification conditions and denials is inconsistent with the plain language of the Clean Water Act, would undermine the authority of the states and tribes to protect their waters and communities, and would add a potential second round of litigation—in the federal courts—to each certification decision, thus further complicating and delaying the review process.

76. In sum, these comments, particularly from the states and tribes, demonstrated how the proposed rule would add significant uncertainty to the 401 review process, and make it more difficult—not less—for a certifying authority to complete the necessary review.

77. Notably, despite recognizing that "Congress enacted section 401 of the CWA to provide States and authorized Tribes with an important tool to help protect the water quality of federally regulated waters within their borders in collaboration with federal agencies," nowhere in the EPA's explanation of or justifications for the Final Rule does the agency explain how this rule will work to better protect waters of the United States. Further, many commenters noted that the restrictions placed on the scope of analysis permitted under the Final Rules would undermine the states' and tribes' ability to protect water quality. Indeed, as several commenters pointed out, the EPA failed to undertake any analysis of what impact this rule will have on water quality.

78. Despite these many critiques and concerns raised by the states, tribes, and public, the EPA retained most of the most problematic components in the Final Rule. As a result, this rule will not address any of the legitimate concerns about the current 401 regulations and, in fact, will sow further confusion about the process for obtaining a 401 certification, while at the same time unlawfully curtailing state and tribal authority under the law. As a result, the Final Rule is both inconsistent with and unresponsive to the comments submitted, and the record does not support EPA's stated rationales for the Final Rule.

III. The Final Rule

79. On July 13, 2020, the EPA published the Final Rule in the Federal Register. 85 Fed. Reg. 42,210 (July 13, 2020).

80. The Final Rule provides that Section 401 certification is triggered when any federally-licensed or -permitted activity "may result" in "a discharge from a point source into a water of the United States." Final Rule at 42,285 (to be codified at 40 C.F.R. §§ 121.2, 121.1(f)).

81. The Final Rule provides that the timetable for certification starts immediately upon receipt of a "certification request," rather than upon receipt of a "complete application." Final Rule at 42,243 & 42,285 (to be codified at 40 C.F.R. §§ 121.1(c), 121.1(m), 121.6(a)). The Final Rule states that a "certification request" must be a written, signed and dated communication that

requests the review of the project under Section 401, and certifies that it correctly and accurately identifies: the proposed project; its proponents; the applicable underlying federal license or permit; and the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters; includes: a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge; a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received; and documents that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request. Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.5(b)–(c)).

82. The Final Rule limits the scope of a certifying authority's review to "assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.3).

83. Under the Final Rule, the term "discharge" is defined as "a discharge from a point source into a water of the United States." Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.1(f)).

84. Under the Final Rule, "water quality requirements" means "applicable provisions of §§ 301, 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." Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.1(n)).

85. The Final Rule directs federal agencies that issue permits or licenses requiring Section 401 certification to establish the "reasonable period of time" for a certifying authority to act on a certification request, "either categorically or on a case-by-case basis." Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.6(a)).

86. The Final Rule provides that once the timeline for certification has been triggered by receipt of a certification request, it cannot be stopped or restarted, even if the project proponent fails to provide requested information. Final Rule at 42,286 (to be codified at 40 C.F.R. § 121.6(e)).

87. The Final Rule allows certification decisions to be based only on the impacts of point source discharges associated with the proposed project or activity, and not on other impacts of the activity as a whole. Final Rule at 42,251 & 42,285 (to be codified at 40 C.F.R. §§ 121.3, 121.1(e), 121.1(n)).

88. The Final Rule empowers the federal permitting or licensing agency to determine whether a certifying authority's denial complied with the rule's procedural requirements, and to deem the certification requirement waived where it concludes that the certifying authority's denial did not comply with the rule's procedural requirements. Final Rule at 42,286 (to be codified at 40 C.F.R. § 121.9(a)(2)).

89. The Final Rule empowers the federal permitting or licensing agency to determine whether a condition imposed by the certifying authority complied with the rule's requirements, before incorporating it in the underlying federal permit or license. Final Rule at 42,286 (to be codified at 40 C.F.R. §§ 121.9(b), 121.10(a)).

FIRST CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully restricts powers Congress preserved for the States)

90. Plaintiffs reallege all previous paragraphs.

91. The Clean Water Act authorizes the EPA to promulgate "such regulations as are necessary to carry out [its] functions under the [Clean Water Act]." 33 U.S.C. § 1361(a).

92. The Clean Water Act provides that "[e]xcept as expressly provided in this Act, nothing in this Act shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370.

93. The EPA has limited "functions" to "carry out" under Section 401, namely: to act as the certifying authority where the discharge triggering Section 401 occurs on land under exclusive federal jurisdiction or on behalf of a tribe it has not authorized to administer Section 401; and to determine whether a discharge may affect the water quality of another state, and take certain actions following such a determination. 33 U.S.C. §§ 1341(a)(1)–(2). The EPA has no other

"functions" to "carry out" under Section 401, and therefore has no statutory authority to prescribe regulations interpreting or implementing the rest of Section 401.

94. The Final Rule narrows the applicability of Section 401, circumscribes the scope of the states' and authorized tribes' review, limits the conditions a state or authorized tribe may impose in granting certification, and empowers federal licensing or permitting agencies to effectively overrule a state or authorized tribe's certification determination.

95. The EPA's decision to impose limits on state and tribal certification authority is arbitrary; capricious; not in accordance with law; and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. §§ 706(2)(A) & (C).

SECOND CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule's unlawful provisions concerning the timeline for certification)

96. Plaintiffs reallege all preceding paragraphs.

97. Section 401 provides that states and authorized 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." 33 U.S.C. § 1341(a)(1).

98. The Final Rule establishes requirements governing the states' and authorized tribes' implementation of their certification processes under Section 401, including but not limited to:

a) mandating when the certification timeline shall begin (Final Rule at 42,243 & 42,285 (to be codified at 40 C.F.R. §§ 121.1(c), 121.1(m), 121.6(a)));

b) limiting the type and scope of information the applicant must provide (Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.5(b)–(c)));

c) restricting the state's or tribe's authority to require the submission of additional information (Final Rule at 42,262);

d) restricting the state's or tribe's authority to manage the timing of its review process (Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.6)); and

e) preventing the state or tribe from identifying the amount of time it will need to conduct its certification review (Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.6)).

99. The EPA's decision to interpret and regulate the timeline for certification, which is the sole prerogative of the certifying authority, is arbitrary, capricious, and not in accordance with law; and also in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. §§ 706(2)(A) & (C).

100. The EPA's interpretation of "certification request" as requiring only limited information about the proposed project or activity is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

101. The EPA's decision to limit the types of actions the certifying authorities may take in response to a request for certification is arbitrary, capricious, or not in accordance with law; and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. §§ 706(2)(A) & (C).

102. The EPA's decision to allow other federal agencies to define the "reasonable period of time" for acting on a certification request is arbitrary, capricious, or not in accordance with law; and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. §§ 706(2)(A) & (C).

THIRD CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully limits Section 401's applicability to activities that may result in point source discharges)

103. Plaintiffs reallege all preceding paragraphs.

104. Section 401 requires certification for any federally-licensed or -permitted activity "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1).

105. The Clean Water Act provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16).

106. The terms "discharge of a pollutant" and "discharge of pollutants," in turn, mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

107. The Final Rule limits the application of Section 401 to activities that may result in a "discharge from a point source." Final Rule at 42,285 (to be codified at 40 C.F.R. §§ 121.1(f), 121.2).

108. The EPA's decision to limit the certification requirement to activities that may result in point source discharges is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

FOURTH CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully limits the scope of—and permissible conditions on—certification to impacts of point source discharges on water quality)

109. Plaintiffs reallege all preceding paragraphs.

110. Section 401(a) requires "the State in which the discharge originates or will originate" to 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).

111. Section 401(d) instructs the certifying authority 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 applicable provisions of the Clean Water Act and "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Any such limitations become a condition on the federal license or permit. *Id*.

112. The Final Rule limits the scope of a certifying authority's review to water quality-related impacts from point source discharges. Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.3).

113. The Final Rule limits the scope of a certifying authority's review to assuring compliance with "state or tribal regulatory requirements for point source discharges into waters of the United States." Final Rule at 42,285 (to be codified at 40 C.F.R. §§ 121.1(n), 121.3).

114. The Final Rule prohibits a certifying authority from imposing conditions unrelated to water quality-related impacts from point source discharges. Final Rule at 42,230 & 42,286 (to be codified at 40 C.F.R. §§ 121.7(d), 121.9(b), 121.10(a)).

115. The EPA's decision to limit the scope of a certifying authority's review to water quality-related impacts from point source discharges is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

116. The EPA's decision to limit the scope of a certifying authority's review to compliance with "state or tribal regulatory requirements for point source discharges into waters of the United States" is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

117. The EPA's decision to prohibit a certifying authority from imposing conditions unrelated to water quality-related impacts from point source discharges is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

118. The EPA's decision to limit the scope of state and tribal certifications and the conditions they may impose, on account of constitutional limits applicable only to the federal government, is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

FIFTH CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully prohibits the certifying authority from considering or relying on State law in making a certification decision)

119. Plaintiffs reallege all preceding paragraphs.

120. Section 401(d) instructs the certifying authority 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 applicable provisions of the Clean Water Act and "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Any such limitations become a condition on the federal license or permit. *Id*.

121. The Final Rule limits the scope of a certifying authority "to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.3).

122. The Final Rule defines "water quality requirements" to mean the "applicable provisions of §§ 301, 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." Final Rule at 42,285 (to be codified at 40 C.F.R. § 121.1(n)).

123. As a result, the Final Rule effectively prohibits a certifying authority from considering or relying on any other requirements of state law it considers "appropriate" when making its certification decision.

124. The EPA's decision to limit the scope of a certifying authority's review in a manner that will prohibit the state from relying on any other appropriate requirement of state law is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

125. The EPA's decision to limit the scope of state and tribal certifications and the conditions they may impose, on account of constitutional limits applicable only to the federal government, is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

SIXTH CLAIM FOR RELIEF

Violation of the Clean Water Act

(The Final Rule unlawfully authorizes federal permitting and licensing agencies to review and overrule certification decisions)

126. Plaintiffs reallege all preceding paragraphs.

127. Section 401(a)(1) provides that where the certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time … after receipt of such request," the certification requirement "shall be waived." 33 U.S.C. § 1341(a)(1).

128. Section 401(a)(1) prohibits the issuance of any federal license or permit before certification has either been granted or waived, and prohibits the issuance of any federal license or permit where certification has been denied. 33 U.S.C. § 1341(a)(1).

129. Section 401(d) 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).

130. The Final Rule empowers federal permitting and licensing agencies to overturn the denial of a certification request upon determining that the certifying authority did not comply with the Final Rule's procedural requirements. Final Rule at 42,286 (to be codified at 40 C.F.R. § 121.9(a)(2)).

131. Moreover, the Final Rule empowers the federal permitting and licensing agencies to refuse to include the terms and conditions imposed in a certification, upon determining that the certifying authority did not comply with the Final Rule's procedural requirements. Final Rule at 42,286 (to be codified at 40 C.F.R. § 121.10(a)).

132. The EPA's decision to authorize federal permitting and licensing agencies to review and overrule certification decisions is arbitrary, capricious, or not in accordance with law; and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. §§ 706(2)(A) & (C).

SEVENTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act

133. Plaintiffs reallege all preceding paragraphs.

134. A rulemaking is arbitrary and capricious if the agency relied on factors which Congress did not intend for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

135. EPA's underlying rationale for the Final Rule is to remove the "confusion and uncertainty" that "are hindering the development of energy infrastructure."

136. The Final Rule introduces new regulatory uncertainty for project proponents and the interested public; runs counter to the evidence presented by the states, tribes, and public on the root causes of any delays that may occur under the current regulations, and thus will not result in more efficient certification reviews; is based on the interest of developing of energy infrastructure and development projects at the expense of protecting water quality; fails to protect the primacy of the states and tribes in protecting and restoring waters within their

boundaries; and otherwise is premised on rationales that are inconsistent with the mandates, goals, and intent of the Clean Water Act.

137. As a result, the EPA acted arbitrarily, capriciously, or not in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A), by adopting the Final Rule.

REQUEST FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

(1) Declare the Final Rule, or portions thereof, are unlawful because they are in excess of the EPA's statutory jurisdiction, authority, or limitations, or short of its statutory right;

(2) Declare the Final Rule, or portions thereof, are unlawful because they are arbitrary, capricious, or otherwise not in accordance with law;

(3) Enter an order vacating the Final Rule or those portions determined to be unlawful;

(4) Enjoin the EPA from implementing, applying, or enforcing the Final Rule or those portions of the Final Rule determined to be unlawful;

(5) Grant Plaintiffs such additional and further relief as the Court may deem just, proper, and necessary.

Date: September 29, 2020.

Respectfully submitted,

/s/ Andrew Hawley
Andrew Hawley
Daniel James Cordalis
Peter M. K. Frost
Sangye Ince-Johannsen

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing First Amended Complaint was electronically filed with the Clerk of the Court on September 29, 2020, 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

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN RIVERS, *et al.*,

Plaintiffs,

v.

ANDREW R. WHEELER, *et al.*,

Defendants,

and

STATE OF LOUISIANA, *et al.*,

Defendant-Intervenors.

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

JOINT CASE MANAGEMENT STATEMENT

Date: October 22, 2020
Time: 11:00 am
Courtroom: 12
450 Golden Gate Ave,
San Francisco Courthouse
Judge: The Honorable William H. Alsup
Action Filed: July 13, 2020

The parties to the above-entitled action submit this Joint Case Management Statement pursuant to the Standing Order for All Judges of the Northern District of California—Contents of Joint Case Management Statement (Standing Order), Civil L.R. 16-5 (Procedure in Actions for Review on an Administrative Record) and 16-9 (Case Management Statement and Proposed Order), and the Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases before Judge William Alsup (Supplemental Order). After having discussed the items enumerated in the Standing Order and applicable local rules, the undersigned counsel for Plaintiffs, Defendants Andrew R. Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency and the United States Environmental Protection Agency (collectively, "EPA" or "Defendants"), State Intervenors,[1] and Industry-Intervenors[2] (collectively, Intervenors) (collectively, the Parties), respectfully submit the following joint statement:

1. Jurisdiction and Service

Plaintiffs allege that this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and 5 U.S.C. §§ 701-706. Plaintiffs further allege that an actual controversy exists between the Parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory, injunctive, and other relief pursuant to 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 701-706.

Defendants have been served.

Defendants reserve challenges to standing and ripeness.

State Intervenors challenge jurisdiction.

2. Facts

On July 13, 2020, Defendants promulgated a final rule entitled "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42,210 (July 13, 2020) (the "Certification Rule" or "Rule"). Pursuant to Section 401of the Clean Water Act, 33 U.S.C. § 1341 (Section 401), "any

[1] State Intervenors are the States of Louisiana, Montana, Arkansas, Mississippi, Missouri, Texas, West Virginia, and Wyoming.

[2] Industry Intervenors are the American Petroleum Institute, and the Interstate Natural Gas Association of America.

applicant for a [f]ederal license or permit to conduct any activity … which may result in any discharge into the navigable waters shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." 33 U.S.C. § 1341(a). Section 401 grants states authority to approve, condition, or deny federally licensed or permitted activities within their borders based on potential impacts on water quality. *Id*., § 1341(a)(1), (d). "No license or permit shall be granted until the certification required by this section has been obtained or has been waived." *Id*. § 1341(a)(1). "No license or permit shall be granted if certification has been denied by the State." *Id*. The Rule updates EPA's existing regulations implementing Section 401. 85 Fed. Reg. at 42,227. The Certification Rule became effective on September 11, 2020. *Id*. at 42,210.

On July 13, 2020, Plaintiffs filed a Complaint seeking judicial review of the Certification Rule under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA). ECF No. 1.

On September 29, 2020, Plaintiffs filed its First Amended Complaint. ECF No. 75.

On October 13, 2020, Defendant and State Intervenors filed answers to the First Amended Complaint. Pursuant to a stipulation (ECF No. 81) Industry Intervenors will file an answer on October 16, 2020.

3. Legal Issues

Plaintiffs allege that the Rule is arbitrary and capricious and, because the Rule violates the Clean Water Act, constitutes an abuse of discretion, is in excess of EPA's jurisdiction and statutory authority, and is not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), (C).

Defendants and Intervenors dispute these claims.

4. Motions

a. Prior Motions

- State Intervenors moved to intervene on August 28, 2020. ECF No. 27. The Court granted the motion on September 17, 2020. ECF No. 62.

- Defendants moved to dismiss the Complaint on September 15, 2020. ECF No. 59. Plaintiffs filed the First Amended Complaint on September 29, 2020. On September 28, 2020, the Court ordered that the Defendants' and Defendant-Intervenors' responses to the First Amended Complaint were due within fourteen days of its filing. ECF No. 73.
- Industry Intervenors moved to intervene on September 4, 2020. ECF No. 56. The Court granted the motion on October 9, 2020. ECF No. 77.

b. Motions Practice related to the Administrative Record

On October 5, 2020, Defendants lodged a certified index to the administrative record in *State of California, et al. v. Andrew Wheeler, et al.*, Case No. 3:20-cv-04869-WHA (ECF No. 109). Plaintiffs do not believe that the Lodged Index reflects the complete administrative record for this case. At a minimum, Plaintiffs contend that Defendants are required to provide a privilege log for any documents that are withheld based on an asserted privilege. *See, e.g., Sierra Club v. Zinke*, 2018 WL 3126401, *5 (N.D. Cal. June 16, 2018) ("Privilege logs are required when a party intends to withhold documents based on the deliberative process privilege"; *Regents of University of California v. U.S. Dep't of Homeland Security*, 2018 WL 1210551, *6 (N.D. Cal. Mar 8, 2018) ("Every court in this district to consider the issue … has required administrative agencies to provide a privilege log in withholding documents that otherwise belong in the administrative record"). Plaintiffs believe that timely production of a privilege log is essential to Plaintiffs' ability to evaluate and comment on the completeness of the administrative record.

Defendants' position is that the administrative record lodged on October 5, 2020, is complete and that EPA is not required to provide a privilege log identifying withheld deliberative materials. *See*, *e.g.*, *Oceana, Inc. v. Pritzker*, 217 F.Supp.3d 310, 318 (D.D.C. 2016); *Stand Up for California! v. Dep't of Interior*, 71 F. Supp. 3d 109, 123 (D.D.C. 2014).

Unless the Court orders otherwise at the Case Management Conference, the Parties anticipate motion practice on this issue will be necessary.

c. Anticipated Motions

Cross-Motions for Summary Judgment. Because this case is governed by the APA, the Parties anticipate resolving this matter through cross-motions for summary judgment. However, the Parties' propose alternative briefing schedules as provided in paragraph 17, below.

As described below, all Parties agree to filing consolidated cross-motions for summary judgment as to all three related cases but disagree as to the schedule.

5. Amendment of Pleadings

Plaintiffs filed an Amended Complaint on September 29, 2020. ECF 75. No additional amendments are anticipated by any party.

6. Evidence Preservation

The Parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information. Plaintiffs do not anticipate that any issues will arise regarding the preservation of evidence but have requested that Defendants take reasonable and proportionate steps to preserve potential evidence relevant to the issues in this action.

7. Disclosures

Because the Parties anticipate this action will be resolved on the administrative record, the Parties agree that initial disclosures are not required under Fed. R. Civ. P. 26(a)(1)(B)(i).

8. Discovery

The Parties do not anticipate discovery.

9. Class Actions

This case is not a class action.

10. Related Cases

The following challenges to the Rule pending in the United States District Court for the Northern District of California are related and assigned to the Honorable William Alsup: *State of California, et al. v. Andrew Wheeler, et al.*, Case No. 3:20-cv-04869-WHA; and *Suquamish Tribe, et al. v. Andrew Wheeler, et al.*, Case No. 3:20-cv-06137-WHA.

The Parties believe it is appropriate to propose that the Court consolidate the three related

cases for all purposes and that, as noted below in Paragraph 17, the cases proceed on the same briefing schedule.

All three Plaintiff groups believe that plaintiff interests differ such that it would be inappropriate for Plaintiff groups to be required to file a single brief.

In addition, several other lawsuits challenging the Rule are pending in other district courts: *S.C. Coastal Conservation Leagues, et al. v. Andrew R. Wheeler, et al.*, Case No. 2:20-cv-03062-DCN (D.S.C.); and *Delaware Riverkeeper, et al. v. U.S. EPA, et al.*, Case No. 2:20-cv-03412 (E.D. Pa.).

11. Relief

Plaintiffs seek: (1) declaratory relief that the Rule, or portions thereof, are unlawful because they are in excess of the EPA's statutory jurisdiction, authority, or limitations, or short of its statutory right; (2) declaratory relief that the Final Rule, or portions thereof, are unlawful because they are arbitrary, capricious, or otherwise not in accordance with law; (3) an order vacating the Rule or those portions determined to be unlawful; (4) injunctive relief enjoining the EPA from implementing, applying, or enforcing the Rule or those portions of the Rule determined to be unlawful; (5) such additional and further relief as the Court may deem just, proper, and necessary.

Defendants and Intervenors deny that Plaintiffs are entitled to any relief.

12. Settlement and Alternative Dispute Resolution (ADR)

The Parties have complied with ADR L.R. 3-5 and have discussed the various ADR options provided by this court and private entities. The Parties do not believe that ADR would be helpful in resolving this matter or narrowing the disputed issues.

13. Consent to Magistrate Judge for All Purposes

The Parties have not consented to have a magistrate judge conduct any further proceedings, including trial and entry of judgment.

14. Other References

The Parties do not believe that this case is suitable for reference to binding arbitration,

special master, or the Judicial Panel for Multidistrict Litigation.

15. Narrowing of Issues

The Parties do not believe that it is possible to narrow the issues.

16. Expedited Trial Procedure

The Parties anticipate that the case will be resolved on summary judgment. No trial is expected to occur.

17. Scheduling

The Parties agree that departure from the default deadlines set forth in Civil L.R. 16-5 is appropriate in this matter. Plaintiffs request oral argument on the Parties' cross-motions for summary judgment.

Plaintiffs have identified numerous issues with the Lodged Index and, therefore, believe that an informal administrative record review and comment process is essential to minimize, streamline, or avoid the need for motion practice related to the record. Accordingly, Plaintiffs propose a schedule for this process below.

Defendants do not agree with this approach and propose an alternate schedule.

a. Plaintiffs' Proposed Schedule.

Plaintiffs respectfully propose the following schedule for certifying the final administrative record, motions related to the sufficiency and completeness of the record, and cross-motions for summary judgment:

Deadline	**Action**
October 26, 2020	Deadline for Plaintiffs to provide comments to Defendants regarding issues with the Lodged Index and record.
November 2, 2020	Defendants provide Plaintiffs with a privilege log reflecting documents withheld from the administrative record.
November 9, 2020	Deadline for Parties to complete meet and confer efforts regarding Plaintiffs' comments on the Lodged Index and record.
November 16, 2020	Defendants provide portable document format (PDF) version of documents identified on the certified index to the administrative record lodged on October 5, 2020 (ECF No. 109) via box.com or a similar cloud-based document management service, and file a notice providing access information.

December 11, 2020	Deadline to file any motions (1) challenging the completeness of the administrative record; (2) for leave to supplement the administrative record; or (3) for leave to take discovery. Response brief due 1/8/21; reply due 1/22/21

If Plaintiffs file a motion to supplement the record or to compel a privilege log, the case shall proceed on Track 2; otherwise, the case shall proceed on Track 1.

Track 1:

Deadline	**Action**
January 15, 2021	Plaintiffs file their motion for summary judgment not to exceed 45 pages of text.
February 12, 2021	Defendants file a combined opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 45 pages of text.
February 26, 2021	Intervenors file a single combined opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 45 pages of text.
March 19, 2021	Plaintiffs file their reply in support of summary judgment and opposition to Defendants' and Intervenors' cross-motion for summary judgment not to exceed 55 pages of text.
April 9, 2021	Defendants file their reply in support of their cross-motion for summary judgment not to exceed 25 pages of text.
April 23, 2021	Intervenors file a single combined reply in support of their cross-motion for summary judgment not to exceed 25 pages of text.
Earliest available date no sooner than 21 days after briefing on the cross-motions for summary judgment is completed	Hearing on cross-motions for summary judgment.

Track 2:

Deadline	**Action**
45 days after ruling granting Plaintiffs' motion to produce a privilege log and/or supplement the record; OR 30 days after denial of Plaintiffs' motion	Plaintiffs file their motion for summary judgment not to exceed 45 pages of text.
30 days after Plaintiffs' motion for summary judgment	Defendants file a combined opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 45 pages of text.
14 days after Defendants' opposition and cross-motion	Intervenors file a single combined opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment not to exceed 45 pages

Deadline	Action
	of text.
21 days after Intervenors' opposition and cross-motion	Plaintiffs file their reply in support of summary judgment and opposition to Defendants' and Intervenors' cross-motion for summary judgment not to exceed 55 pages of text.
21 days after Plaintiffs' reply and opposition	Defendants file their reply in support of their cross-motion for summary judgment not to exceed 25 pages of text.
14 days after Defendants' reply	Intervenors file a single combined reply in support of their cross-motion for summary judgment not to exceed 25 pages of text.
Earliest available date no sooner than 21 days after briefing on the cross-motions for summary judgment is completed	Hearing on cross-motions for summary judgment.

b. Defendants' and Defendant-Intervenors' Proposed Schedule.

As noted above in Paragraph 10, Defendants propose that the three related cases be consolidated for all purposes. Accordingly, Defendants propose filing a consolidated motion for summary judgment as to the plaintiffs in each related case with appropriate increased page limits. Defendants have proposed the same schedule for each of the related cases. Defendants and Defendant-Intervenors propose the following schedule:

Summary Judgment	Administrative Record	Deadline
	Parties seek to informally resolve disputes regarding Plaintiffs' concerns regarding supplementation of the record	October 23-November 6, 2020
	Defendants will make portable document format (PDF) versions of documents identified on the certified index to the administrative record lodged on October 5, 2020 (ECF No. 109) available on box.com or a similar cloud-based document management service, and file a notice providing access information	October 30, 2020
Defendants file consolidated motion for summary judgment in all related cases (page limit for consolidated brief is 50)	Plaintiffs file motion to supplement the record and to compel a privilege log	November 6, 2020
Defendant-Intervenors file separate briefs in support of		November 13, 2020

Summary Judgment	Administrative Record	Deadline
Defendants' motion for summary judgment (combined page limit is 40)		
	Defendants file opposition to motion to supplement the record and to compel a privilege log	November 20, 2020
	Plaintiffs file reply in support of motion to supplement the record and to compel a privilege log	December 1, 2020
	Hearing on motion to supplement the record and to compel a privilege log	December 11, 2020 or whenever is convenient for the Court
Plaintiffs file combined motion for summary judgement and opposition to Defendants' and Defendant-Intervenors' motion for summary judgment (page limit is 40)		December 18, 2020
Defendants file combined reply in support of motion for summary judgment and opposition to cross-motions for summary judgment in all related cases (page limit is 40)		January 15, 2021
Defendant-Intervenors file separate combined reply briefs in support of Defendants' motion for summary judgment and opposition to cross-motion for summary judgment (combined page limit is 40)		January 22, 2021
Plaintiffs file reply in support of cross-motion for summary judgment (page limit is 40)		January 29, 2021
Hearing on Cross-Motions for Summary Judgment		February 11, 2021 or whenever it is convenient for the Court

18. Trial

The Parties anticipate that this case will be resolved by summary judgment and do not anticipate a trial.

19. Disclosure of Non-party Interested Entities or Persons

Civil L.R. 3-15 does not apply to any government entity or its agencies, including Plaintiffs, Defendants, and Intervenor-Defendants.

20. Professional Conduct

All attorneys of record for the Parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

21. Other

Administrative Record – Defendants' Position

On October 5, 2020, Defendants lodged the certified index to the administrative record *State of California, et al. v. Andrew Wheeler, et al.*, Case No. 3:20-cv-04869-WHA (ECF No. 109). For the convenience of Plaintiffs and the Court, Defendants will make portable document format (PDF) versions of documents identified on the certified index to the administrative record lodged on October 5, 2020 (ECF No. 109) available on box.com, or a similar cloud-based document management service, and file a notice providing access information.

Administrative Record – Plaintiffs' Position

Based on their review of the Lodged Index, as well as the fact that Defendants have not provided a privilege log for documents that have been withheld from the record, Plaintiffs believe that the administrative record is incomplete. Plaintiffs also request that Defendants provide certain documents not amenable to PDF format, such as spreadsheets, in native format.

22. Plan to Provide Opportunities to Junior Lawyers

The Parties provide the following statements pursuant to paragraph 3 of the Supplemental Order:

Plaintiffs' Statement:

Plaintiffs are represented by the Western Environmental Law Center ("WELC"). WELC Staff Attorney Sangye Ince-Johannsen, who is an attorney with fewer than six years of experience, will be participating in all aspects of this matter. Specifically, Mr. Ince-Johannsen will be play a leading role in developing and arguing Plaintiffs' motion for summary judgment. It

will not be necessary for client representatives to attend the upcoming case management conference where this subject will be discussed

Defendants' Statement:

The Supplemental Order requires law firms with more than fifty lawyers to submit a plan for how the firm will provide opportunities to junior lawyers to argue motions, take depositions, and examine witnesses. Thus, this requirement does not apply to the Department of Justice. However, although neither attorney assigned to this case or the related cases is a junior attorney, the Department of Justice provides significant opportunities for junior attorneys in many cases before this Court.

Intervenors' Statements:

The offices of the state attorneys general representing the State Intervenors are not law firms per se. Nevertheless, the state attorneys general's offices do employ more than 50 lawyers overall, and plan to offer opportunities to junior attorneys in this litigation. For example, the Louisiana Department of Justice has assigned Assistant Solicitor Ben Wallace—who graduated from law school in 2018 and is new to the office after completing a clerkship—to this litigation. Assistant Solicitor Wallace will participate in reviewing the administrative record, as well as drafting and arguing of motions, as appropriate

As required by the *Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases Before Judge Williams Alsup*, counsel for the American Petroleum Institute and the Interstate Natural Gas Association of America (coalition) states that Hunton Andrews Kurth LLP is a law firm with more than fifty lawyers nationwide and that it will, consistent with the best interests of the Coalition and the just, speedy, and inexpensive disposition of this matter, provide opportunities for junior lawyers to actively participate in the defense of this case. This may include arguing pre-trial motions in court, taking depositions, and examining witnesses at trial. The specific junior lawyers and proceedings will be identified as the case progresses. Counsel for the coalition does not believe it necessary for client representatives to attend the upcoming case management conference for discussion of this subject.

Dated: October 15, 2020

Respectfully Submitted,

/s/ Andrew Hawley

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Case Management Statement was electronically filed with the Clerk of the Court on October 15, 2020, 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
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[Additional Parties and Counsel Listed on Signature Pages]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA AND THE STATE WATER RESOURCES CONTROL BOARD, STATE OF WASHINGTON, STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND,

Case No.: 3:20-cv-4869

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*)

STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WISCONSIN, AND THE DISTRICT OF COLUMBIA,

Plaintiffs,

v.

ANDREW R. WHEELER, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Plaintiffs, the States of California, Washington, New York, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and Virginia, the District of Columbia, and the California State Water Resources Control Board, by and through their respective Attorneys General, allege as follows against defendants Andrew R. Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency (EPA), and EPA (collectively, Defendants):

INTRODUCTION

1.1 This lawsuit challenges a final rule issued by the Defendants, entitled "Updating Regulations on Water Quality Certification," 85 Fed. Reg. 42,210 (July 13, 2020) (Rule). The Rule upends fifty years of cooperative federalism by arbitrarily re-writing EPA's existing water quality certification regulations to unlawfully curtail state authority under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. (CWA or the Act).

1.2 The CWA's primary objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In achieving that goal, Congress recognized the critical and important role states play in protecting and enhancing waters within their respective borders. *Id.* § 1251(b). And, Congress sought to preserve the States' preexisting and broad authority to protect their waters. To those ends, the Act specifically provides that "[i]t is the policy of the Congress 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 ….” *Id*.

1.3 This preservation of state authority is present throughout the Act. Congress preserved for each State the authority to adopt or enforce the conditions and restrictions the state deems necessary to protect its state waters, so long as the state does not adopt standards that are less protective of waters than federal standards. *Id*. § 1370. State standards, including those of the Plaintiff States, may be and frequently are more protective. And, critical to the current action, Congress in section 401 of the Act, 33 U.S.C. § 1341 (section 401), expressly authorized States to independently review the water quality impacts of projects that may result in a discharge and that require a federal license or permit to ensure that such projects do not violate state water quality laws.

1.4 Where a State denies a water quality certification under section 401, Congress specifically prohibited federal agencies from permitting or licensing such projects. *Id.* § 1341(a)(1).

1.5 Congress also broadly authorized States to include conditions in state certifications necessary to ensure an applicant’s compliance with any “appropriate requirement of State law.” *Id.* § 1341(a), (d). The conditions in state certifications must be incorporated as conditions in federal permits. *Id*. § 1341(d). In this way, section 401 prevents the federal government from using its licensing and permitting authority to authorize projects that could violate state water quality laws. *See generally, id.* § 1341.

1.6 EPA has long acknowledged and respected the powers preserved for the States in section 401. In fact, until 2019, EPA’s regulations and every guidance document issued by EPA for section 401 certifications—spanning three decades and four administrations—expressly recognized states’ broad authority under section 401 to condition or deny certification of federally permitted or licensed projects within their borders. The Supreme Court and Circuit Courts of Appeals have affirmed that broad state authority under section 401.

1.7 In April 2019, however, President Trump signed Executive Order 13868, directing EPA to issue regulations that reduce the purported burdens current section 401 certification

requirements place on energy infrastructure project approval and development, thus effectively prioritizing such projects over water quality protection. Executive Order on Promoting Energy Infrastructure and Economic Growth, 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order 13868). EPA issued the Rule pursuant to Executive Order 13868.

1.8 The Rule violates the Act and unlawfully usurps state authority to protect the quality of waters within their borders.

1.9 Contrary to the language of section 401, Supreme Court precedent, and EPA's long-standing interpretation, the Rule prohibits States, including Plaintiff States, from considering how a federally approved project, as a whole, will impact state water quality, instead unlawfully limiting the scope of state review and decision-making to point source discharges into narrowly defined waters of the United States. *Cf. PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology* (*PUD No. 1*), 511 U.S. 700, 711 (1994) ("The language of [Section 401(d)] contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge'" because the text "allows the State to impose 'other limitations' on the project in general.").

1.10 Similarly, the Rule would unlawfully limit states' review and decision-making authority under section 401 by allowing only consideration of whether a federally licensed project will comply with state water quality standards and requirements regulating point source discharges. But section 401 contains no such limitation, instead broadly authorizing States to impose any condition necessary to ensure an applicant complies with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Both EPA and the Courts have long recognized the broad scope of the phrase "appropriate requirement of State law." *See PUD No. 1*, 511 U.S. at 712-13 (Section 401(d) "author[izes] additional conditions and limitations on the activity as a whole"; these conditions and limitations include "state water quality standards … [which] are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process").

1.11 The Rule would also interfere with the States' ability to apply their own administrative procedures to their review of applications for water quality certification, instead

imposing onerous federal control over virtually every step of the administrative process. The Rule requires States to take action within a time limit imposed by the federal permitting agency based on a minimal list of required information. State agencies appear to be discouraged from obtaining additional information if that information cannot be developed and provided within that time limit, even for major infrastructure projects that pose significant risk to a wide variety of state water resources for decades. Even when a State is able to make a certification decision before the expiration of the time limit imposed by the federal agency, the federal agency could *still* determine that the State waived its authority if it concludes that the State failed to provide certain information to the federal agency required by the Rule. This Federal dictate of state administrative procedures is fundamentally inconsistent with the cooperative federalism scheme established by the CWA in general, and with the preservation of broad state authority affirmed by section 401 in particular.

1.12 EPA's departure from 50 years of consistent administrative and judicial precedent by narrowing state authority under section 401 is contrary to Congress's 1972 enactment of the CWA, which by its terms expressly preserved state authority by incorporating the language of section 401 essentially unchanged from its predecessor statute, the Water Quality Improvement Act of 1970. EPA claims that this drastic change is justified based on its "first holistic analysis of the statutory text, legislative history, and relevant case law." 85 Fed. Reg. at 42,215. However, nothing in the text, purpose, or legislative history of section 401, no matter how "holistically" considered, supports the Rule's substantial infringement on state authority. The Rule unlawfully interprets a statute that is "essential in the scheme to preserve state authority to address the broad range of pollution" affecting state waters, *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (*S.D. Warren*), to instead restrict state authority to do so.

1.13 By attempting to limit the scope of state section 401 water quality certifications and by imposing new, unjustified, and unreasonable substantive limits, time constraints, and procedural restrictions on States' review of and decisions on section 401 certification applications, the Rule is a radical departure from past EPA policy and practice, is unlawful, and

abandons the decades-long successful cooperative federalism approach Congress intended in the CWA.

1.14 As set forth below, the Rule is arbitrary, capricious, an abuse of discretion, contrary to the CWA and binding precedent, and in excess of EPA's authority under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C). Accordingly, Plaintiff States seek a declaration that the Rule violates the Clean Water Act and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA), and request that the Court set aside and vacate the Rule.

JURISDICTION AND VENUE

2.1 This action raises federal questions and arises under the CWA and the APA. This Court has jurisdiction over the States' claims pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and 5 U.S.C. §§ 701-706. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory, injunctive, and other relief pursuant to 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 701-706.

2.2 The United States has waived sovereign immunity for claims arising under the APA. 5 U.S.C. § 702.

2.3 The States are "persons" within the meaning of 5 U.S.C. § 551(2), authorized to bring suit under the APA to challenge unlawful final agency action. 5 U.S.C. §§ 701(2), 702.

2.4 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because plaintiff State of California resides within the district and this action seeks relief against federal agencies and officials acting in their official capacities.

INTRADISTRICT ASSIGNMENT

3.1 Pursuant to Civil Local Rules 3-5(b) and 3-2(c), there is no basis for assignment of this action to any particular location or division of this Court.

PARTIES

4.1 The Plaintiff States are sovereign states of the United States of America. The States bring this action in their sovereign and proprietary capacities. As set out below, the Rule directly harms the States' interests, including, but not limited to, environmental harms, financial harms that flow from implementing EPA's radical shift in policy, and limits on powers

specifically reserved to the States by Congress in the Act. The States also bring this action as *parens patriae* on behalf of their citizens and residents to protect public health, safety, and welfare, their waters, natural resources, and environment, and their economies.

4.2 Defendant EPA is the federal agency with primary regulatory authority under the Act and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

4.3 Defendant Andrew R. Wheeler is sued in his official capacity as Administrator of the EPA and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

STATUTORY AND REGULATORY BACKGROUND

The Administrative Procedure Act

5.1 Federal agencies are required to comply with the APA's rulemaking requirements in amending or repealing a rule.

5.2 Under the APA, a federal agency must publish notice of a proposed rulemaking in the Federal Register and "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c).

5.3 "[R]ule making" means "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5).

5.4 An agency that promulgates a rule that modifies its long-standing policy or practice must articulate a reasoned explanation and rational basis for the modification and must consider and evaluate the reliance interests engendered by the agency's prior position. *See, e.g., Dep't of Homeland Security v. Regents of the University of Ca.*, ___ S. Ct. ___, Slip Op. at 23-26 (June 18, 2020); *Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* 5 U.S.C. § 706(2)(C).

5.5 The APA authorizes this Court to "hold unlawful and set aside agency action, findings and conclusions" it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law" or taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

The Clean Water Act

5.6 The Act's objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

5.7 In furtherance of that primary objective, Congress both preserved and enhanced the States' authority to protect the quality of state waters. The Act provides that "[i]t is the policy of the Congress 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 …." *Id.* § 1251(b). As such, "Congress expressed its respect for states' role[s] through a scheme of cooperative federalism …." *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007).

5.8 Congress's preservation of pre-existing state authority is evident throughout the Act. For example, section 303 of the Act authorizes states, subject to baseline federal standards, to determine the level of water quality they will require and the means and mechanisms through which they will achieve and maintain those levels. 33 U.S.C. § 1313.

5.9 Section 510 of the Act states that "nothing in [the Act] shall … preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" as long as such requirements are at least as stringent as the Act. *Id.* § 1370.

5.10 Section 401 of the Act provides that "[a]ny applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." *Id.* § 1341(a)(1). Section 401(d) broadly states that "[a]ny certification provided … shall 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 effluent limitations and other limitations … and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section." *Id.* § 1341(d).

5.11 The authority reserved to States in section 401 is meaningful and significant. In enacting section 401, Congress sought to ensure that all activities authorized by the federal government that may result in a discharge would comply with "State law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." S. Rep. 92-313, at 69, *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 ("Legislative History Vol. 2"), at 1487 (1973).

5.12 States' authority under section 401 to impose conditions on a federally permitted or licensed project is not limited to water quality controls specifically tied to a "discharge." Rather, section 401 "allows [states] to impose 'other limitations' on the project in general to assure compliance with various provisions of the Act and with 'any other appropriate requirement of State law.'" *PUD No. 1*, 511 U.S. at 711. Thus, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"—section 401(d) authorizes additional conditions and limitations "*on the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 711-12 (emphasis added). Section 401's "terms have a broad reach, requiring state approval any time a federally licensed activity 'may' result in a discharge…, and its object comprehends maintaining state water quality standards." *S.D. Warren*, 547 U.S. at 380. Furthermore, "Congress intended that [through section 401, States] would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

5.13 The Act imposes only one restriction on the timeframe of state certification review and decision-making: if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived." 33 U.S.C. § 1341.

5.14 In the quarter of a century since the Supreme Court's decision in *PUD No. 1*, Congress has not limited or otherwise amended the language of section 401.

EPA's Longstanding Section 401 Regulations and Guidance

5.15 In 1971, EPA promulgated regulations regarding state water quality certifications pursuant to section 21(b) of the Water Quality Improvement Act of 1970—the CWA's predecessor (1971 Regulations). *See* 36 Fed. Reg. 22,369, 22,487 (Nov. 25, 1971). Congress carried over the provisions of section 21(b) in section 401 of the CWA of 1972 with only "minor" changes. Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1394.

5.16 In the Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act, Congress directed EPA to "promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section [401] of this [Act] or permit application pursuant to section 402 of this [Act]." 33 U.S.C. § 1314(h). This is the only instruction that Congress gave EPA with regards to implementing section 401. EPA did so, as codified in 40 C.F.R. Part 136 (defining the scientific methods for analyzing a wide array of pollutants).

5.17 Following the 1972 amendments and the enactment of section 401, Congress directed EPA to modify other existing regulations but did not direct EPA to revise its existing 1971 Regulations.

5.18 Accordingly, EPA continued to apply the 1971 Regulations to implement section 401 following the CWA's enactment in 1972.

5.19 Not only does the Rule conflict with the Act's express protection of state interests under section 401, the Rule is a significant departure from, and contrary to, EPA's 1971 Regulations.

5.20 Pursuant to EPA's 1971 Regulations, when issuing a section 401 certification, states are required to include a statement certifying that a permitted "activity," not just a point source discharge, will comply with water quality standards. *See* former 40 C.F.R. § 121.2(a)(3) (June 7, 1979). Furthermore, "water quality standards" was broadly defined to include standards

established pursuant to the CWA, as well as any "State-adopted water quality standards." *Id.* § 121.1(g).

5.21 The 1971 Regulations did not permit federal agencies to determine whether state denials or conditional certifications met specified requirements and were therefore effective or not. Moreover, a State could only waive its authority under section 401 if it provided express written notification of such waiver or failed to act on a certification request within a reasonable period of time. *Id.* § 121.16(b) (June 7, 1979).

5.22 In April 1989, EPA's Office of Water issued a section 401 certification guidance document entitled "Wetlands and 401 Certification—Opportunities and Guidelines for States and Eligible Indian Tribes" (1989 Guidance).

5.23 EPA's 1989 Guidance acknowledged that section 401 "is written very broadly with respect to the activities it covers." 1989 Guidance at 20. The 1989 Guidance further stated that "'[a]ny activity, including, but not limited to, the construction or operation of facilities which *may* result in *any discharge*' requires water quality certification." *Id.* (emphasis in original). The 1989 Guidance explained that the purpose of the water quality certification requirement in section 401, "was to ensure that no license or permit would be issued for an activity that through inadequate planning or otherwise could in fact become a source of pollution." *Id.* at 20.

5.24 The 1989 Guidance contemplated broad state review of federally permitted or licensed projects and stating the "imperative" principle that "all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State's [401] certification review." *Id.* at 22, 23. The 1989 Guidance also provided examples of conditions that States had successfully placed on section 401 certifications. These included watershed management plans, fish stocking, and noxious weed controls. *Id.* at 24, 54-55. EPA noted that "[w]hile few of these conditions [were] based on traditional water quality standards, all [were] valid" under section 401. *Id.* at 24. EPA further noted that "[s]ome of the conditions [were] clearly requirements of State or local law related to water quality other than those promulgated pursuant to the [CWA] sections enumerated in Section 401(a)(1)." *Id.*

5.25 Consistent with the text of section 401 and EPA's 1971 Regulations, the 1989 Guidance narrowly construed the circumstances under which a State would waive its authority to review certification requests under section 401: a waiver would be deemed to have occurred only if a state failed to act within "a reasonable period of time (which shall not exceed one year) after receipt" of a certification request. *Id*. at 31.

5.26 The 1989 Guidance also advised States to adopt regulations requiring that applicants submit information to ensure informed decision-making. *Id*. Further, the 1989 Guidance encouraged States to "link the timing for review to what is considered a receipt of a complete application." *Id*. As an example, EPA cited a Wisconsin regulation requiring a "complete" application before the agency review time began. *Id*., *citing* Wisconsin Administrative Code, NR 299.04. The 1989 Guidance noted that pursuant to the same Wisconsin regulation, the state agency would review an application for completeness within 30 days of receipt and could request any additional information needed to make a certification decision. *Id*. (currently, these requirements are codified in Wisconsin Administrative Code, NR 299.03).

5.27 EPA issued additional section 401 guidance in April 2010 entitled "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes" (2010 Guidance). The 2010 Guidance was consistent with and affirmed EPA's longstanding recognition of States' broad authority preserved under the CWA and enhanced by section 401.

5.28 In the 2010 Guidance, EPA stated that, "[a]s incorporated into the 1972 [CWA], § 401 water quality certification was intended to ensure that no federal license or permit would be issued that would prevent states or tribes from achieving their water quality goals, or that would violate [the Act's] provisions." 2010 Guidance at 16. Relying on the Supreme Court's controlling decision in *PUD No. 1*, the 2010 Guidance confirmed that "once § 401 is triggered, the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." *Id*. at 18. For example, EPA explained that "water quality implications of fertilizer and herbicide use on a subdivision and golf course might be

considered as part of a § 401 certification analysis of a CWA § 404 permit that would authorize discharge of dredged or fill material to construct the subdivision and golf course." *Id*.

5.29 In line with EPA's long-standing position, the 2010 Guidance maintained an expansive view of the scope of other state laws appropriately considered under section 401 certification reviews: "It is important to note that, while EPA-approved state and tribal water quality standards may be a major consideration driving § 401 decision[s], they are not the only consideration." *Id*. at 16.

5.30 The 2010 Guidance acknowledged that States establish requirements for what constitutes a complete application and highlighted the fact that the timeframe for state review of a section 401 certification request "begins once a request for certification has been made to the certifying agency, *accompanied by a complete application*." *Id*. at 15-16 (emphasis added).

5.31 In the years following EPA's issuance of its 1989 and 2010 guidance documents, Congress has neither limited nor otherwise amended the language of section 401.

Executive Order 13868 and Section 401 Certifications

5.32 On April 10, 2019, President Trump issued Executive Order 13868, upending EPA's longstanding broad interpretation of state authority to protect water quality under section 401.

5.33 Intended to promote and speed infrastructure development, particularly in the coal, oil, and natural gas sectors, Executive Order 13868 directed EPA to evaluate ways in which section 401 certifications have "hindered the development of energy infrastructure." 84 Fed. Reg. at 15,496. Executive Order 13868 failed to acknowledge the critical role of section 401 certifications to the Act's primary purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, and to preserving States' authority to do so.

5.34 Executive Order 13868 directed the EPA Administrator to undertake a number of actions related to section 401 certifications. First, Executive Order 13868 required the Administrator, within 60 days, to (1) examine the 2010 Guidance and issue superseding guidance to States and authorized tribes; and (2) issue guidance to agencies to reduce the burdens on energy infrastructure projects caused by section 401's certification requirements. Second,

Executive Order 13868 required the Administrator, within 120 days, to review EPA's section 401 regulations for consistency with Executive Order 13868's energy infrastructure and economic growth goals and publish revised regulations consistent with those goals. Third, Executive Order 13868 required the Administrator to finalize the revised regulations no later than 13 months from April 10, 2019.

5.35 Executive Order 13868 also required all federal agencies that issue licenses or permits requiring section 401 certification to, within 90 days of the final EPA Rule, "initiate a rulemaking to ensure their respective agencies' regulations are consistent with" the EPA Rule. Exec. Order No. 13868, Sec. 3(d).

5.36 In response to Executive Order 13868, on June 7, 2019, EPA issued a document entitled "Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes" with a stated purpose of facilitating implementation of Executive Order 13868 (2019 Guidance). The 2019 Guidance attempted to impose substantially shorter timeframes for, and narrow the permissible scope of, state review. Although the 2019 Guidance was issued without notice and opportunity for comment, all of the Plaintiff States submitted a letter to EPA objecting to the guidance. Concurrently, the EPA Administrator informed the States he was withdrawing and rescinding the 2010 Guidance.

5.37 On August 22, 2019, EPA published the proposed Rule in the Federal Register with only a 60-day public comment period that closed on October 21, 2019. 84 Fed. Reg. 44,080.

5.38 Along with the proposed Rule, EPA published its "Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking" (Economic Analysis). In keeping with Executive Order 13868, the 23-page Economic Analysis focused largely on the economic effects of states' section 401 certification conditions and denials for the energy industry projects.

5.39 The Economic Analysis failed to consider the potential economic impacts from decreased water quality caused by the Rule's limitations on the scope of States' section 401 authority.

5.40 EPA held public hearings on the proposed Rule on September 5, 2019, and September 6, 2019, in Salt Lake City, Utah. Several Plaintiff States gave oral testimony at the

public hearings, including Washington and New York. Plaintiff States also submitted written comments on the proposed Rule on October 17 and 21, 2019.

The Final Section 401 Rule

5.41 On June 1, 2020, EPA released a pre-publication version of the final Rule, entitled "Clean Water Act Section 401 Certification Rule." In announcing the final Rule, the Administrator stated that EPA was "following through on President Trump's Executive Order to curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and to put in place clear guidelines that finally give these projects a path forward."[1]

5.42 On July 13, 2020, EPA published the final Rule in the Federal Register. 85 Fed. Reg. 42,210. By its terms, the Rule becomes effective 60 days following the publication date.

5.43 The final Rule is a radical departure from prior EPA policy and practice regarding section 401, drastically curtailing state authority under section 401 in a way that is contrary to: (1) the plain language, structure, purpose, and legislative history of the CWA; (2) binding Supreme Court precedent interpreting section 401; and (3) EPA's own guidance on section 401, which spans decades and multiple administrations, resulting in significant reliance by the States. Moreover, the Rule unlawfully limits States' section 401 authority.

5.44 The Rule asserts, without rational basis, that it will reduce regulatory uncertainty and increase predictability for States, tribes and project proponents. 85 Fed. Reg. at 42,236, 42,242. The Rule conflicts with the CWA's text, structure, purpose, and intent, as well as longstanding agency guidance and controlling precedent, and forces the States to amend their own section 401 laws. As a result, the Rule will in fact cause increased confusion and uncertainty that will ensue while the States attempt to revise their statutes and regulations related to section 401 and the States, federal agencies, and project proponents litigate and attempt to implement and comply with the Rule's requirements.

[1] https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0

Limits on Scope of Section 401 Certification Review

5.45 The Rule unlawfully limits the applicability and scope of section 401 certifications to impacts from specific, point source discharges to waters of the United States, thus prohibiting States from conditioning water quality certifications to assure the effects of the project as a whole do not violate water quality standards. 85 Fed. Reg. 42,285 (to be codified at 40 C.F.R. §§ 121.1; 121.3).

5.46 Confining the scope of section 401 certification to point source discharges is contrary to the Act's plain language and the Supreme Court's decision in *PUD No. 1*. In *PUD No. 1*, the Supreme Court held that, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"—section 401(d) "is most reasonably read as authorizing additional conditions and limitations on *the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied." *Id*. at 711-12 (emphasis added).

5.47 EPA acknowledges that the Rule departs from the controlling precedent in *PUD No. 1*, *see, e.g.,* 85 Fed. Reg. at 42,231, but asserts that *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005) (*Brand X*) allows EPA to effectively overrule the Supreme Court's *PUD No. 1* decision. *Brand X*, however, does not permit EPA to overrule binding Supreme Court precedent or adopt an interpretation that is not in accordance with the law.

5.48 In limiting the scope of section 401 certifications to impacts from specific, point source discharges, the Rule abandons without a rational explanation EPA's previous position articulated in the 1989 Guidance that "it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project." 1989 Guidance at 22. Similarly, the Rule abandons without a rational explanation EPA's position set forth in the 2010 Guidance that "the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law." 2010 Guidance at 18.

Limits on Appropriate Requirements of State Law

5.49 In direct conflict with the Act's language and Congressional intent, the Rule also unlawfully limits the term "other appropriate requirements of State law" in Section 401(d) to "water quality requirements," newly defined as the "applicable provisions of §§ 301, 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." *See* 85 Fed. Reg. at 42232 (to be codified as 40 C.F.R. § 121.1(n))

5.50 By restricting the definition of "water quality requirements," the Rule potentially excludes a broad range of state and tribal law directly applicable to water quality that has been used for decades to evaluate and condition federally licensed or permitted projects.

5.51 In limiting "water quality requirements" only to specified provisions of the Act and those state and tribal laws related to "point source discharges," the Rule not only abandons but runs contrary to EPA's longstanding position that "[t]he legislative history of [section 401] indicates that the Congress meant for the States to impose whatever conditions on [federally permitted projects] are necessary to ensure that an applicant complies with all State requirements that are related to water quality concerns." 1989 Guidance at 23.

5.52 The Rule also departs from EPA's longstanding position that "[t]he legislative history of Section 401(d) indicates that Congress meant for the States to condition certifications on compliance with any State and local law requirements related to water quality preservation" and that "conditions that relate in any way to water quality maintenance are appropriate." *Id*. at 25-26.

5.53 EPA fails to provide a rational explanation for its complete departure from its longstanding interpretation of section 401. With its sudden departure from an established regulatory approach, EPA also failed to consider the reliance interests of states that have developed section 401 certification procedures and water quality control programs in reliance on EPA's prior, longstanding interpretation of section 401.

Restrictions on Certification Request Process

5.54 The Rule also sets out new procedures for the submission and evaluation of section 401 certification requests. These procedures plainly conflict with the CWA's text and purpose.

5.55 Prior to the Rule, the States or other certifying authorities and EPA together determined the types of information an applicant was required to submit in a section 401 certification request. In contrast, the Rule enumerates an insufficient and minimal list of information project proponents are directed to provide in a section 401 certification application. *Compare* 40 C.F.R. § 121.3 (June 7, 1979), *with* 85 Fed. Reg. at 42,285 (to be codified as 40 C.F.R. § 121.5). Contrary to *PUD No. 1*, the Rule does not require project applicants to provide information related to the water quality impacts caused by the proposed activity as a whole. Rather, the Rule merely requires each applicant to identify the "location and nature" of potential discharges and the "methods and means" by which the discharge(s) will be monitored and managed, along with other, limited information. 85 Fed. Reg. at 42,285 (to be codified as 40 C.F.R. § 121.5f(b)-(c)).

5.56 Although the Rule allows States and other certifying authorities to request additional information from project applicants, EPA attempts to limit this in the Preamble by suggesting that—regardless of whether such information is sufficient to fully evaluate water quality impacts—the requested information is to be limited to whatever can be "produced and evaluated within the reasonable time." 85 Fed. Reg. at 42,246.

5.57 The Rule also sets out a procedure whereby federal agencies must establish a "reasonable period of time" by which certifying authorities must act on requests for section 401 certifications, either categorically or on a case-by-case basis. 85 Fed. Reg. at 42,285-286 (to be codified as 40 C.F.R. § 121.6). Pursuant to the Rule, this time period cannot exceed one year under any circumstances. *Id.* (to be codified as 40 C.F.R. § 121.6(a)). Moreover, this reasonable time period is to be measured from the certifying authority's "receipt" of the certification request, rather than the certifying authority's receipt of the complete certification application. *Id*. at 42,285 (to be codified as 40 C.F.R. § 121.1(m)).

5.58 The Rule further prohibits a certifying authority from requesting that a project applicant withdraw a certification request and resubmit it with additional information to extend the timeframe for review, even where the request lacks information necessary for the certifying authority to conduct a proper review. *Id*. at 42,285-286 (to be codified as 40 C.F.R. § 121.6(e)). This interpretation is in conflict with section 401's purpose of preserving state authority.

5.59 The Rule prescribes a broad range of circumstances under which a state's section 401 review authority is deemed waived because of a state's purported failure to follow certain newly-included procedural requirements. *Id.* (to be codified as 40 C.F.R. § 121.9). Where a certifying authority fails to grant, grants with conditions, or denies a certification application within the reasonable time period, as determined by the federal agency, it waives its ability to do so. *Id*. (to be codified as 40 C.F.R. § 121.9(a)(2)). Additionally, where a certifying authority does not meet the Rule's procedural requirements in certifying or denying a section 401 application, the certification or denial will be deemed waived. *Id*. And where a condition imposed by a certifying authority is not supported by the required information, the condition is deemed waived. *Id*. In addition, where a certifying authority certifies an application without following the procedural requirements set forth in the Rule, the certification will be deemed waived. *Id*. (to be codified as 40 C.F.R. § 121.9(b)).

5.60 Taken together, these procedural requirements of the Rule impermissibly expand the waiver provision of section 401 in conflict with the Act's language and Congressional intent.

5.61 Further, these procedural requirements of the Rule significantly impair the ability of States and other certifying authorities to fully and efficiently review project proposals for water quality impacts and will likely result in an increase of certification denials for lack of sufficient information.

5.62 These unprecedented restrictions also conflict with existing state practices, procedures, and regulations on initiating section 401 certification review, many of which were developed in reliance on EPA's long-standing position on these requirements.

HARMS TO PLAINTIFF STATES

6.1 The Rule harms the sovereign, environmental, economic, and proprietary interests of Plaintiff States.

6.2 The States' respective jurisdictions encompass a substantial portion of the United States. Along with countless other waterbodies and wetlands, the water resources found within Plaintiff States include the entirety of the Pacific Coast from Mexico to Canada, large portions of the Atlantic Coast, the Great Lakes and Lake Champlain, Chesapeake Bay and its tributaries, and the majority of the Columbia River. Plaintiff States contain headwaters formed in the Sierra Nevada, Cascades, Rocky, and Appalachia mountains. Many of the nation's largest rivers originate in and/or flow through the Plaintiff States, including the Mississippi, the Columbia, the Colorado, and the Hudson. The States have a fundamental obligation to protect these waters and wetlands, both for their own economic interests and on behalf of the millions of residents and thousands of wildlife species that rely on them for survival. Many States also legally hold both the surface and groundwaters within their borders in trust for their residents.

6.3 The Rule significantly impairs Plaintiff States' abilities to protect the quality of these waters. In the Act, Congress preserved the States' broad, existing powers to adopt the conditions and restrictions necessary to protect state waters, so long as those efforts were not less protective than federal standards. To those ends, the States have long exercised section 401 authority to protect against adverse impacts to water quality from federally licensed or permitted activities within state borders.

6.4 As described in detail above, the Rule unlawfully curtails both the scope of water quality-related impacts that the States can address, and the sources of state law on which States can base certification review and decisions for federally licensed or permitted projects. For example, the 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." 85 Fed. Reg. 42,250. The definition of "water quality requirements" in the Rule, in turn, further narrows the scope to only specified provisions of the Act and state and tribal

regulatory requirements "for point source discharges into waters of the United States." 85 Fed. Reg. 42,285 (to be codified at 40 C.F.R. § 121.1(n)).

6.5 Consistent with longstanding relevant Supreme Court and lower court decisions, section 401 certification practice, and EPA guidance, when evaluating requests for section 401 certification the States have used section 401 to review all potential water quality impacts from a proposed project, both upstream and downstream and over the life of the proposed project. The States also have reviewed impacts as they relate to both "waters of the United States" and state waters, including groundwater, as defined under their respective state laws. In doing so, the States have assessed project impacts pursuant to a broad range of appropriate water-related state law requirements, including requirements applicable to both point and non-point sources of water pollution.

6.6 For example, the States have used section 401 authority to address water quality impacts that, depending on the circumstances, may not be non-point: turbidity associated with dam reservoir wave action and pool level fluctuations, aquatic habitat loss, contamination of groundwater supplies, contaminant loading from spills and discharges associated with over-water industrial activities, impacts on stream flows, and wetland fill. States have also used section 401 authority in the context of large water supply projects to require mitigation to address long-term impacts from operation, such as hydrologic modifications and water quality degradation associated with enhanced stratification in new and expanded reservoirs. Impacts such as stormwater runoff, whether or not related to any particular point source discharge contemplated by the Rule, may have significant detrimental effects on water quality in and around project sites. In the case of western water diversion projects, stormwater runoff may adversely impact different river basins. Section 401 certifications have been one of the primary mechanisms the States have used to mitigate these impacts when associated with federally licensed and permitted projects. The Rule's limitation to point source impacts will prevent States from addressing and preventing these harms under their section 401 authority, to the detriment of the States' proprietary interests in the quality of those waters, their related ecosystems, and the general health and well-being of their residents.

6.7 In addition to impacts to state waters themselves, the Rule also directly harms other state economic and proprietary interests.

6.8 For example, many States own or hold in trust the fish and other wildlife populations within their borders, and have certain statutory obligations to protect these resources. Because the Rule prevents the States from fully protecting the aquatic habitat and resources those species rely upon for survival, the Rule will result in direct harms to wildlife and wildlife populations.

6.9 Increased pollution, degradation and loss of waters, as well as other impacts to water quality as a result of the Rule also will impair the States' water recreation industries by making waters less desirable for fishing, boating, and swimming, and curtailing commercial and tax revenues associated with such activities.

6.10 The States have relied on the 1971 Regulations and EPA's longstanding practice and guidance interpreting section 401 broadly to authorize protection of water quality from federally licensed or permitted projects within their borders. Over the decades since the promulgation of the 1971 Regulations, the States have expended significant resources to develop and implement their own regulatory programs based on that broad interpretation of section 401. The Rule upends the States' section 401 programs and will force the States to significantly revise these programs to conform to the Rule's requirements.

6.11 The Rule will cause the States to incur direct financial harms. For example, the Rule will force States to hire additional personnel to process requests for section 401 certifications on the truncated timelines and with the additional procedures established by the Rule. Washington alone allocated over $600,000 to hire the additional staff it anticipates will be required in order to conduct section 401 certification reviews under the Rule. This expenditure is for the 2020 fiscal year alone, and is an expense that is expected to continue year-over-year well into the future. Connecticut anticipates needing to hire at least two additional professional staff, and Wisconsin estimates expending an additional $170,000 annually for additional staff to comply with the Rule. While state budgets are nearly always constrained, the effective date of the

Rule comes during that time when states are facing a projected $555 billion shortfall over the next two fiscal years due to the impact of the COVID-19 pandemic.

6.12 Most, if not all, of the States will incur costs related to the expensive and time-consuming process of revising their laws and regulations in order to conform to the Rule.

6.13 New Jersey, New York, and California, among other states, have robust application review and public comment processes outlined in both state law and regulation that will need to be overhauled in light of the Rule and EPA's dramatic shift in section 401 policy. These changes to state laws and regulations require investment of the same regulatory resources required to review and process section 401 certifications, none of which were considered in EPA's economic review of the proposed rule and potential harms.

6.14 Finally, the States have relied on EPA's longstanding and consistent interpretation of section 401 as conferring broad authority on the States to protect water quality within their respective jurisdictions, whether those impacts occur from a specific discharge or by operation of a project as a whole, consistent with the statutory text and Supreme Court precedent.

6.15 By abandoning this long-standing position and policy, the Rule substantially degrades the primary mechanism by which States have ameliorated or avoided impacts to state waters from federally licensed and/or permitted activities, contrary to Congress's intent. As a result, the Rule forces the States either to incur the financial and administrative burdens associated with instituting or expanding their water protection programs or to bear the burdens of degraded waters.

6.16 Expanding water protection programs will require difficult and time-consuming processes involving state program creation and expansion, state legislative and regulatory changes, and state appropriation and expenditures. And, the Rule compromises the States' long reliance on section 401 to ensure the full scope of state water quality protections apply to activities that are otherwise preempted from state regulation.

6.17 Applicants for section 401 certification have also relied on EPA's longstanding position that section 401 allows an applicant to work with a state certifying authority to define a mutually acceptable scope and timeframe for agency review. By forcing state certifying agencies

to unnecessarily limit the scope and timeframe of their review, the Rule increases the chances that section 401 requests will be needlessly denied, leading to administrative inefficiencies and unnecessary litigation, and the loss or delayed benefits of projects that would have been certified had the States been operating under the previous regime. In its haste to promote energy infrastructure pursuant to President Trump's Executive Order—a consideration that is not entertained in any capacity by the text or purpose of the Act—EPA utterly failed to assess the unintended impacts the Rule will have on the States and the regulated parties seeking certification under section 401.

6.18 The relief sought herein will redress these and other injuries caused by the Rule.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Unlawful Implementation of Section 401 of the Clean Water Act
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.1 Plaintiff States re-allege the facts set out in Paragraphs 1.1 through 6.18 as though fully set out herein.

7.2 The APA provides that this Court "shall" "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A).

7.3 Agency action is not in accordance with the law if the agency fails to interpret and implement the statutory language consistent with the statute's text, structure, and purpose and with controlling Supreme Court precedent.

7.4 The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, is an unlawful and impermissible implementation of section 401 of the Clean Water Act, 33 U.S.C. § 1341, as interpreted by the United States Supreme Court, because it unlawfully limits the States' authority granted to them by Congress through enactment of the Act.

7.5 As a result, the Rule must be set aside as arbitrary, capricious, and not in accordance with law.

SECOND CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Disregard of Prior Agency Policy and Practice
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.6 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.7 When an agency promulgates a rule that modifies its long-standing policy or practice, it must articulate a reasoned explanation and provide a rational basis for doing so.

7.8 An agency modifying or abandoning its long-standing policy or position must consider and take into account the reliance interests that are impacted by the change.

7.9 In adopting the Rule, Defendants failed to provide a reasoned explanation for defying the Supreme Court's long-standing interpretation of section 401 and abandoning their own long-standing policy and practice of interpreting section 401 as a broad reservation of states' rights.

7.10 The Rule lacks a rational basis because—despite EPA's assertions to the contrary—the Rule will increase uncertainty and decrease predictability in the section 401 certification process.

7.11 Defendants also failed to consider and take into account the serious reliance interests engendered by the Agency's prior long-standing policy and position regarding state authority under section 401.

7.12 For these reasons, the Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, is arbitrary, capricious, and not in accordance with law, and must be set aside.

THIRD CAUSE OF ACTION
Arbitrary and Capricious and Not in Accordance with Law
Failure to Consider Statutory Objective and Impacts on Water Quality
in Violation of the Administrative Procedure Act
(5 U.S.C. § 706)

7.13 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.14 Agency action is not in accordance with law if the agency fails to consider the applicable statutory requirements.

7.15 Agency action is arbitrary and capricious if the agency fails to consider important issues, considers issues that Congress did not intend for it to consider, or fails to articulate a reasoned explanation for the action.

7.16 When Defendants promulgated the Rule, they were required to consider whether it met the Act's objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters as set forth in 33 U.S.C. § 1251(a).

7.17 The protection of water quality is the paramount interest that must be considered by Defendants when promulgating regulations for the administration of the Clean Water Act, including those defining the contours of state authority to condition or deny section 401 certification requests.

7.18 Defendants promulgated the Rule without weighing its adverse impacts to the Nation's waters. Directed by an Executive Order aimed at increasing domestic energy production without any consideration of water quality, Defendants relied on factors that Congress did not intend for it to consider. Defendants also failed to consider how those impacts undermine, rather than further, the Act's objective of restoring and maintaining the integrity of the Nation's waters.

7.19 The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, conflicts with the Clean Water Act's objective to protect water quality. As a result, the Rule is arbitrary and capricious and not in accordance with law.

FOURTH CAUSE OF ACTION
Agency Action in Excess of Jurisdiction
(5 U.S.C. § 706)

7.20 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.21 Under the APA, the Court "shall . . . set aside agency action" that is taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

7.22 In issuing the Rule, EPA relies on sections 401 and 501 of the Act. However, section 401 does not grant EPA any rulemaking authority for procedures and responsibilities expressly reserved for states, and section 501(a) limits EPA to prescribing "such regulations as are necessary to carry out [the Administrator's] functions under [the] Act." 33 U.S.C. § 1361.

7.23 The Rule exceeds EPA's authority to adopt regulations necessary to carry out the agency's functions under the Act, and instead intrudes on the "responsibilities and rights" Congress explicitly left to the states. *Id.* §§ 1251(b), 1341, 1361.

7.24 EPA also relies on section 304 of the Act, in which Congress directed EPA to, "promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of this Act or permit application pursuant to section 402 of this Act." 33 U.S.C. § 1314(h). But nothing in section 304 authorizes EPA to promulgate regulations that infringe upon state authority or dictate state law or administrative procedures in reviewing requests for and granting or denying certifications pursuant to section 401.

7.25 Because the Rule exceeds EPA's rulemaking authority under the Act, it must be set aside.

RELIEF REQUESTED

WHEREFORE, the States respectfully request that this Court issue a judgment and order:

1. Declaring that in developing and adopting the Rule, EPA acted arbitrarily and capriciously and not in accordance with law, abused its discretion, and exceeded its statutory jurisdiction and authority;
2. Declaring the Rule unlawful, setting it aside, and vacating it;
3. Awarding the Plaintiff States their reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

4. Awarding the Plaintiff States such additional and further relief as the Court may deem just, proper, and necessary.

Respectfully submitted this 21st day of July, 2020,

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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 21, 2020

/s/ Tatiana K. Gaur
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUQUAMISH TRIBE, PYRAMID LAKE PAIUTE TRIBE, ORUTSARARMIUT NATIVE COUNCIL, COLUMBIA RIVERKEEPER, and SIERRA CLUB, Plaintiffs, v. ANDREW WHEELER, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 3:20-cv-6137 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Clean Water Act, 33 U.S.C. § 1251 *et seq.*; Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*)

INTRODUCTION

1. Congress declared a single yet sweeping objective for the Clean Water Act ("CWA"): "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act embodies a cooperative federalism framework that empowers regulators at the federal, state, and tribal levels to work together to pursue this objective nationwide. Section 401 of the Act is an integral component of this cooperative framework. Through this provision, Congress ensured that states and authorized tribes could protect their waters and local environments by giving them broad power to grant, deny, or condition approval for a wide array of projects requiring federal licenses, permits, and approvals.

2. The balance between the federal government, states, and federally recognized Indian tribes reached by Congress in Section 401 has worked well for decades. In 1970, Congress passed Section 401's predecessor, section 21(b) of the Water Quality Management Act of 1970, which served a similar federalist purpose, delegating broad authority to states. In

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passing the 1972 amendments to the CWA, Congress made only minor changes to the provision, and only one—a directive to EPA to establish test procedures for the analysis of pollutants that must be required in order to approve a project under Section 401—that bears on how the Section is implemented. Since the passage of the 1972 CWA amendments, Congress has hardly altered Section 401 at all because there was no reason.

3. Recognizing Congress's intent, the Supreme Court, as well as lower courts, have interpreted the statute as granting wide latitude to states and tribes to condition and deny federal permits for environmentally harmful projects that result in discharges into local waters. The Environmental Protection Agency's ("EPA") guidance and implementing regulations pertaining to Section 401 have, since the provision's passage, echoed this view of expansive state and tribal authority. States and tribes around the country have come to rely on the consistent agency guidance and practice on Section 401. This status quo arrangement has worked well with tens of thousands of federal permits requiring certification every year by a state or tribe.

4. Plaintiffs challenge a final rule promulgated by the EPA upending the longstanding regulations interpreting CWA Section 401. *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) ("Section 401 Rule" or "Final Rule"). By promulgating the rule, EPA has upset the federal/state/tribal balance and substantially narrowed the authority of states and tribes to protect themselves from the harmful environmental impacts of federally licensed projects resulting in discharges into their waters. EPA has made these major revisions for reasons that are contrary to the objectives of the CWA, prioritizing the development of environmentally ruinous fossil fuel infrastructure over the integrity of the nation's waters.

5. Plaintiffs Tribes are federally recognized Indian tribes. The Pyramid Lake Paiute Tribe was approved for "Treatment in the same Manner as a State ("TAS") for purposes of CWA Section 401 in January 2007. Plaintiff Tribes rely on Section 401 provisions that are essential for the protection of their waters, fisheries, and tribal resources. Plaintiff Tribes work either

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directly or in cooperation with states and EPA to ensure that discharges into the waters they depend upon occur only in compliance with all relevant laws and regulations.

6. Plaintiffs Columbia Riverkeeper and Sierra Club are environmental advocacy organizations that partake in Section 401 proceedings as part of their broader toolkits to protect the integrity of the Nation's waters. For example, both organizations played significant roles in the campaign against the construction of the environmentally destructive Millennium Bulk Coal Terminal, a major fossil fuel project that was denied Section 401 certification.

7. The Section 401 Rule exceeds the authority granted to EPA by Congress in the CWA. As the Supreme Court has observed, the Act strikes a delicate balance between federal and state- or tribal-level regulators in accord with the principles of cooperative federalism.

8. The Section 401 Rule is also arbitrary and capricious. EPA failed to explain its decision to deviate from the agency's longstanding, prior interpretation of CWA Section 401, and EPA failed to consider important aspects of the problem, including the effects of stripping away a crucial tool of states and tribes seeking to protect waters and communities in their jurisdictions.

9. The Final Rule was also promulgated without observing requisite procedures mandated by law. Specifically, EPA failed to conduct meaningful consultation with tribal authorities as required by Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments and EPA's May 2011 Policy for Consultation and Coordination with Indian tribes.

10. For these violations of law, Plaintiffs ask the Court to vacate and set aside the Section 401 Rule, enjoin reliance on the Section 401 Rule, and reinstate the prior CWA regulations in force.

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JURISDICTION AND VENUE

11. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question). This action is brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e), as some Plaintiffs reside, have offices, and have members in California, and many of the consequences of the defendants' violations of the law giving rise to the claims have occurred or will occur in this district.

INTRADISTRICT ASSIGNMENT

13. This case is properly assigned to the San Francisco Division or the Oakland Division under Civil L.R. 3-2(c) because some plaintiffs and their members are located in counties within those districts.

PARTIES

A. Plaintiffs

14. Suquamish Tribe is a signatory to the 1855 Treaty of Point Elliott, one of the Stevens Treaties, named after the U.S. negotiator and Washington Territorial Governor Isaac Stevens. In a series of treaties with the U.S. government in 1854 and 1855, the Indian tribes of what is now Puget Sound and the Washington coast ceded their aboriginal lands to the United States and retained or reserved certain lands, sovereignty, as well as fishing rights in their usual and accustomed fishing grounds, and hunting and gathering rights on open and unclaimed lands.

15. The Suquamish Tribe is located on the Port Madison Indian Reservation in Suquamish, Washington and is in Kitsap County. There are approximately 1,100 enrolled Suquamish Tribal members. The Suquamish Tribe is a federally recognized Indian tribe with a governing body recognized by the Secretary of the Interior. This action is brought by the

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Suquamish Tribe on its own behalf and on behalf of its members *parens patriae*. By bringing this action, the Suquamish Tribe does not waive its sovereign immunity from suit.

16. The Suquamish Tribe relies on land and resources in the Salish Sea and along its shorelines for traditional, commercial, economic, and cultural purposes. The Suquamish Tribe's "usual and accustomed" treaty-reserved fishing grounds extend well beyond the Port Madison Reservation boundaries and includes marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River in Canada, including Haro and Rosario Straits, the streams draining into the western side of Puget Sound and Hood Canal. The Suquamish Tribe actively protects all of its treaty-reserved natural resources through avoidance of impacts to habitat and natural systems throughout its aboriginal territory in Western Washington. The Suquamish Tribe needs to ensure protection and restoration of the treaty reserved rights, resources, and habitats, and to safeguard the health, livelihoods, and wellbeing of Suquamish Tribal members for the next seven generations.

17. Since time immemorial, the Suquamish have lived, fished, hunted, and gathered in this area. Salmon and shellfish play a central role in the Tribe's subsistence, economy, culture, spiritual life, and day-to-day existence. These treaty-reserved resources and the ability to continue traditional activities require a healthy ecosystem in the Salish Sea. Members of the Suquamish Tribe use and enjoy areas throughout the Salish Sea to exercise their treaty-reserved fishing and shellfishing rights and for spiritual, cultural, aesthetic, subsistence, and commercial purposes. The Suquamish Tribe is directly harmed by EPA's attempts to dilute the authority under CWA Section 401 of tribes eligible for TAS to review, set conditions upon, and deny federal licenses for activities that may discharge waters into its jurisdiction.

18. When EPA proposed the challenged Section 401 regulation, the Suquamish Tribe submitted substantial and substantive comments.

19. The Pyramid Lake Paiute Tribe is a federally recognized Indian tribe with approximately 2,288 enrolled members, based on the 477,000-acre Pyramid Lake Reservation

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located thirty-five miles northeast of Reno, Nevada. This action is brought by the Pyramid Lake Paiute Tribe on its own behalf and on behalf of its members *parens patriae*. By bringing this action, the Pyramid Lake Paiute Tribe does not waive its sovereign immunity from suit.

20. Pyramid Lake is a 125,000-acre terminus desert lake fed by the Truckee River which lies entirely within the boundaries of the Pyramid Lake Reservation. As a terminus lake, Pyramid Lake has no outlet. Pyramid Lake is an important and central cultural and spiritual resource of the Tribe, and also provides fishing and recreational activities that are a significant source of tribal employment and revenue. In addition, Pyramid Lake is the only habitat in the world for the endangered Cui-ui fish, and also is prime habitat for threatened Lahonton Cutthroat Trout. In its native Numu language, the Pyramid Lake Paiute people are called *cui-ui ticcutta*, which means Cui-ui eaters.

21. The Pyramid Lake Paiute Tribe's application for TAS was approved by the EPA on January 30, 2007. The Tribe developed and implements EPA-approved tribal water quality standards within the reservation—including the first water quality standards ever developed for Pyramid Lake. The Pyramid Lake Paiute Tribe is directly harmed by EPA's attempts to dilute its authority under CWA Section 401 to review, set conditions upon, and deny federal licenses for activities that may discharge waters into its jurisdiction.

22. When EPA proposed the challenged Section 401 regulation, the Pyramid Lake Paiute Tribe submitted substantial and substantive comments.

23. Orutsararmiut Native Council is a federally recognized sovereign tribal government responsible for the health, safety, and well-being of its citizens in Bethel, Alaska, located along the Kuskokwim River. Its mission is to promote the general welfare, enhance independence, encourage self-sufficiency/self-motivation, enhance quality of life, and preserve cultural and traditional values of the Tribe, and to exercise tribal authority over resources through educational, economic, and social development opportunities. Orutsararmiut Native Council brings this action on its own behalf and on behalf of its citizens *parens patriae*. By

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bringing this action, Orutsararmiut Native Council does not waive its sovereign immunity from suit.

24. Orutsararmiut Native Council has adopted a resolution opposing the proposed Donlin Gold Project and has engaged in administrative and legal processes associated with permits for the mine. The Project would be located along a tributary to the Kuskokwim River upstream from Bethel and would be the world's largest single pure gold mine. The proposed mine requires a CWA Section 404 permit from the U.S. Army Corps of Engineers, and accordingly, a Section 401 water quality certification from the state of Alaska. Since submitting comments on the Alaska Department of Environmental Conservation's notice that Section 401 certification review was underway in July 2018, Orutsararmiut Native Council has remained engaged in the administrative process involved with Alaska's issuance of the Section 401 certification. The issue is currently on appeal before an Alaska administrative law judge. Orutsararmiut Native Council asserts that Alaska may not issue the certification because it does not have reasonable assurance that the Project will meet the state's water quality standards for mercury and temperature or that existing uses for fish habitat will be protected.

25. Orutsararmiut Native Council is vulnerable to environmental harm from changes to Section 401 as it depends upon the state to certify federally licensed activities. For tribes without authority to implement tribal water quality standards, the Final Rule will limit the ability to provide input in determining whether to grant Section 401 certifications or developing conditions on 401 certifications that would serve to protect their interests from the impact of project actions.

26. Columbia Riverkeeper is a non-profit, tax-exempt organization with approximately 16,000 members and supporters in Oregon and Washington. Its principal place of business is in Hood River, Oregon. Columbia Riverkeeper's mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. To achieve these objectives, Columbia Riverkeeper operates scientific,

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educational, and legal programs to protect water quality, fish and wildlife habitat, and human health throughout the Columbia River Basin. Columbia Riverkeeper's vision is to restore clean water and recover healthy, abundant populations of salmon and other species that support both tribal and non-tribal fishing. Columbia Riverkeeper's members, including member Diane L. Dick, catch and eat fish caught in the Columbia River, drink water from the river, and recreate on and along the river.

27. Columbia Riverkeeper submitted comments on EPA's proposed CWA Section 401 regulations, and Columbia Riverkeeper and its members have been deeply involved in Section 401 decisions for many years. Most recently, on May 7, 2020, the Washington Department of Ecology ("Ecology") issued Section 401 certifications with conditions to ensure water quality standards were met for eight federal hydroelectric facilities on the Columbia and Snake Rivers in Washington. The U.S. Army Corps of Engineers challenged the CWA Section 401 conditional certifications before the state adjudicatory board; Columbia Riverkeeper has moved to intervene to defend Ecology's Section 401 conditional certifications.

28. Columbia Riverkeeper has also been focused on Ecology's CWA Section 401 certification denial for the Millennium Bulk Terminals—Longview project, a massive coal-export terminal proposed along the banks of the Columbia River in Longview, Washington. On September 26, 2017, Ecology denied the CWA Section 401 certification entirely, based on failure of Millennium to provide reasonable assurance that water quality standards would be met and failure to comply with Washington's State Environmental Policy Act. Columbia Riverkeeper has intervened in state and federal court litigation to help defend Ecology's Section 401 certification denial.

29. Sierra Club is one of the oldest environmental organizations in the United States. Sierra Club is incorporated in the state of California as a Nonprofit Public Benefit Corporation with headquarters in Oakland, California. The organization has over 779,000 members nationwide and local chapters across the country. Sierra Club is dedicated to protecting and

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preserving the natural and human environment, and its purpose is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

30. Sierra Club and its members regularly participate in state proceedings under Section 401. Examples of Section 401 proceedings in which Sierra Club and its members are currently is engaged include the following:

- Review by the state of California of relicensing of hydroelectric dams,
- Review by the state of Alaska of a proposed copper, gold, and molybdenum mine,
- Review by the state of Minnesota of a proposed tar sands pipeline, and
- Review by the state of Oregon of a proposed liquefied natural gas export terminal.

31. Sierra Club and its members have relied upon and continue to routinely rely upon the CWA Section 401. In California, Sierra Club, through its participation in the Foothill Water Network, has participated in the Section 401 process regarding the Federal Energy Regulatory Commission's ("FERC") relicensing of the Yuba-Bear hydroelectric project. Sierra Club submitted comments opposing the operator's request for a determination that California had waived CWA Section 401 authority and requested rehearing of FERC's determination of waiver. On August 17, 2020, Sierra Club appealed FERC's determination that California had waived CWA Section 401 authority to the 9th Circuit. By seeking to preserve California's authority to impose conditions on this project, Sierra Club works to protect, *inter alia*, the interests of Sierra Club members who recreate in and on the rivers near the project's component dams.

32. In Alaska, on August 24, 2020, Sierra Club submitted comments on an application for CWA Section 401 certification for the proposed Pebble mine, an open pit copper, gold, and molybdenum mine in the headwaters of the Bristol Bay watershed. Sierra Club argued that there is no reasonable assurance the project will comply with water quality standards. The Alaska Department of Environmental Conservation has yet to issue a decision on the application

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for CWA Section 401 certification. Sierra Club's work here supports the interests of Sierra Club members like Todd Radenbaugh, who fishes in and hikes and hunts around Bristol Bay.

33. In Oregon, Sierra Club has been extensively involved in the CWA Section 401 process for the Pacific Connector Gas Pipeline and Jordan Cove liquefied natural gas export project. Sierra Club submitted comments to the state of Oregon regarding the joint CWA Section 401 application on August 6, 2018. Oregon denied certification in May 2019. When the applicants later asked FERC to determine that this denial was too late and was therefore ineffective, Sierra Club, who was already a party in the pertinent FERC docket, submitted comments to FERC supporting the state. This issue remains pending before FERC.

34. In Minnesota, Sierra Club has been actively engaged in the review by the state of an application under CWA Section 401 for a proposed tar sands pipeline. With its partners, Sierra Club submitted comments on the state's draft permit on April 10, 2020 and currently is an intervenor in an administrative hearing proceeding under state law to review specific factual questions about the pipeline's impacts to water quality and whether the project can be certified under Section 401. Sierra Club members, including Jami Gaither, live and recreate along the pipeline's proposed route, which would pass through some of Minnesota's most pristine waterways and wetlands.

35. When EPA proposed the challenged CWA Section 401 regulation, the Sierra Club submitted substantial and substantive comments.

B. Overarching Interests

36. EPA failed to conduct meaningful government-to-government consultation with the Suquamish Tribe, Pyramid Lake Paiute Tribe, and Orutsararmiut Native Council on the changes to the CWA Section 401 regulations, violating Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments and EPA's policies regarding Tribal Consultation and Coordination and its Policy for the Administration of Environmental Programs on Indian Reservations. EPA also has a legal obligation under the United States' general trust

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responsibility to protect tribal lands and treaty-reserved resources, including the water that flows through and over tribal lands and the natural resources that depend on those waters. Tribal treaty rights are often dependent on clean water and productive ecosystems. EPA's changes to CWA Section 401 regulations undermine that trust responsibility and fail to address treaty rights.

37. If the Section 401 Rule is allowed to stand, all of the Plaintiffs and their members will suffer significant additional harm. The new rule leaves Plaintiffs and their citizens and members more vulnerable to environmental degradation because the new rule would limit review of projects to only a subset of the large number of environmentally harmful activities that currently are covered by Section 401. The scope of the review certifying authorities would be permitted to engage in, and the conditions certifying authorities could impose, would be far less comprehensive. As a result, far fewer federally permitted activities that could degrade the quality of state and tribal waters will be curtailed and mitigated. Plaintiffs' citizens and members will suffer from increased impairment of their local waterways and wetlands.

C. Defendants

38. Andrew Wheeler, the Administrator of the U.S. Environmental Protection Agency, is sued in his official capacity. Mr. Wheeler has responsibility for implementing and fulfilling the duties of the EPA, including the administration of the CWA. Mr. Wheeler signed the CWA Section 401 Rule on June 1, 2020.

39. U.S. Environmental Protection Agency, a federal agency charged with administering the CWA.

BACKGROUND

I. SECTION 401 OF THE CLEAN WATER ACT

40. The overarching objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

41. The Act protects waters from pollution, and from damage or destruction from dredging or filling, by prohibiting "the discharge of any pollutant by any person" except in

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compliance with the Act's permitting requirements and other pollution-prevention programs. *Id.* § 1311(a) (incorporating *id.* §§ 1312, 1316, 1317, 1328, 1342, and 1344). The Act followed and sought to reverse years of failed efforts to protect and clean up the Nation's waters through the implementation of state-based water quality standards. S. Rep. No. 92-414 at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672.

42. Congress empowered regulators at both the federal and state level to pursue the Act's expansive aims through a number of mechanisms in line with a cooperative federalism framework. *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 633 (1992); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). For example, Congress established the National Pollutant Discharge Elimination System to require collaboration between states and EPA in the distribution of permits to point source polluters. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205–08 (1976). Congress also included provisions in the Act allowing states to set standards for pollution, and to set requirements that exceed federal minimums. 33 U.S.C. §§ 1313, 1342(b), 1370. Congress went so far as to remark that states have "the *primary* responsibilities and rights … to prevent, reduce, and eliminate pollution." *Id.* § 1251(b) (emphasis added).

43. Section 401 is an integral component of the CWA's larger cooperative federalism framework. Section 401's "terms have a broad reach," *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006), allowing states and tribes to exercise their regulatory powers to block federal licenses for activities that may result in discharges into navigable waters in their jurisdictions. Specifically, states and tribes have discretion under Section 401 to deny certification or impose conditions on a federal license or permit. The state or tribe with jurisdiction over the territory in which the discharge originates may deny or condition federal licenses pursuant to applicable effluent limitations guidelines, new source performance standards, toxic pollutant restrictions, and any other appropriate requirements of state or tribal law.

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44. Once a discharge into navigable waters triggers the requirement for certification under Section 401, the conditions of certification need not specifically pertain to the discharge that triggered the certification process, but instead may apply to the activity of the applicant as a whole.

45. Section 401 also provides the state or tribe with "a reasonable period of time (which shall not exceed one year) after receipt of such request" to act on an application under Section 401 before certification is waived.

46. The CWA does not give the federal agencies unfettered discretion to set deadlines that prevent states and tribes from exercising their substantive authority under Section 401. In limited, though not all, circumstances a state or tribe may request that an applicant withdraw and resubmit a certification application to restart the statutory reasonable period of time.

47. Federal licensing authorities are bound to accept any conditions imposed upon their licenses by the state or tribe seeking to regulate water quality in its jurisdiction. A federal licensing authority has no power to review a decision by a state or tribe to impose conditions upon a federal license or to deny certification to an applicant, although it may challenge such a decision in state or federal court. Section 401(a)(1) provides that where a certification request is denied, "no license or permit shall be granted," although the federal agency may obtain judicial review of the state's or the tribe's decision. Similarly, Section 401(d) denies federal permitting agencies authority to review the substance of state or tribal Section 401 conditions of approval, providing that any conditions a state or tribe includes in its certification decision "shall become a condition on any Federal license or permit subject to the provisions of this section."

48. The 1987 Amendments to the CWA added provisions allowing EPA to treat federally recognized Indian tribes in a similar manner as states for certain provisions of the Act. 33 U.S.C. § 1377(e); 40 C.F.R. § 131.4. Tribes that apply for and are granted TAS are authorized to implement Section 401 and other sections of the Act over tribal lands and waters, in keeping with EPA's longstanding policy encouraging tribal efforts to develop and administer

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environmental programs. *See* EPA, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (1984); *see also* "Revised Interpretation of Clean Water Act Tribal Provision," 81 Fed. Reg. 30,183 (May 16, 2016).

49. In 1971, EPA promulgated the regulations that have governed the implementation of Section 401 since that time.

50. In 2010, EPA supplemented these longstanding regulations with a handbook offering "a wide-ranging description of [Section 401] certification provisions and practices" to assist "states and tribes interested in using [Section 401] as an effective water resource protection tool." The regulations and the guidance took an expansive view of states' or tribes' authority under Section 401, in line with the text and history of the statute, as well as judicial precedent. The broad authority of states and authorized tribes under Section 401 has remained unchanged by Congress or EPA for decades.

II. REVISION OF CWA SECTION 401 REGULATIONS

51. States and tribes rely heavily on Section 401 to prevent environmental degradation in their jurisdictions. EPA acknowledges that from 2013 to 2018, an average of 4,266 individual and 58,766 general federal permits requiring Section 401 certification were issued per year. This is an underestimate, as it accounts only for permits issued by the U.S. Army Corps of Engineers, the United States Coast Guard, FERC, and the Nuclear Regulatory Commission. States and tribes issue 401 certifications for other federal permits as well.

52. The Section 401 regulations and guidance have worked well across the board, allowing most applications for certification filed per year to be processed promptly. As recently as last year, EPA conceded that "denials are uncommon" and that decisions on certification requests occur well within the period of envisioned by Congress. When delays in processing Section 401 applications do occur, EPA concedes that it is most commonly because of "incomplete requests."

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53. On April 10, 2019, President Trump issued Executive Order ("EO") 13,868, the "Executive Order on Promoting Energy Infrastructure and Energy Growth." The EO asserts that it is "the policy of the United States to promote private investment in the Nation's energy infrastructure" and instructs a number of federal agencies to take actions in line with that policy. One provision of EO 13868 instructs EPA to review its guidance and implementing regulations related to CWA Section 401.

54. In accordance with the EO, on June 9, 2019 EPA rescinded the 2010 Handbook and replaced it with a new guidance document, which reinterpreted Section 401. The document provoked backlash from stakeholders, including state attorneys general across the country, who stated that, if adhered to, the guidance would undermine the authority of states and tribes to protect themselves from environmentally harmful infrastructure projects under Section 401.

55. On August 22, 2019, EPA published a Proposed Rule, titled "Updating Regulations on Water Quality Certification," which further demonstrated the agency's determination to curtail the regulatory powers of states and tribes under Section 401. 84 Fed. Reg. 44,080 (Aug. 22, 2019) ("Proposed Rule"). EPA received 125,000 comments on the proposed rule in the course of the next two months, including dozens of comments from states and tribes that raised concerns about federal overreach and the rule's potential to degrade the environment and harm communities within the jurisdictions of these certifying authorities. On June 1, 2020, EPA finalized a substantially similar version of the Proposed Rule, retitled Clean Water Act Section 401 Certification Rule. 85 Fed. Reg. 42,210.

56. EPA admits that its primary motivation in proposing and finalizing the rule is a desire to facilitate the construction of fossil fuel infrastructure. This purpose is entirely divorced from Congress' intent in passing Section 401 and the CWA. Executive Order 13,868 directs EPA to promote the construction of energy infrastructure to transport "supplies of coal, oil, and natural gas" to market. *See* 84 Fed. Reg. at 44,081–82. Before the promulgation of the Proposed Rule Administrator Wheeler confirmed that its purpose was to "take action to accelerate and

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promote the construction of pipelines and other important energy infrastructure." The Economic Analysis EPA published along with the proposed rule reflects the agency's intent by focusing largely on the alleged economic effects of state regulation of energy industry projects under Section 401 and ignoring any potential economic effects from degraded water quality caused by the limitations placed on state and tribal authority. Upon the publication of the Final Rule, Administrator Wheeler reiterated that the Trump administration was motivated to revise Section 401 by a belief that certifying authorities "have held our nation's energy infrastructure projects hostage" and a desire "to put in place clear guidelines that finally give these projects a path forward."

57. The Millennium Coal Terminal is one of the energy infrastructure projects the Trump administration cited to as justification for this rulemaking. The Washington Department of Ecology determined that the coal terminal would destroy twenty-four acres of wetlands and five acres of aquatic habitat, as well as impair tribal access to protected fishing sites. Ecology denied the CWA 401 certification on two grounds: first, that project proponents had failed to supply reasonable assurances that state water quality standards would be met, and second, that the certification should be denied under the Washington State Environmental Policy Act due to its significant and unavoidable environmental and public health risks and harms. State and federal courts, in ongoing litigation, have upheld Ecology's 401 certification denial.

58. The Trump administration cited the Constitution Pipeline as another example to justify the rulemaking. The New York Department of Environmental Conservation denied certification for this pipeline after the applicant failed to provide the state with sufficient information to show that the project would not adversely affect 250 streams across the state, many of which are key to local ecosystems. Project proponents' efforts to overturn New York's 401 certification denial were unsuccessful.

59. EPA also attempted to justify its change in policy by raising perceived inefficiencies in the processing of Section 401 applications for fossil fuel infrastructure projects.

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84 Fed. Reg. 44,081–82; *see also* 85 Fed. Reg. 42,211, 42,223. It does so in spite of the fact that many—likely most—of the thousands of annual permit decisions requiring Section 401 certification are for projects unrelated to coal, oil, and natural gas infrastructure.

III. LACK OF ADEQUATE TRIBAL CONSULTATION

60. On April 22, 2019—almost two weeks after the EO directing EPA to make changes to Section 401—EPA Assistant Administrator David Ross sent a letter to "all 573 of the Tribes federally recognized at that time," which announced the agency's intent to consult with tribes regarding its plans to revise its Section 401 regulations. The brief consultation period formally ended approximately one month later on May 24, 2019, without EPA sharing the text or any details about its proposed changes and without any time for meaningful back and forth exchanges between tribal governments and EPA about what EPA had planned. Two "Informational Webinars" were held for tribes in May 2019, but little information was provided by EPA in the webinars, and multiple requests for additional time for consultation were denied. Informal communication with tribes continued thereafter, but EPA released its proposed rule only two weeks later. By the EPA's own admission "[c]onsultation was not done" with several tribes that made requests with the agency, including the Suquamish Tribe and Pyramid Lake Paiute Tribe, who both requested government-to-government consultation in their comments on the proposed rule, submitted October 21, 2019.

61. Prior to promulgation of the deregulatory Final Rule described below, EPA had long acknowledged that "there is a gap in water quality protection under the CWA for waters on Indian reservations." The Final Rule further diminishes the protections afforded to Plaintiff Tribes under the CWA, despite EPA's longstanding interpretation that Congress expressed a preference for tribal regulation of surface water quality on reservations to assure compliance with the goals of the CWA. 56 Fed. Reg. 64,876, 64,878–79 (Dec. 12, 1991). The Final Rule's restriction of tribal authority to ensure that federal actions comply with tribal laws, combined with the lack of tribal consultation in promulgating the Rule, violate both EPA's stated policy to

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work with tribes as sovereign entities with primary authority over their land and water resources and the duty to uphold the federal government's trust responsibility to tribes as expressed in treaties and the basic tenets of federal Indian law.

IV. SIGNIFICANT RULE CHANGES

62. As described below, the sprawling Final Rule reinterprets Section 401 to 1) limit the types of projects for which a certification application is required, 2) limit the scope of activities states and tribes may review in the course of the certification process, and 3) expand the role of federal agencies in determining how much time certifying authorities have to conduct their review of certification applications and whether the state or tribe has waived its authority to review a project under Section 401. Cumulatively these revisions strip away a significant share of the authority Congress intended to delegate to states and tribes, leaving these local authorities far less capable of protecting their waters and their residents from environmental degradation resulting from federally licensed projects.

A. Reducing the Number and Types of Projects for Which Certification Is Required

63. In spite of the fact that the term "point source" is used nowhere in Section 401, the Final Rule states that an applicant only needs to seek certification for a project that results in a point source discharge. 85 Fed. Reg. 42,229–31.

B. Narrowing the Scope of Certifying Authority Review

64. For those projects that require Section 401 Certification, EPA reinterpreted the "scope" of Section 401 to limit the review of certifying authorities to a project proponent's discharges from point sources into the regulatory-defined waters of the United States. *Id.* at 42,250–251.

65. EPA stated that certifying authorities may only review an applicant's discharge under Section 401, rather than the activity of the applicant as a whole. *Id.* at 42,251–53.

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66. EPA failed to adequately explain how this narrowing of the scope of Section 401 conforms with the provision's essential purpose, which is to assure "that Federal licensing or permitting agencies cannot override state water quality requirements."

67. EPA further asserted that in processing an application a certifying authority may only consider whether the point source discharge in question complies with "water quality requirements," which the regulations limit to those requirements outlined in sections 301, 302, 303, 306, and 307 of the CWA and the requirements of state and tribal laws and regulations that pertain specifically to point source discharges into waters of the United States. *Id.* at 42,253–54. According to EPA, the sweeping language contained in Section 401(d), stating that a certifying authority must assure that an applicant complies with "any other appropriate requirement of state law," does not broaden the permissible scope of review beyond a discharge's compliance with this narrow subset of "water quality requirements." *Id.* at 42,254–56.

68. Under the Final Rule, conditions on federal permits or outright denials of certification must comply with the Final Rule's narrow interpretation of the scope of Section 401—*i.e.*, certifying authorities may place conditions only upon point source discharges in order to ensure compliance with water quality requirements and may deny only projects where a point source discharge violates water quality requirements. *Id.* at 42,256.

C. Expanding Federal Authority Over the Section 401 Process

69. In the Final Rule, EPA substantially expanded the role of federal agencies in the states and tribes' Section 401 review process by significantly increasing federal authority to find that the certifying agency waived its Section 401 authority, suggesting restrictions on what information certifying agencies can request, and establishing additional procedural hurdles for certifying agencies.

70. EPA gave federal licensing authorities broad discretion to set the length of the reasonable period of time to act on a given certification request. *Id.* at 42,259–60. The Final Rule requires the federal licensing agency to inform the certifying authority of the reasonable

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period of time within 15 days of receipt of the certification request. *Id.* at 42,248. If the certifying authority disagrees with the amount of time it is given by the federal agency, the Final Rule leaves it without an appeals process, except to seek recourse through judicial review, which almost certainly would not provide relief within the time allotted. *Id.* at 42,260. The Final Rule also provides that no matter what circumstances certifying agencies encounter, including recalcitrant applicants or particularly risky or complicated projects, it is wholly within the power of the federal licensing agency—again, effectively without any recourse to any effective appeal—to decide whether a certifying agency will be given more time beyond what the federal agency initially provided. *Id.* at 42,260–61.

71. The Final Rule categorically prohibits the certifying authority from requesting that an applicant withdraw a certification request or taking action independent of the federal licensing agency to extend the reasonable period of time. *Id.* at 42,260–62. EPA concluded that a waiver occurs even if the applicant voluntarily withdraws its application and submits a new application within the original one-year period, except if the project has been modified to the point of requiring a new certification request. *Id.* at 42,262. EPA did not define what kind of project change would be sufficiently significant to warrant submitting a new request that would restart the one-year clock, and gave the power to decide that question with the federal licensing agency. *Id.* at 42,267.

72. The Final Rule further aggrandizes EPA's role by defining when the clock begins to run from the point when certifying agencies receive the materials EPA has determined are sufficient to commence review. The Final Rule sets a list of materials that starts the clock but fall far short of what is needed to begin a meaningful review. Notably, the Final Rule does not include a requirement that the applicant provide information on all of the project's potential impacts to water quality, information on the designation of the waterway receiving the discharge, or whether and to what extent the project might result in more than one discharge in the same waterway that could have cumulative effects. *Id.* at 42,244, 42,285–86.

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73. The Preamble to the Final Rule also suggests that certifying agencies are limited to requesting information from applicants that can be "produced and evaluated within the reasonable time," rather than whatever the certifying agency, in its discretion, deems is needed to evaluate whether the project will comply with the CWA. *See id.* at 42,246.

74. The Final Rule grants federal licensing agencies the power to declare that a certifying authority has waived its right to set conditions upon or deny an application. *Id.* at 42,263. The federal licensing agency may use this veto power if a state or tribe fails to comply with detailed requirements—described by EPA as "procedural" requirements—when taking action to condition or deny a federal permit. *Id.* at 42,263, 42,267–68.

75. Furthermore, against the precautionary spirit of Section 401, the Final Rule shifts the burden for proving compliance with these narrow water quality requirements from the applicant to states and tribes and gives the federal licensing agency additional power to find a waiver. *Id*. at 42,256. If a certifying authority seeks to condition a permit, then the state or tribe must provide the federal licensing agency with an explanation in writing that the condition on a license is necessary to ensure that the relevant discharge is in compliance with those water quality requirements that fall within the narrow scope of review permitted by the Final Rule. *Id.* at 42,263. In order to deny an application, a certifying authority must, in writing and complete with legal citations, explain why a discharge will not comply with the aforementioned water quality requirements, or, alternatively, describe the specific water quality data or information that the applicant failed to submit that would be necessary to ensure that the discharge complied with water quality requirements. *Id.* In addition, the Final Rule does not require federal licensing authorities to allow states and tribes to remedy conditions and denials deemed deficient. *Id.* at 42,269. Federal licensing agencies may review these written explanations, and, upon the discovery of a failure to follow EPA's newly-prescribed procedural requirements, may reject the certifying authorities' conditions and denials. *Id.* at 42,263.

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76. Even if a certifying authority were to make it through this gauntlet and successfully impose conditions upon a federal license, under the Final Rule, states and tribes lack authority to enforce any of their 401 certification conditions. Instead, the federal permit, with its incorporation of state or tribal conditions, becomes the operative action. *Id.* at 42,263.

CLAIMS FOR RELIEF

COUNT I

Violation of the Clean Water Act and the Administrative Procedure Act:
The Final Rule Is Contrary to the Clean Water Act

77. The CWA's single objective is to restore and protect the physical, chemical, and biological integrity of the Nation's waters and to do so as broadly as possible. 33 U.S.C. § 1251.

78. To achieve the Act's broad purpose, Congress expressly created a partnership between the states and authorized tribes on the one hand and the federal government on the other. The Act gives states and tribes broad authority under Section 401 to review federal projects that may affect water quality within their jurisdictions.

79. EPA cannot adopt regulations that are manifestly contrary to the text and purpose of the CWA and Section 401. 5 U.S.C. § 706(2)(A). The Final Rule is contrary to law, because it upends the balance struck by Congress and seeks to carve out key aspects of powers given to the states and authorized tribes.

80. EPA also exceeded its authority and acted contrary to the CWA, 33 U.S.C. § 1341, by adopting provisions in the Final Rule that (1) limit the scope of the states' and tribes' review over projects subject to Section 401 to pollution from point sources rather than the activity as a whole; (2) limit the ability of states and tribes to deny a certification except when there is no reasonable assurance that the discharge from a point source, rather than the activity as a whole, will comply with water quality requirements; (3) limit the conditions a state or tribe may include in a certification to ones that are related to water quality requirements and imposed on a discharge from a point source; (4) prevent states and tribes from enforcing Section 401

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conditions; (5) give federal agencies the power to veto the decisions by states and tribes to condition or deny federal permits, (6) deny states and tribes the opportunity to ensure that they have a reasonable period of time to review an application for certification, (7) shift evidentiary burdens for proving compliance with relevant water quality requirements and local laws from the applicant for a federal license to the state or tribe.

81. EPA's adoption of the Final Rule is in excess of statutory authority and arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), (C).

COUNT II

Violation of the Clean Water Act and the Administrative Procedure Act:
Failure of Rational Decision Making

82. When promulgating regulations, EPA must articulate a satisfactory explanation for its actions, including a rational connection between the facts and the agency's choice. A regulation is arbitrary and capricious under the APA where:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

83. EPA has for decades interpreted and implemented Section 401 in a manner that has been to the satisfaction of several successive presidential administrations, states, tribes, Congress, and the Courts. When an agency changes or amends its prior position, including its interpretation of a statute, it must provide an adequate explanation. A change in prior policy must be supported by a more detailed justification than a new rule crafted from scratch when claiming facts have changed or where there are reliance interests implicated by the policy change. Any unexplained inconsistency between the agency's prior position and its replacement is grounds for finding that the agency's interpretation is arbitrary and capricious.

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84. EPA has presented no credible justification for dramatically changing its long-term interpretation of the scope of Section 401 or presented a sound justification for why the Final Rule will be more protective of water quality. There are not pervasive delays stemming from the Section 401 process as it has been implemented without intervention by Congress for decades. Facilitating the extraction of fossil fuels and the construction of energy infrastructure is an impermissible rationale for a reinterpretation of Section 401, contrary to the factors that Congress intended agencies to consider when rulemaking under the CWA.

85. EPA's adoption of the Final Rule was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), (C).

COUNT III

Violation of Responsibilities to Tribes

86. The United States has a trust responsibility to protect Indian lands, resources, and other interests. The trust responsibility is a legally enforceable fiduciary duty that arises out of a number of sources of law, including treaties, statutes, Executive Orders, and the common law. In carrying out the federal trust responsibility, EPA must ensure that tribal resources are protected and that tribal concerns and interests are considered before an agency takes action that will impact tribal interests. On- and off-reservation fishing rights that are protected by treaty, rights to water necessary to fulfill the original purpose of the reservation, and the right to subsistence resources are protected interests of the Plaintiff Tribes.

87. EPA's trust responsibility includes the duty to meaningfully consult with tribes prior to promulgating a rule that affects tribal interests. EPA is required to adhere to "an accountable process" for consultation with tribes. Consultation should occur early enough to allow tribes to provide input prior to the promulgation of a proposed rule and should continue throughout the rulemaking process. A series of meetings between a Tribe and EPA may be required over the course of the rulemaking process.

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88. In promulgating the Final Rule, EPA failed to meaningfully consult Plaintiff Tribes. The responsibility to provide meaningful consultation is reflected in and incorporated into internal EPA policy documents, such as "EPA Policy for the Administration of Environmental Programs on Indian Reservations" and "EPA Policy on Consultation and Coordination with Indian Tribes."

89. EPA's decision to adopt the Final Rule without meaningfully consulting with Plaintiff Tribes; its failure to comply with its own policies and procedures relating to its responsibilities to tribes when promulgating the Section 401 rulemaking; and the agency's failure to analyze how the Final Rule and its implementation will affect tribes is arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706(2)(A), (C).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court:

A. Adjudge and declare that the Section 401 Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law;

B. Vacate and set aside the Section 401 Rule;

C. Enjoin EPA from applying or otherwise relying upon the Section 401 Rule;

D. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorney's fees; and

E. Grant Plaintiffs such additional and further relief as the Court may deem just and proper.

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DATED this 31st day of August, 2020.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

CLEAN WATER ACT RULEMAKING.

No. C 20-04636 WHA
No. C 20-04869 WHA
No. C 20-06137 WHA

(consolidated)

This Document Relates to:

ALL ACTIONS.

ORDER RE PROPOSED TIMELINE FOR ADMINISTRATIVE RECORD COMPLETION

The parties' stipulated schedule for completion of the administrative record and production of a privilege log is **GRANTED**.

IT IS SO ORDERED.

Dated: November 30, 2020.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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) **ORDER RE JOINT MOTION TO HOLD PROCEEDINGS IN ABEYANCE**

Based on the Parties' Joint Motion to hold these proceedings in abeyance, filed February 19, 2021, the Court hereby **ORDERS** that the joint motion shall be **GRANTED**, and this Court will hold this case in abeyance for 60 days, up to and including April 20, 2021. Defendant EPA shall meet and confer with all parties regarding the status of EPA's review by April 10, 2021. EPA shall provide a status report regarding its review of the Certification Rule by April 20, 2021.

IT IS SO ORDERED.

Dated: 22 February, 2021.

WILLIAM ALSUP
United States District Court Judge

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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 MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 a.m. PDT

Notice of Motion and Motion

PLEASE TAKE NOTICE that, on August 26, 2021, at 8:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable William Alsup, Courtroom 12, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, or by telephone or webinar, 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"), will and do respectfully move for remand without vacatur. The motion is based on this notice and the accompanying memorandum of points and authorities; any declarations, exhibits, and request for judicial notice filed in support of the motion; together with such oral and/or documentary evidence as may be presented at the hearing on this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

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"), by and through their counsel, respectfully request that the Court remand, without vacatur, EPA's Section 401 Certification Rule that revised 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 ("CWA"), 33 U.S.C. § 1341. Remand is appropriate here because EPA has announced its intention to reconsider and revise the Certification Rule. *Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,541 (June 2, 2021) ("Notice"). EPA has "determined that it will reconsider and propose revisions to the rule through a new rulemaking effort." Declaration of John Goodin ¶ 9 ("Goodin Decl."). "EPA seeks to revise the rule in a manner that promotes efficiency and certainty in the certification process, that is well-informed by stakeholder input on the rule's substantive and procedural components, and that is consistent with the cooperative federalism principles central to section 401." *Id.* ¶ 13.

Defendants have conferred with the parties regarding this motion. Plaintiffs plan to oppose this motion. Defendant-Intervenors do not object to the motion based on counsel for Defendants' description, but reserve the right to file a response if they think one is necessary, after seeing the motion. Dkt. No. 141.

BACKGROUND

On July 13, 2020, EPA's final rule, *Clean Water Act Section 401 Certification Rule*, was published. 85 Fed. Reg. 42,210 (the "Certification Rule" or the "Rule"). The Certification Rule became effective on September 11, 2020. 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. Executive Order 13,990 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 Certification Rule was specifically listed in a subsequent White House Statement as one of the agency actions to be reviewed pursuant to the Executive Order for potential suspension, revision or rescission.[1]

Plaintiffs allege that EPA violated the Administrative Procedure Act because the Certification Rule is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Dkt. No. 75 ("Am. Rivers Compl.") ¶¶ 95, 99-101, 108, 115-18, 124-15, 132, 137 (citing 5 U.S.C. §§ 706(2)(A), 706(2)(C)); Dkt. No. 96 ("States' Compl.") ¶¶ 7.5, 7.12, 7.19, 7.25 (same); Dkt. No. 98 ("Suquamish Compl.") ¶¶ 79-81, 85, 89 (same).

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. *Notice*, 86 Fed. Reg. 29,541 (June 2, 2021). As explained in the Notice and Goodin Declaration, EPA is reconsidering numerous topics in the Certification Rule. 86 Fed. Reg. at 29,542-44; Goodin Decl. ¶ 15. The specific topics that EPA has committed to reconsidering as part of that process include:

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[1] Fact Sheet: List of Agency Actions for Review, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-ofagency-actions-for-review/ (last accessed on May 20, 2021).

- the utility of the pre-filing meeting process to date, including whether the pre-filing meeting request component of the Rule has improved or increased early stakeholder engagement, whether the minimum 30 day timeframe should be shortened in certain instances (*e.g.*, where a certifying authority declines to hold a pre-filing meeting), and how certifying authorities have approached pre-filing meeting requests and meetings to date;
- the sufficiency of the elements described in 40 C.F.R. § 121.5(b) and (c), and whether stakeholders have experienced any process improvements or deficiencies by having a single defined list of required certification request components applicable to all certification actions;
- the process for determining and modifying the "reasonable period of time," including whether additional factors should be considered by federal agencies when setting the "reasonable period of time," whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time, and any implementation challenges or improvements identified through application of the Rule's requirements for the "reasonable period of time";
- 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, whether the Agency should revise its interpretation of "other appropriate requirements of State law," and whether the Agency should revise its interpretation of scope of certification based on implementation challenges or improvements identified through the application of the newly defined scope of certification;

- the certification action process steps, including whether there is any utility in requiring specific components and information for certifications with conditions and denials; whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, and if so, whether there should be greater certifying authority engagement in the federal agency review process including an opportunity to respond to and cure any deficiencies; whether federal agencies should be able to deem a certification or conditions as "waived," and whether, and under what circumstances, federal agencies may reject state conditions;
- enforcement of CWA Section 401, including the roles of federal agencies and certifying authorities in enforcing certification conditions; whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law; whether the CWA citizen suit provision applies to Section 401; and the Rule's interpretation of a certifying authority's inspection opportunities;
- modifications and "reopeners," including whether the statutory language in CWA Section 401 supports modification of certifications or "reopeners," the utility of modifications (*e.g.*, specific circumstances that may warrant modifications or "reopeners"), and whether there are alternate solutions to the issues that could be addressed by certification modifications or "reopeners" that can be accomplished through the federal licensing or permitting process;
- the neighboring jurisdiction process, including whether the Agency should elaborate in regulatory text or preamble on considerations informing its analysis under CWA Section 401(a)(2), whether the Agency's decision to make a determination under CWA Section 401(a)(2) is wholly discretionary, and whether the Agency should provide further guidance on the Section 401(a)(2) process that occurs after EPA makes a "may affect" determination;

- application of the Certification Rule, including impacts of the Rule on processing certification requests, impacts of the Rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the Certification Rule's procedural requirements;
- existing state CWA Section 401 procedures, including whether the Agency should consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future; and
- facilitating implementation of any rule revisions, including whether, given the relationship between federal provisions and state processes for water quality certification, EPA should consider specific implementation timeframes or effective dates to allow for adoption and integration of water quality provisions at the state level, and whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (*e.g.*, the United States Army Corps of Engineers and the Federal Energy Regulatory Commission) so that implementation of revised water quality certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.

86 Fed. Reg. at 29,542-44; Goodin Decl. ¶ 15. EPA is conducting initial stakeholder outreach by taking written input through a public docket that will be open until August 2, 2021, i.e., 60 days after publication of the Notice in the Federal Register. 86 Fed. Reg. at 29,541. After considering public input and information provided during stakeholder meetings, EPA will draft new regulatory language and supporting documents and submit the draft rule to the Office of Management and Budget ("OMB"). Goodin Decl. ¶¶ 20-22. EPA expects the proposed rule detailing revisions to the Certification Rule will be published in the Federal Register in Spring 2022, which will initiate a public comment period. *Id.* ¶ 23. 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. *Id.* ¶¶ 24-26. EPA expects to sign a final rule in spring 2023. *Id.* ¶ 27.

STANDARD OF REVIEW FOR VOLUNTARY REMAND

"[A]n agency may reconsider its own regulations, 'since the power to decide in the first instance carries with it the power to reconsider.'" *State v. Bureau of Land Mgmt.*, No. 18-CV-00521-HSG, 2020 WL 1492708, at *8 n.9 (N.D. Cal. Mar. 27, 2020) (quoting *Nat'l Res. Def. Council, Inc. v. United States Dep't of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002) (quoting *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)); *accord Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) (stating that "it is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions").

"A federal agency may request remand in order to reconsider its initial action." *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). 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." *Id*. (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("*SKF USA*"). An "agency may request a remand (without confessing error) in order to reconsider its previous position . . . " *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); *see also 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" and quoting *SKF USA*, 254 F.3d at 1027-28).

ARGUMENT

When determining whether to grant a motion for voluntary remand, courts consider whether: (1) the request for voluntary remand is made in good faith and "reflects substantial and legitimate concerns," *Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 2011 WL 3607790, at *4 (citing *SKF*, 254 F.3d at 1029); (2) remand supports "judicial economy," *Nat. Res. Def. Council*

v. United States Dep't of Interior, 275 F. Supp. 2d at 1141; and (3) voluntary remand would not cause "undue prejudice" to the parties, *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015). Here, the balance of all three factors weighs in favor of remand.

First, voluntary remand is appropriate because EPA has identified "substantial and legitimate concerns" with the Certification Rule and has publicly announced its intention to reconsider and revise the Rule. *SKF*, 254 F.3d at 1029 ("[I]f the agency's concern [with the challenged action] is substantial and legitimate, a remand is usually appropriate."); *N. Coast Rivers All.*, 2016 WL 8673038, at *3 (same); *Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 2011 WL 3607790, at *4 (same). Specifically, EPA has identified "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." 86 Fed. Reg. at 29,542. EPA also has serious concerns about whether the Certification Rule "constrains what states and Tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the 401 review process begins." *Id.* at 29,543. Likewise, EPA "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." *Id*. EPA is also "concerned that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality." *Id*. And EPA "is concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of non-substantive and easily fixed procedural concerns identified by the federal agency [and] that the rule's prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances." *Id*. These concerns mirror many of Plaintiffs' allegations.[2]

[2] *See* Am. Rivers Compl. ¶¶ 94, 98, 107, 112-14, 123, 130-31, 136; States' Compl. ¶¶ 1.9-1.13, 5.43-5.46, 5.48-5.50, 5.54-5.61; Suquamish Compl. ¶¶ 62-76.

Courts have granted remand in similar situations. For example, in *SKF USA*, the Federal Circuit found a remand to the Department of Commerce appropriate in light of the agency's change in policy. 254 F.3d at 1025, 1030. Likewise, in *FBME Bank Ltd. v. Lew*, the District Court for the District of Columbia remanded a rulemaking to the Department of the Treasury to allow the agency to address "serious 'procedural concerns'" with the rule, including "potential inadequacies in the notice-and-comment process as well as [the agency's] seeming failure to consider significant, obvious, and viable alternatives." 142 F. Supp. 3d at 73.

A confession of error is not necessary for voluntary remand so long as the agency is committed to reconsidering its decision. *SKF USA*, 254 F.3d at 1029. For example, remand may be appropriate if an agency "wishe[s] to consider further the governing statute, or the procedures that were followed," or if an agency has "doubts about the correctness of its decision or that decision's relationship to the agency's other policies." *Id.*; *see also Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (an agency does not need to "confess error or impropriety in order to obtain a voluntary remand" so long as it has "profess[ed] [an] intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge"); *N. Coast Rivers All.*, 2016 WL 11372492, at *2 (explaining that an "agency may request a remand (without confessing error) in order to reconsider its previous position") (emphasis in original) (quoting *SKF USA*, 254 F.3d at 1029). That standard is met here, as EPA has made clear that it intends to reconsider and revise the Certification Rule to address "substantial concerns" associated with the Rule. 86 Fed. Reg. at 29,542; Goodin Decl. ¶ 14. Along with receiving public input through a docket, EPA has held a series of webinar-based listening sessions to solicit stakeholder feedback on potential approaches to revise the Certification Rule. *Notice*, 86 Fed. Reg. at 29,544; Goodin Decl. ¶ 17.

In sum, "an agency must be allowed to assess 'the wisdom of its policy on a continuing basis.'" *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (citation omitted). EPA's actions are consistent with that principle, and this Court "should permit

such a remand in the absence of apparent or clearly articulated countervailing reasons." *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004).

Second, granting remand here is in the interest of judicial economy. "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) (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)); *see Nat. Res. Def. Council v. United States Dep't of Interior*, 275 F. Supp. 2d at 1141 ("Voluntary remand also promotes judicial economy by allowing the relevant agency to reconsider and rectify an erroneous decision without further expenditure of judicial resources."). Here, allowing EPA to reconsider its decision made during the prior Administration—including the legal basis and policy effects of the Rule—and address its substantial concerns with the Rule through the administrative process will preserve this Court's and the parties' resources. *See FBME Bank*, 142 F. Supp. 3d at 74; *see also B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) ("[A]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." (quoting *Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978))). Continuing to litigate the very same issues that EPA is currently reconsidering and "would be inefficient," *FBME Bank*, 142 F. Supp. 3d at 74, and a waste of "scarce judicial resources," *Friends of Park v. Nat'l Park Serv.*, No. 13-cv-03453-DCN, 2014 WL 6969680, at *2 (D.S.C. Dec. 9, 2014).

In addition, continuing to litigate this case would interfere with EPA's ongoing reconsideration process by forcing the Agency to structure its administrative process around pending litigation, rather than the Agency's priorities and expertise. *See Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013) (noting that because agency did "not wish to defend" action, "forcing it to litigate the merits would needlessly waste not only the agency's resources but also time that could instead be spent correcting the rule's deficiencies"), *aff'd*, 601 F. App'x 1 (D.C. Cir. 2015).

Third, any prejudice Plaintiffs may suffer due to a remand without vacatur would be limited here because EPA has committed to reconsidering the Certification Rule to ensure that Clean Water Act Section 401 is implemented in a manner consistent with the policies set forth in Executive Order 13,990, many of which implicate the same concerns that Plaintiffs have raised in this litigation. *See* 86 Fed. Reg. at 7037. As noted above, EPA is considering revising provisions in the Certification Rule related to many of the issues raised in this case:

- pre-filing meeting requests, *Notice*, 86 Fed. Reg. at 29,543;
- certification requests, 86 Fed. Reg. at 29,543;[3]
- reasonable period of time, 86 Fed. Reg. at 29,543;[4]
- scope of certification, 86 Fed. Reg. at 29,543;[5]
- certification actions and federal agency review, 86 Fed. Reg. at 29,543;[6]
- certifying authority enforcement of certification conditions, 86 Fed. Reg. at 29,543; and
- certifying authority modification of certifications, 86 Fed. Reg. at 29,543.

Moreover, EPA has committed to ensuring that stakeholders and the public, including Plaintiff States, Defendant-Intervenor States, Plaintiff Tribes and Industry Defendant-Intervenors, have the opportunity to provide input to EPA in its reconsideration process. 86 Fed. Reg. at 29,544; Goodin Decl. ¶¶ 17, 18, 23.

A new rulemaking process will necessarily take time, but Plaintiffs cannot demonstrate undue prejudice from the time required under the Administrative Procedure Act to revise agency regulations. Nor have Plaintiffs identified harms that outweigh the benefits of remand here. The Plaintiff States allege that the Certification Rule "forces the States either to incur the financial

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[3] *See* Am. Rivers Compl. ¶¶ 39, 71, 100; States' Compl. ¶¶ 5.54-5.58.
[4] *See* Am. Rivers Compl. ¶¶ 19, 25, 28, 99-102; States' Compl. ¶¶ 6.11-6.13, 6.17; Suquamish Compl. ¶¶ 62, 70.
[5] *See* Am. Rivers Compl. ¶¶ 19, 36, 39, 94, 115-18; States' Compl. ¶¶ 6.4, 6.16-6.17; Suquamish Compl. ¶¶ 37, 62-68, 75, 80, 84.
[6] *See* Am. Rivers Compl. ¶¶ 130-32; States' Compl. ¶¶ 1.11, 7.4, 7.11-7.12; Suquamish Compl. ¶¶ 69-76, 80.

and administrative burdens associated with instituting or expanding their water protection programs or to bear the burdens of degraded waters." States' Compl. ¶ 6.15.[7] The States further allege that the Certification "Rule increases the chances that section 401 requests will be needlessly denied, leading to administrative inefficiencies and unnecessary litigation, and the loss or delayed benefits of projects that would have been certified had the States been operating under the previous regime." *Id.* ¶ 6.17. The Plaintiff Tribes allege harm from "EPA's attempts to dilute the authority under CWA Section 401 of tribes eligible for [Treatment in the same Manner as a State ("TAS")] to review, set conditions upon, and deny federal licenses for activities that may discharge waters into its jurisdiction." Suquamish Compl. ¶¶ 17, 18. The Tribes also allege harm from a lack of meaningful consultation with the Tribes. *Id.* ¶¶ 36, 60, 88-89. But these harms are "too abstract and speculative to clearly outweigh [remand's] benefits," *Am. Forest Res. Council v. Ash*e, 946 F. Supp. at 43, including the critical benefit of allowing EPA to reconsider the Rule in light of the concerns raised by Plaintiff States and Tribes.

The other Plaintiffs[8] are not directly regulated by the Certification Rule, which regulates the conduct of states, federal agencies, tribes, and project proponents. Those Plaintiffs' alleged harms all flow from the implementation of the Certification Rule to specific future projects.[9] But those harms are too speculative to overcome EPA's interest in remand, because they depend on a causal chain of events for potential future projects that may or may not occur, including (1) how a state may apply the Certification Rule to a specific project; (2) how a federal agency will apply

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[7] *See* States' Compl. ¶¶ 6.11-6.13 (alleging financial harm from increased regulatory expenses).

[8] Non-state or TAS-tribe plaintiffs include American Rivers, American Whitewater, California Trout, Idaho Rivers United, Sierra Club, Columbia Riverkeeper, and Orutsararmiut Native Council.

[9] *See, e.g.*, Am. Rivers Compl. ¶ 12 (explaining that there are "numerous projects requiring federal permits in each of those which are potentially impacted" by the Certification Rule and of interest to plaintiff American Rivers); ¶ 16 (alleging that plaintiffs "frequently participate in state certification determinations under Section 401, and are directly injured by the [Certification] Final Rule's attempt to narrow the applicability, scope, and outcome of Section 401 certifications"), ¶¶ 18-19 (alleging interest in future certification for "modifications at the Camp Far West Hydroelectric Project" and for the "Goldendale Energy Storage Project").

certifications and conditions to a particular project; (3) how challenges to a state certification or condition would be adjudicated in a judicial or administrative proceedings; and (4) whether resolution of any challenges or implementation concerns would take longer than EPA's rulemaking process. These Plaintiffs' allegations are also "too abstract and speculative to clearly outweigh [remand's] benefits," *Am. Forest Res. Council v. Ash*e, 946 F. Supp. 2d at 43, including allowing EPA to address its concerns with the Certification Rule, and potentially Plaintiffs' concerns as well, through the administrative process. Further, in the interim, Plaintiffs continue to have the option to challenge 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. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (plaintiff "will have ample opportunity later to bring [their] legal challenge" in the context of a future agency action applying the challenged plan "when harm is more imminent and more certain.").

In any event, any possible prejudice to Plaintiffs caused by the Rule remaining in effect while EPA revises it pursuant to the required process of the Administrative Procedure Act should not be considered "undue" prejudice. During the rulemaking period, EPA is committed to providing technical assistance to all stakeholders, including States and Tribes, 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. EPA's efforts may mitigate or eliminate alleged potential harms of concern to all Plaintiffs.

CONCLUSION

EPA has identified numerous concerns with the Certification Rule, many of which have been raised by Plaintiffs in this case, and the Agency has already begun reconsidering the Rule. Where an agency has committed to reconsidering the challenged action, the proper course is remand to allow the agency to address its concerns through the administrative process. *See Am. Forest Res. Council*, 946 F. Supp. 2d at 43. Rather than requiring EPA to litigate a rule that it is

currently reconsidering, Defendants respectfully ask the Court to remand the Certification Rule to the Agency without vacatur.

Respectfully submitted this 1st day of July, 2021.

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