

**In the Supreme Court of the United States**

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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.

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**APPENDIX TO APPLICATION FOR STAY PENDING APPEAL  
VOLUME II OF IV**

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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

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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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14  
15 UNITED STATES DISTRICT COURT  
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17  
18 **In re:**  
19 **CLEAN WATER ACT RULEMAKING**

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

(Consolidated)

20  
21 **This document relates to:**  
22 **ALL ACTIONS**

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

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

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5 Trump Will Bust Cuomo’s Gas Blockade (Aug. 16, 2019),  
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7 Misuse of the Clean Water Act (June 1, 2020), [https://www.epa.gov/newsreleases/epa-  
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**MEMORANDUM AND POINTS OF AUTHORITIES**

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

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

**BACKGROUND**

15  
16 On July 13, 2020, EPA published the *Clean Water Act Section 401 Certification Rule*, 85  
17 Fed. Reg. 42,210 (to be codified at 40 C.F.R. pt. 121) (“Certification Rule”), upending a half century  
18 of regulatory practice under CWA Section 401, 33 U.S.C. § 1341. EPA promulgated the  
19 Certification Rule over the objections of myriad commenters, including Plaintiffs. Dozens of states  
20 and tribes across the country had argued that the proposed regulation upset the cooperative federalist  
21 principles at the heart of the CWA. *See, e.g.*, Att’y Gen. of States of Wash., N.Y., Cal., et al.,  
22 Comments on Proposed Rule 23–25 (Oct. 21, 2019), [https://www.regulations.gov/comment/EPA-](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0556)  
23 [HQ-OW-2019-0405-0556](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0556) (“State AG Comments”); Pyramid Lake Paiute Tribe, Comments on  
24 Proposed Rule 3 (Oct. 21, 2019), [https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0547)  
25 [0547](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0547); Nez Perce Tribe, Comments on Proposed Rule 9 (Oct. 21, 2019), [https://www.regulations.gov/](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0908)  
26 [comment/EPA-HQ-OW-2019-0405-0908](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0908). These certifying authorities were joined by citizens,  
27 nonprofit organizations, and other concerned parties who pointed to the tremendous harm the  
28 Certification Rule was likely to have on the public and the environment. *See, e.g.*, Sierra Club et al.,

1 Comments on Proposed Rule 1–2 (Oct. 21, 2019), [https://www.regulations.gov/comment/EPA-HQ-](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0903)  
 2 [OW-2019-0405-0903](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0903) (“Sierra Club Comments”); Am. Fisheries Soc’y et al., Comments on  
 3 Proposed Rule 1–2 (Oct. 21, 2019), [https://www.regulations.gov/comment/EPA-HQ-OW-2019-](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0784)  
 4 [0405-0784](https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0784); Nat’l Wildlife Fed’n, et al., Comments on Proposed Rule 6–8 (Oct. 21, 2019),  
 5 <https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0911>.

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

20 Plaintiffs filed their complaint against EPA requesting vacatur of the Certification Rule on  
 21 September 1, 2020. Plaintiffs maintain that EPA’s rulemaking was arbitrary, capricious, an abuse of  
 22 discretion, and contrary to law because the Certification Rule violated the CWA, was promulgated  
 23 without a satisfactory explanation for upending decades of policy and practice, was promulgated in  
 24

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

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

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

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

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

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

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

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

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

**ARGUMENT**

1  
2 The Court should deny EPA’s request for voluntary remand and allow this case to proceed to  
3 the merits, as doing so is in the interests of judicial economy and would avoid undue prejudice to the  
4 Plaintiffs. In the alternative, the Court should remand to EPA and also vacate the legally invalid  
5 Certification Rule.

6 **I. The Court Should Deny EPA’s Request for Voluntary Remand Without Vacatur.**

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

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

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

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



1 either compelled or forbidden by the governing statute to reach a different result.” *See SKF USA Inc.*  
 2 *v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).<sup>3</sup>

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

11 The heart of this case is whether the Certification Rule is contrary to the CWA. Among the  
 12 numerous provisions of the Certification Rule that are violative of the text of Section 401 are the  
 13 provisions limiting the scope of an agency’s review of applicants’ activities, *see* 40 C.F.R.  
 14 §§ 121.1(f), (n); 121.3; *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S.700, 707–  
 15 13 (1994), and provisions that grant federal agencies authority to ignore state and tribal decisions to  
 16 deny or condition certifications based on the failure to comply with newly created requirements  
 17 found in the Certification Rule, *see* 40 C.F.R. § 121.9.

18 The Biden administration and EPA have raised questions akin to those raised by the  
 19 Plaintiffs<sup>5</sup> as to whether the CWA forbids provisions of the Certification Rule. President Biden  
 20

21 <sup>3</sup> Courts in the 9th Circuit “generally look to the Federal Circuit’s decision in *SKF USA* for guidance  
 22 when reviewing requests for voluntary remand.” Order Granting Req. for Voluntary Remand  
 23 Without Vacatur, *N. Coast Rivers All. v. U.S. Dep’t of the Interior*, No. 16-CV-00307, 2016 WL  
 8673038, at \*3 (E.D. Cal. Dec. 16, 2016).

24 <sup>4</sup> *See also* Press Release, EPA, *supra* note 1.

25 <sup>5</sup> Plaintiffs raise statutory arguments against the rule in their complaint pointing out that the text and  
 26 purpose of CWA Section 401 compels EPA to rescind the Certification Rule. Suquamish Compl. ¶¶  
 27 77–81. Several of Plaintiffs’ comments on the proposed version of the Certification Rule argue  
 28 multiple points of statutory construction, including that EPA’s narrowing of the scope of Section 401  
 review of applicant activities is not permitted by the CWA. Sierra Club Comments at 8–10 (“*PUD*  
*No. 1 . . .* was plainly a *Chevron* step 1 decision, resting on the conclusion that the statutory text was  
 unambiguous.”); Suquamish Tribe, Comments on Proposed Rule 5–6 (Oct. 21, 2019),  
<https://www.regulations.gov/comment/EPA-HQ-OW-2019-0405-0926>.

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

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

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

18 The interest of judicial economy weighs against remanding this proceeding without vacatur.<sup>6</sup>  
 19 Indeed, granting EPA’s motion would likely lead to more litigation and administrative burdens, not  
 20 fewer.

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

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

1 Certification Rule to remain on the books between now and 2023 could force it to engage in  
2 litigation over the validity of conditions or denials on Section 401 certifications for specific projects.  
3 Morgan Decl. ¶¶ 19, 24, 25, 27. Should it occur, such litigation could take the form of a challenge to  
4 federal agency attempts to use the Certification Rule to oppose certification decisions, or, more  
5 likely, to defend against industry applicants that attempt to use the Certification Rule to invalidate  
6 conditions or denials or to challenge a certifying agency's ability to exercise its Section 401  
7 authority over a project. At least one additional Plaintiff will likely need to challenge state  
8 certifications that rely on the illegal provisions in the Certification Rule as a basis for granting  
9 certifications that will not fulfill the CWA's purpose of protecting water quality. Goldberg Decl. ¶¶  
10 9, 17. EPA itself appears to be cognizant that such litigation may be forthcoming, noting that  
11 Plaintiffs will "continue to have the option to challenge individual 401 certifications or federal  
12 actions taken pursuant to the Certification Rule as they arise" in the prolonged period before the  
13 Certification Rule is revised. EPA Motion at 12.

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

19 A decision on the merits in this case will help avoid a waste of administrative resources and  
20 judicial resources over the longer term. The Court likely would issue its decision long before EPA's  
21 2023 date for publishing a final rule and would provide greater clarity for ongoing and future  
22 litigation where any party seeks to rely on the construction of Section 401 adopted in the  
23 Certification Rule. The Court also has an opportunity to provide clarification and guidance to both  
24 Plaintiffs and EPA regarding the meaning of Section 401, and whether or not the terms of the  
25 provision are ambiguous, which will give EPA more direction in its reinterpretation of Section 401  
26 during its forthcoming rulemaking. Alternatively, should the Court decide that the statute is  
27 ambiguous and that the agency is owed deference, clarification regarding the statutory meaning of  
28 Section 401 in this case may persuade the Plaintiffs to avoid re-litigating questions of statutory

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

3 **C. Remand Will Unduly Prejudice Plaintiffs.**

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

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

22 The first project, the CEMEX Paiute Pit, is a mine that proposes to discharge pollutants into  
23 the Truckee River, which feeds into Pyramid Lake, a precious cultural resource for the Tribe. *Id.* ¶¶  
24 1, 9, 10, 12, 22, 24. The second project involves sediment removal from a sediment island formed on  
25 the Truckee River behind a federal dam that runs the risk of contaminating Pyramid Lake Paiute  
26 Tribe’s waters with mercury and further sediment deposition. *Id.* ¶¶ 26, 27. In both cases, the Tribe  
27 is concerned that the Certification Rule’s limitations on the scope of its review will prevent Tribal  
28

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

3 Threats to the Tribe’s water quality in turn place endangered and threatened wildlife within  
4 the Reservation in peril and risk revenue expenditures for the Tribal government. *Id.* ¶¶ 10, 11, 20,  
5 23, 26, 27. For example, the Tribe states that, if the Certification Rule remains in force, it may be  
6 unable to stop contamination from projects requiring Construction General Permits which run the  
7 risk of depositing sediment “in the Truckee River delta and impair[ing] the spawning of the  
8 Lahontan Cutthroat Trout and cui-ui.” *Id.* ¶¶ 18–20. Furthermore, the rule will result in  
9 administrative inefficiencies for Pyramid Lake Paiute Tribe, such as forcing administrative staff to  
10 divert more resources towards information gathering in order to ensure that administrative agencies  
11 have a complete application to review. *Id.* ¶¶ 14–17.

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

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

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

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

## 17 **II. The Court Should Vacate the Rule Upon Remand.**

18 If the Court decides to remand the Certification Rule, it must vacate the rule. This is, in part,  
19 because EPA has made no showing that "equity demands" remand without vacatur. *See Pollinator*  
20 *Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Idaho Farm Bureau Fed'n*  
21 *v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)). To the contrary, rather than being one of the "limited  
22 circumstances" when remand without vacatur is permissible, *see Cal. Cmities. Against Toxics v. EPA*,  
23 688 F.3d 989, 994 (9th Cir. 2012), here, the Certification Rule is marred by serious legal errors and  
24 the consequences of vacatur would be less disruptive than the consequences of leaving the rule  
25 unaltered. *See Pollinator Stewardship Council*, 806 F.3d at 532.

### 26 **A. Serious Legal Errors Mar the Certification Rule.**

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

1 Certification Rule runs afoul of the text of the CWA and its purpose to restore and protect the  
2 physical, chemical, and biological integrity of the Nation's waters, 33 U.S.C. § 1251, as well as the  
3 cooperative federalist framework that structures the Act, *see U.S. Dep't of Energy v. Ohio*, 503 U.S.  
4 607, 633 (1992) (White, Blackmun, & Stevens, concurring in part), and Section 401, *see also S.D.*  
5 *Warren Co.*, 547 U.S. at 380. For example, the Certification Rule's provisions narrowing the scope  
6 of states' and tribes' review of the activities of project applicants contradict the Supreme Court's  
7 interpretation of the unambiguous statutory text of Section 401. *See* 40 C.F.R. §§ 121.1(f), (n);  
8 121.3; *see also PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 711–13 (interpreting the scope of review  
9 broadly). The Certification Rule also aggrandizes the role of federal agencies in the Section 401  
10 process in manner wholly proscribed by the CWA, by providing them with the ability to ignore some  
11 state and tribal decisions and to limit the timing and scope of state and tribal requests for information  
12 from applicants. *See* 40 C.F.R. §§ 121.6–121.9; *see also City of Tacoma v. FERC*, 460 F.3d 53, 67  
13 (D.C. Cir. 2006) (noting that, on matters of substance, the federal agency's role is limited to waiting  
14 for the state or tribe's decision and deferring to it). In addition, the Certification Rule attempts to  
15 significantly limit the number and types of projects for which certification is required. *See* 40 C.F.R.  
16 §§ 121.1(f); 121.2.

17 EPA's promulgation of the Certification Rule was also rife with legal errors because (1) the  
18 agency failed to provide sufficient justification for departing from a half century of practice and  
19 policy related to the interpretation and implementation of Section 401; (2) it based its decision to do  
20 so on an EO aimed at promoting fossil fuel infrastructure, not clean water; and (3) EPA did not  
21 present any explanation for how the Certification Rule would be more protective of water quality.  
22 *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43  
23 (1983).

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

1 legal errors can help to establish the seriousness of a legal error). In addition, the Biden  
 2 administration’s rescission of EO 13,868, which mandated revision of EPA’s interpretation of  
 3 Section 401 to help foster fossil fuel infrastructure projects, supports Plaintiffs’ claims that the  
 4 Certification Rule was promulgated based on impermissible factors unrelated to water quality. *See*  
 5 86 Fed. Reg. at 7041.

6 EPA’s characterization of these legal errors as “substantial concerns” rather than serious  
 7 violations of law is belied by the Agency’s own statements. *See* 86 Fed. Reg. at 29,542–43. EPA has  
 8 expressed certainty that the rule must be revised for many of the same reasons that Plaintiffs point to.  
 9 EPA Motion at 5, 12 (stating that “EPA *will* draft new regulatory language” and that the agency  
 10 intends to address Plaintiffs’ concerns on remand) (emphasis added); Goodin Decl. ¶¶ 9, 11 (stating  
 11 that EPA “*will* . . . propose revisions to the rule” and that the agency “*intends* to . . . revise the  
 12 Certification Rule . . . consistent with the cooperative federalism principles central to CWA section  
 13 401”) (emphasis added). This point is crucial: in assessing the seriousness of a legal error, the Court  
 14 must consider whether or not the rule is likely to remain the same after the agency supplements its  
 15 reasoning, or whether “such fundamental flaws in the agency’s decision make it unlikely that the  
 16 same rule would be adopted on remand.” *Pollinator Stewardship Council*, 806 F.3d at 532.<sup>7</sup> Here,  
 17 the agency has admitted that there is no chance the same rule will be promulgated following remand,  
 18 meaning that it should be vacated if remand is granted.

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

22  
 23  
 24  
 25 <sup>7</sup> Plaintiffs contend that EPA’s concessions about the errors in the rule combined with the flaws on  
 26 the face of the rule are sufficient to hold the rule invalid and immediately vacate it. *See Cal.*  
 27 *Communities Against Toxics*, 688 F.3d at 993 (holding rule invalid based on EPA’s concessions as  
 28 confirmed by the record). Should this Court rule otherwise, Plaintiffs reserve their right to argue for  
 the invalidity of the rule through a fully developed motion for summary judgment in this proceeding  
 in accordance with a schedule set by the court and in forthcoming proceedings.



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

2           The Court should vacate the Certification Rule upon remand to avoid disruption and return to  
3 the status quo ante. *See Pollinator Stewardship Council*, 806 F.3d at 532 (vacating an agency action  
4 that was itself disruptive). The Section 401 regulations and guidance in effect prior to the  
5 promulgation of the rule worked well, allowing most applications for certification filed each year to  
6 be processed promptly. According to EPA’s own documents, from 2013 to 2018, an average of  
7 4,266 individual and 58,766 general federal permits requiring Section 401 certification were issued  
8 per year. EPA, EPA ICR No. 2603.02, ICR Supporting Statement, Information Collection Request  
9 for Updating Regulations on Water Quality Certification Proposed Rule, Docket ID No. EPA-HQ-  
10 OW-2019-0405-0070, at 8 (Aug. 2019). As recently as 2019, EPA conceded that denials of permits  
11 under Section 401 were “uncommon” and that decisions on certification requests typically occurred  
12 within the period of time contemplated by Congress. EPA, Economic Analysis for the Clean Water  
13 Act Section 401 Certification Rule, Docket ID No. EPA-HQ-OW-2019-0405-1125, at 15 (May  
14 2020). Delays in processing Section 401 applications most commonly occurred because of  
15 “incomplete certification requests.” *Id.*

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

1 *Stewardship Council*, 806 F.3d at 532 (ordering vacatur where failing to do so would threaten bee  
2 populations and “risk more potential environmental harm than vacating it”) *with Cal. Cmities.*  
3 *Against Toxics*, 688 F.3d at 993–94 (denying vacatur where vacatur would delay the construction of  
4 a power plant which would result in blackouts, create air pollution, place at risk a billion-dollar  
5 investment and hundreds of jobs, and necessitate the passage of new state legislation). The agency  
6 cannot make this showing. Vacatur of the Certification Rule certainly will not have consequences on  
7 par with the type of enormous and irremediable social, environmental, and economic disruptions that  
8 the Ninth Circuit has concluded prohibit vacatur. *See Cal. Cmities. Against Toxics*, 688 F.3d at 993–  
9 94.

10 Indeed, as in *Pollinator Stewardship Council*, here harm, and particularly harm to the  
11 environment, would be caused by a failure to vacate the Certification Rule. *See* 806 F.3d at 532  
12 (vacating an EPA action on the grounds that a failure to do so would place populations of bees at  
13 risk). Just as in *Pollinator Stewardship Council*, Plaintiffs have identified endangered and threatened  
14 species of fish that they are concerned would be placed at risk between now and the spring of 2023  
15 by a failure to vacate the Certification Rule. Morgan Decl. ¶¶ 10, 20, 23, 26, 27; Goldberg Decl. ¶¶  
16 4, 7. They have also identified other types of environmental harms tied to projects slated for Section  
17 401 review between now and the spring of 2023. These imminent environmental harms include  
18 threats to air quality, water bodies, and the aesthetic character of affected areas. *See, e.g.*, Morgan  
19 Decl. ¶ 25; Goldberg Decl. ¶¶ 6, 12, 15. And much of this harm, should it occur, would be  
20 irreparable. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental  
21 injury, by its nature ... is often permanent or at least of long duration, *i.e.*, irreparable.”).

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

1 In addition, Pyramid Lake Paiute Tribe has described how the Certification Rule would  
2 create obstacles to routine Section 401 reviews of Construction General Permits. *Id.* ¶¶ 18–20. The  
3 Tribe notes that the regulation would cause a significant resource strain on their already-taxed staff  
4 by upending the Tribe’s standard practices and procedures for information-gathering for all Section  
5 401 certification reviews for projects affecting the waters of the Pyramid Lake Reservation. *Id.* ¶¶  
6 13–17.

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

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

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**CONCLUSION**

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

DATED: July 26, 2021

Respectfully submitted,

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11  
 12 **IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13  
 14 In Re  
 15 Clean Water Act Rulemaking

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

16 **PLAINTIFF STATES' OPPOSITION  
 TO DEFENDANTS' MOTION FOR  
 17 REMAND WITHOUT VACATUR**

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

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## I. INTRODUCTION

1  
2  
3 In September of 2020, the Environmental Protection Agency’s final *Clean Water Act*  
4 *Section 401 Certification Rule* took effect, drastically curtailing state authority under section  
5 401 of the Clean Water Act, 33 U.S.C. § 1341. Because of the significant harms to state fiscal  
6 and natural resources posed by the 2020 Rule, the undersigned States filed the current action  
7 challenging the rule as violative of the Administrative Procedure Act and the Clean Water Act.  
8 Following the new Presidential Administration’s statements that it would review the 2020 Rule  
9 to determine compliance with an executive order on improving public health and protecting  
10 the environment, Exec. Order No. 13,990, the States agreed to stay the case pending EPA’s  
11 decision on what, if any, actions it would take upon the conclusion of its review. EPA has now  
12 made its decision, announcing its intent not to repeal, but to revise, the 2020 Rule and  
13 committing only to an “expected” spring 2023 completion date. EPA seeks remand of the 2020  
14 Rule without vacatur, leaving the Rule in place for at least an additional two years and causing  
15 significant harms to the States during that time. Moreover, EPA seeks dismissal of the States’  
16 legal challenge with prejudice, permanently insulating the 2020 Rule from judicial review.

17 The States support EPA’s efforts to revisit the 2020 Rule and certainly share the  
18 substantial concerns EPA itself raises as to the Rule’s lawfulness. The States, however, oppose  
19 EPA’s remand motion and urge the Court to establish an expedited briefing schedule on the  
20 merits at the Court’s earliest convenience. EPA’s assertion that remand will have “limited”  
21 prejudicial effect on the States’ interests is demonstrably false. As documented in the States’  
22 declarations and outlined below, the harms that will flow from the continued application of the  
23 2020 Rule over the next two years are severe and potentially irreversible. Indeed, significant  
24 harms that greatly prejudice the States and the States’ co-Plaintiffs in this case are *already*  
25 occurring. Moreover, no judicial economy is gained by forcing piecemeal litigation of 401  
26

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

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

## 10 II. ARGUMENT

### 11 A. Remand Without Vacatur Is Improper Because It Will Unduly Prejudice the 12 Plaintiff States.

13 While an agency's stated intent to revisit a challenged rule is a necessary condition to  
14 obtain remand, "it is not always a sufficient condition." *Am. Waterways Operators v. Wheeler*,  
15 427 F.Supp.3d 95, 98–99 (D. D.C. 2019). Courts have "broad discretion" to grant or deny an  
16 agency's remand request and, in exercising that discretion, routinely deny remand when it  
17 would "unduly prejudice the non-moving party." *See Utility Solid Waste Activities Group v.*  
18 *EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018), *citing FBME Bank Ltd. v. Lew*, 142 F.Supp.3d 70,  
19 73 (D. D.C. 2015). Courts have also denied agency requests for voluntary remand where the  
20 agency does not propose to vacate the rule and plaintiffs are left "subject to a rule they claimed  
21 was invalid." *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000).

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

1 Sobeck in Support of Plaintiff States’ Opposition to Defendants’ Motion for Remand Without  
 2 Vacatur (Sobeck Decl.) ¶¶ 9–10; Declaration of Paul Wojoski in Support of Plaintiff States’  
 3 Opposition to Defendants’ Motion for Remand Without Vacatur (Wojoski Decl.) ¶ 8;  
 4 Declaration of Loree’ Randall in Support of Plaintiff States’ Opposition to Defendants’ Motion  
 5 for Remand Without Vacatur (Randall Decl.) ¶ 5. Between now and EPA’s estimated  
 6 completion of a revised rule in 2023, the 21 States challenging the Rule in this action will  
 7 receive and process thousands of 401 certification requests.<sup>1</sup> *See, e.g., id.* All of those requests  
 8 are (or will be) governed by the illegal and restrictive 2020 Rule—a rule that, even by EPA’s  
 9 own reckoning, fails to adhere to the cooperative federalism principles embodied within the  
 10 Clean Water Act and significantly impairs the States’ abilities to protect water quality. EPA  
 11 Motion for Remand at 7 (EPA Br.). As set out below, far from having “limited” impacts, the  
 12 2020 Rule is causing (and will continue to cause) detrimental effects to water quality and State  
 13 resources. Because the States will be severely prejudiced if the Rule is allowed to stand while  
 14 EPA conducts a multi-year revision process, the Court should deny EPA’s request for remand  
 15 and allow the parties to proceed to the merits.

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

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

25 \_\_\_\_\_  
 26 <sup>1</sup> In addition to the Plaintiff States, tribal plaintiffs expect to receive a substantial  
 number of requests for 401 certification during the same period.

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

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

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25  
26 <sup>2</sup> H.R. Rep. No. 91-127, at 24 (1969), reprinted in 1970 U.S.C.C.A.N. 2691, 2697.

1           These impacts on state water resources occur across a wide spectrum of activities  
2 requiring approvals from various federal agencies, but are perhaps most acutely felt in the  
3 context of hydropower licensing and relicensing. In addition to point source impacts, dams are  
4 significant sources of non-point water pollution. Randall Decl. ¶ 7. Without proper mitigation  
5 measures, dams cause increased water temperature resulting from decreased water flows  
6 within streams and decreased flow rates as a result of ponding behind dam structures.  
7 Randall Decl. ¶ 7; Declaration of Corbin J. Gosier in Support of Plaintiff States’ Opposition to  
8 Defendants’ Motion for Remand Without Vacatur (Gosier Decl.) ¶ 13; Sobeck Decl. ¶¶ 76,  
9 79–80. Dam structures alter flow in rivers and creeks downstream of hydroelectric dams, cause  
10 fluctuations of water levels within the impoundment created by dams, kill fish passing through  
11 hydroelectric turbines, and prevent the upstream movement of fish and other water or wetland-  
12 dependent wildlife. Gosier Decl. ¶ 13; Sobeck Decl. ¶¶ 79, 80. Dam reservoirs also lead to  
13 vegetation loss, reducing shading and increasing temperatures, and wave impacts caused by  
14 reservoir creation increase turbidity and sedimentation. Randall Decl. ¶ 7; Sobeck Decl.  
15 ¶ 79–80. These impacts from dam structures and operations, in turn, can result in a host of  
16 adverse impacts, including further temperature increases, smothered aquatic habitat,  
17 interference with predation patterns, and lower oxygen levels. Randall Decl. ¶ 7; Gosier Decl.  
18 ¶ 15; Sobeck Decl. ¶ 76, 79–80. Increased turbidity triggered by dams can also cause an  
19 increase in toxin mobility, including PCBs and other “forever chemicals,” due to increased  
20 absorption of these chemicals by sediment particles. Randall Decl. ¶ 7.

21           Typically, states and tribes have relied on the section 401 certification process to  
22 mitigate or eliminate these and other impacts. For example, certifying authorities included in  
23 401 certifications requirements to mitigate vegetation loss, geoengineer shorelines to decrease  
24 erosion, and ensure reservoir discharge points are lower in the water column where  
25 temperatures are lower. Randall Decl. ¶ 8; Gosier Decl. ¶ 15; Sobeck Decl. ¶ 78. Additionally,  
26 because hydropower licenses can last up to 50 years, the ability to revisit and modify 401

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

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

12 Far from being hypothetical, these impacts will occur during EPA’s reconsideration of  
13 the 2020 Rule, with numerous relicensings set to take place in multiple Plaintiff States if the  
14 2020 Rule is in effect for the next two years. Randall Decl. ¶ 10; Gosier Decl. ¶ 23; Sobeck  
15 Decl. ¶ 73. And, because FERC licenses for dams will last between 30-50 years, the lack of  
16 adequate water quality conditions attached to these licenses will have adverse impacts for a  
17 *generation*. Randall Decl. ¶ 11; Sobeck Decl. ¶ 72. For instance, in Washington alone three  
18 hydropower dams on the Skagit River will require 401 certifications between now and the  
19 spring of 2023, well within EPA’s estimate of how long the 2020 Rule will remain in effect.  
20 Randall Decl. ¶ 10. The Skagit is home to numerous anadromous fish species, including  
21 Chinook salmon—a threatened species and the primary source of food for the endangered  
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25 <sup>3</sup> This practice was long permitted as a practical and necessary part of section 401  
26 authority, but is now prohibited by the 2020 Rule. 85 Fed. Reg. 42,280 (July 13, 2020) *citing*  
40 C.F.R. § 121.6(e).

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

9 Other states will suffer similar impacts. Like much of the West, California is  
10 experiencing extreme drought conditions and is struggling to maintain its rivers at a  
11 temperature habitable for salmonids and native fishes. Sobeck Decl. ¶¶ 53, 79–80. Even under  
12 non-drought conditions, temperature management is a material issue in most FERC-related  
13 certifications where inaction for decades could result in permanent water quality impairments  
14 and impacts to threatened, endangered, or other aquatic species of concern. *Id.* ¶ 79. The 2020  
15 Rule hamstring California’s efforts to address temperature and other impacts resulting from  
16 hydropower operations. It may be too late to provide the water quality protections at all in  
17 some cases if the 2020 Rule is left standing until 2023. *Id.* ¶ 81. North Carolina regularly relied  
18 on section 401 to control nutrient loading and excess sedimentation, two of the most harmful  
19 threats to North Carolina’s water quality and the cause of many of the impacts discussed above,  
20 including destruction of aquatic habitat and increased pollution transport. Wojoski Decl.  
21 ¶¶ 19–22, 33. Colorado estimates that the vast majority of conditions it utilizes under section  
22 401 to control adverse water quality impacts from water supply projects to streams and  
23 reservoirs (like increased temperatures, reduced flows and higher metal concentrations) are  
24

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



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

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

7 **2. The 2020 Rule will continue to wreak havoc on the “nationwide” permit**  
8 **system**

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

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

1 next two years. Wojoski Decl. ¶ 30; Randall Decl. ¶ 24. Citing the 2020 Rule as justification,  
2 the Corps upended the nationwide permit system for these permits. To begin with, and as  
3 recently explained by the Council on Environmental Quality (CEQ), the Corps' expedited  
4 process for 401 certification of the nationwide permits was "unusual" and significantly  
5 curtailed state authority and input throughout the process. Randall Decl. ¶¶ 14–17, Ex. E. As  
6 CEQ noted, "[t]he timing for renewal of the permits occurred earlier than in previous renewals,  
7 401 certification was requested on proposed permits rather than final ones, and requests for  
8 extensions of the reasonable period of time by which to submit 401 certifications were  
9 declined." *Id.*

10 Despite the fact that the Clean Water Act requires federal agencies to accept 401  
11 certification decisions as written, the Corps relied on the 2020 Rule to require states to review  
12 certification requests and issue decisions within an unprecedented short review window, force  
13 states to certify draft permits, "declined to rely" on certifications based on its determination  
14 that certifications contained "reopener" clauses and, in one case, declared waiver of state  
15 certification authority based on a state's inadvertent omission of written explanations for  
16 certification conditions. Randall Decl. ¶ 14, 18; Declaration of Rebecca Roose in Support of  
17 Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Roose Decl.)  
18 ¶ 22, Wojoski Decl. ¶¶ 5, 26–28, Sheeley Decl. ¶ 31; Sobeck Decl. ¶ 17. As a result of the  
19 2020 Rule, the Corps invalidated state certification decisions and conditions for these 16  
20 nationwide permits throughout a wide swath of the country, including multiple Plaintiff States.  
21 The Corps' application of the Rule also led to the complete loss of section 401 authority for  
22 multiple permits in several states.

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

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

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

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

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

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

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

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

- 23 • The 2020 Rule mandates that project proponents submit a pre-filing meeting request  
 24 30 days before an application can be submitted, regardless of whether such a meeting has any

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25 <sup>5</sup> The purpose of this denial was to ensure that North Carolina could include  
 26 individualized conditions for projects relying on these nationwide permits. Wojoski Decl.  
 ¶¶ 28–29.

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

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

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

1 time” in which state action must be completed. *See* 40 C.F.R. § 121.5(b). This portion of the  
2 2020 Rule prohibits the certifying authority from determining when it has enough information  
3 about a proposed project such that the application can be deemed complete; instead, a project  
4 proponent is considered to have submitted a complete request so long as the minimal  
5 information required by the 2020 Rule is provided, and without regard to the requirements of  
6 state administrative procedures or the quality, descriptiveness, or completeness of the submitted  
7 materials. Wojoski Decl. ¶¶ 10–11; Randall Decl. ¶¶ 26–29. As a result, the “reasonable period  
8 of time” clock may begin counting down well in advance of when a certifying authority has the  
9 information necessary to adequately review the potential impacts to water quality. Wojoski  
10 Decl. ¶ 11; Randall Decl. ¶ 27. Moreover, while the 2020 Rule does permit a certifying authority  
11 to request additional information it deems necessary for an adequate (and legally defensible)  
12 review of the proposal, the clock for the state’s review does not reset when that information is  
13 provided. EPA’s solution to this is for certifying authorities to simply *deny* the certification  
14 request. 85 Fed. Reg. at 42,273 (July 13, 2020). Thus, where state administrative procedures  
15 require an applicant to provide additional information, state agencies must choose between  
16 complying with state administrative procedures (and risk waiving their authority under the 2020  
17 Rule) or complying with the 2020 Rule (and risk being sued for noncompliance with state law).  
18 *See* Sheeley Decl. ¶¶ 30, 34; Randall Decl. ¶ 28. This leads to inefficiencies, project delays, and  
19 wasted staff time. Sheeley Decl. ¶ 30; Wojoski Decl. ¶ 11; Roose Decl. ¶ 21; Mrazik Decl. ¶ 7.

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

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

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

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

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

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

12 Other cases cited by EPA are inapposite and do not counsel remand because none  
13 involve the situation presented here: i.e., where the agency's request for remand would leave  
14 the challenged rule in place for years despite serious concerns over its legality. In *FBME Bank*,  
15 the agency's remand request was granted, but only after the court expressly recognized that the  
16 rule in question had already been enjoined and would not apply to the plaintiff during the  
17 course of the agency's reconsideration. *FBME Bank v. Jacob Lew*, 142 F. Supp. 3d 70, 75  
18 (2015). The court in *American Forest Resource Council v. Ashe*, 946 F. Supp. 2d 1 (D. D.C.  
19 2013), had already determined on the merits that the rule was invalid and only departed from  
20 the typical rule requiring vacatur because the harms of leaving an endangered species without  
21 *any* habitat protections during remand outweighed the benefits of vacating the rule. *Id.* at 44–  
22 45.

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



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

10 Finally, EPA’s argument on impacts to agency resources also rings hollow. To begin  
11 with, EPA is under no legal obligation to defend the 2020 Rule—especially in light of its  
12 concession that the 2020 Rule fails to adhere to cooperative federalism, is contrary to Supreme  
13 Court case law, and negatively impacts states’ abilities to protect water quality. Indeed,  
14 agencies frequently decline to defend rules with which they disagree or have changed policy  
15 on. *See, e.g., League of Women Voters of U.S. v. Newby*, 838 F.3d 1 (D.C. Cir. 2016) (United  
16 States Election Assistance Commission declining to defend administrative decisions approving  
17 guidance on voting laws that required proof of citizenship). But, even if EPA does defend the  
18 validity of the 2020 Rule, impacts to the agency would be minimal. Notably, questions related  
19 to the legality of the 2020 Rule are entirely legal ones, and EPA will not be required to develop  
20 or provide any additional scientific or technical basis for the 2020 Rule. Indeed, in adopting  
21 the 2020 Rule, EPA admitted that it did not consider potential adverse water quality impacts  
22 or any other non-policy concerns. 85 Fed. Reg. 42,227 (July 13, 2020). Thus, any impacts to  
23 the agency are limited—a point that is driven home by the fact that EPA’s declaration in  
24 support of its motion to remand does not allege any lack of resources necessary to engage in  
25 the current litigation. *See* ECF No. 143-1 (Goodin Declaration).  
26

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

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

7 In the event the Court decides to remand the 2020 Rule, the Court should remand with  
 8 vacatur.<sup>6</sup> Generally, vacatur is the default in cases where a court orders a remand of a  
 9 challenged agency action. *See, e.g., All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d  
 10 1105, 1121–22 (9th Cir. 2018) (citing *Alsea Valley All. v. DOC*, 358 F.3d 1181, 1185 (9th Cir.  
 11 2004)). EPA's motion does not explain why vacatur of the 2020 Rule is not appropriate. Given  
 12 (1) the clear and serious errors involved in the 2020 Rule; (2) the agency's essential concession  
 13 that the Rule must be significantly revised in order to address its numerous deficiencies, and  
 14 (3) the serious harms that will result from its continued implementation during EPA's two-  
 15 year new rulemaking process, vacatur is appropriate and justified.

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

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

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

1 adopted on remand.” *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir.  
2 2015). As to the second factor, “courts may decline to vacate agency decisions when vacatur  
3 would cause serious and irreparable harms that significantly outweigh the magnitude of the  
4 agency’s error.” *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic & Atmospheric Admin.*,  
5 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) (internal quotations).

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

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

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

3           “One way to measure the seriousness of an agency’s errors is to attempt to evaluate the  
4           likelihood that the agency will be able to justify future decisions” that would be the same as  
5           the challenged agency action. *N. Coast Rivers Alliance*, 2016 WL 8673038, at \*8. In assessing  
6           this factor, courts have relied on the agency’s admission of error or the agency’s concession  
7           that the challenged decision must be revised. *See Cal. Cmty. Against Toxics*, 688 F.3d 989,  
8           993 (2012) (considering EPA’s concession that there are flaws in the reasoning supporting its  
9           challenged rule in the evaluation of the first *Allied-Signal* factor); *N. Coast Rivers Alliance*,  
10          2016 WL 8673038, at \*8 (considering the Department of Interior’s admission that its new  
11          decision will need to be revised). EPA has effectively conceded that the 2020 Rule was  
12          promulgated in error. EPA specifically admits that it must “reconsider and revise the 2020  
13          Rule” because it has “substantial concerns with a number of provisions of the 401  
14          Certification Rule that relate to cooperative federalism principles and CWA section 401’s goal  
15          of ensuring that states are empowered to protect their water quality.” EPA Br. at 7 (citing 86  
16          Fed. Reg. at 29,542) EPA also points to its serious concerns that “the rule’s narrow scope of  
17          certification and conditions may prevent state and tribal authorities from adequately protecting  
18          their water quality.” *Id.* In particular, EPA will specifically seek to reconsider and revise “the  
19          Rule’s interpretation of the scope of certification and certification conditions, and the definition  
20          of ‘water quality requirements’ as it relates to the statutory phrase ‘other appropriate  
21          requirements of State law,’ including whether the Agency should revise its interpretation of  
22          scope to include potential impacts to water quality not only from the ‘discharge’ but also from  
23          the ‘activity as a whole’ consistent with Supreme Court case law.” EPA Br. at 3.

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

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

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

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

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

20 The balance of equities similarly weighs heavily in favor of vacatur. EPA has not given  
21 any “indication that [they] . . . or anyone else would be seriously harmed or disrupted” if the  
22 2020 Rule were vacated. *See ASSE Int’l v. Kerry*, 182 F. Supp. 3d 1059, 1065 (C.D. Cal. 2016).  
23 The 2020 Rule upended the long-standing regulatory regime that governed state certifications  
24 for nearly 50 years. Compl. ¶¶ 1.6, 5.15–5.31. Vacating the 2020 Rule will simply restore the  
25 status quo that existed for more than four decades while EPA engages in a rulemaking to  
26 remedy the Rule’s defects. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“The

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

9 Even if there was a credible argument to be made that vacatur and return to the prior  
10 familiar regulatory framework will be disruptive, the seriousness of any such disruption is  
11 vastly outweighed by the significant harms from continuing to implement the 2020 Rule on  
12 remand. As set forth in Section A above, Plaintiffs have presented detailed testimony  
13 demonstrating that the harms from maintaining the Rule while the agency engages in prolonged  
14 rulemaking are numerous, significant, and potentially irreparable. These serious harms include  
15 frustration of Plaintiffs’ efforts to implement environmental protections to limit the water  
16 quality impacts of federally approved projects, such as hydropower projects and dams, on state  
17 natural resources and endangered species; ensure critical drought protections of water  
18 resources are put in place timely; and impose conditions required by state law on federal  
19 projects governed by Army Corps’ nationwide permits, among others. Wojoski Decl.  
20 ¶¶ 16–22; Randall Decl. ¶¶ 7–10; Gosier Decl. ¶¶ 12–13; 23 Sobeck Decl. ¶¶ 17–19, 22–48,  
21 70–79. And the Rule has and will continue to cause delay, confusion, inconsistencies, and  
22 increased administrative costs borne by the Plaintiffs as they try to comply with its onerous  
23 and illegal requirements. Sobeck Decl. ¶¶ 21, 22, 48, 50; Konowal Decl. ¶ 7 (issues with  
24 modification); Wojoski Decl. ¶ 10–11; Randall Decl. ¶¶ 26–28 (issues with insufficient info);  
25 Mrazik Decl. ¶ 5; Wojoski Decl. ¶ 9; Sheeley Decl. ¶ 25 (issues with prefilling meeting  
26 requests).

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

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

### 17 III. CONCLUSION

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

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

3 Dated: July 26, 2021

Respectfully submitted,

4  
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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 26, 2021

/s/ Kelly T. Wood

Kelly T. Wood

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11  
 12 **IN THE UNITED STATES DISTRICT COURT**  
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14  
 15 In Re  
 16 Clean Water Act Rulemaking

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

17 **DECLARATION OF EILEEN**  
 18 **SOBECK IN SUPPORT OF**  
 19 **PLAINTIFFS' OPPOSITION TO**  
 20 **MOTION FOR REMAND**

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

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

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

24           3.       In preparing this declaration, I relied on my professional experience and training  
25 which have provided me a strong basis to determine ongoing and future harms caused by the  
26

1 401 Rule. If called upon to testify about the matters discussed herein, I could and would testify  
2 competently hereto.

3 **PERSONAL BACKGROUND**

4 4. I have been employed as the Executive Director of the State Water Board since  
5 2017. My duties and responsibilities include overseeing all divisions and offices of the State  
6 Water Board, including the Division of Water Rights and the Division of Water Quality. The  
7 Division of Water Rights is responsible for issuing Section 401 water quality certifications  
8 (“certifications”) for activities or facilities subject to FERC licensing or involving the diversion  
9 or use of water. The Division of Water Quality is responsible for issuing certifications related  
10 to discharges not associated with a FERC license or appropriation of water. The Division of  
11 Water Quality also coordinates certification responsibilities for the nine Regional Water  
12 Quality Control Boards (“Regional Water Boards”).

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

21 **CERTIFICATIONS ISSUED UNDER CLEAN WATER ACT SECTION 401**

22 6. Section 401 of the Clean Water Act (“Section 401”) requires that every  
23 applicant for a federal permit or license for an activity that may result in a discharge to waters  
24 of the United States provide a certification from the state in which the discharge occurs that the  
25 activity will meet requirements adopted under specific Clean Water Act sections as well as  
26



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

3 7. Section 401 allows each state to designate an agency responsible for reviewing  
4 and approving or denying water quality certification requests. 33 U.S.C. § 1341(a)(1). In  
5 California, the State Water Board is the agency with certification authority. Cal. Water Code §  
6 13160; Cal. Code Regs. tit. 23, §§ 3830-3838, 3855-3861, 3867-3869.

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

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

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

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

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

21 13. The State Water Board issues certifications for discharges that may fall under  
22 the jurisdiction of more than one Regional Water Quality Control Board or involve an  
23 appropriation of water, a hydroelectric facility where the proposed activity requires a FERC  
24 license or amendment to a FERC license, or any other diversion of water for domestic,  
25 irrigation, power, municipal, industrial, or other beneficial use.  
26



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

7 18. The Water Boards have also had to make programmatic adjustments due to the  
8 401 Rule. For example, in some instances where the USACE has found waiver of the Water  
9 Boards' Section 401 certification authority based on the 401 Rule, the Water Boards have had  
10 to issue additional state water quality approvals, known as waste discharge requirements, to  
11 protect water quality. These additional approvals result in greater resource expenditures for  
12 largely the same result as under the prior rules.

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

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

22 21. The 401 Rule has introduced a high level of uncertainty and confusion into the  
23 certification process in California which inhibits, rather than promotes, the system of  
24 cooperative federalism established by the Clean Water Act. Both the Lake Fordyce Dam  
25 Safety Project and Emergency Drought Salinity Barrier Project, discussed below, show how  
26

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

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

#### 10 **A. Lake Fordyce Dam Safety Project**

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

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

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

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

23 27. DSOD has classified Lake Fordyce Dam as having an extremely high  
24 downstream hazard potential, meaning that dam failure when Fordyce Reservoir (also referred  
25  
26

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

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

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

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

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

21 32. The State Water Board was the California Environmental Quality Act  
22 (“CEQA”) lead agency for the project. As part of the project’s CEQA process, on September  
23 24, 2020, the State Water Board released a draft Initial Study/Mitigated Negative Declaration  
24 for public review and comment. After considering the comments received, on October 30,  
25  
26

1 2020 the State Water Board adopted a Mitigated Negative Declaration and Mitigation  
2 Monitoring and Reporting Program.

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

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

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

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

- 17 a. During the meeting, USACE's Sacramento District expressed the opinion that  
18 the 401 Rule would apply, and that, under USACE's their interpretation of the  
19 401 Rule, certifications cannot be amended or modified.
- 20 b. State Water Board staff explained that because the terms of the October 2020  
21 certification did not allow for the implementation of PG&E's proposed changes,  
22 the certification would need to be amended. Board staff also explained that,  
23 based on a U.S. EPA Fact Sheet providing answers to frequently asked  
24  
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1 questions,<sup>1</sup> PG&E's proposed changes to this existing project should be  
2 processed under the previously applicable Clean Water Act Section 401  
3 regulations because PG&E had submitted its certification request prior to the  
4 September 11, 2020 effective date of the 401 Rule. State Water Board staff  
5 provided USACE's Sacramento District with a link to this U.S. EPA document  
6 and requested that USACE consider U.S. EPA's and Board staff's positions.

7 37. On May 19, 2021, USACE's Sacramento District informed the State Water  
8 Board that after internal discussion and debate, USACE management continued to interpret the  
9 401 Rule as prohibiting modifications to a certification after issuance, even when the request  
10 for certification was submitted before the effective date of the 401 Rule. According to  
11 USACE, the key inquiry was whether "the modified activity constitutes as 'material change'  
12 that has a potential to violate [water quality] standards without an update to the [certification]."  
13 If so, USACE would consider it a new action subject to the procedural requirements of the 401  
14 Rule.

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

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

24  
25 <sup>1</sup> Available at [https://www.epa.gov/sites/production/files/2020-06/documents/frequently\\_asked\\_questions\\_fact\\_sheet\\_for\\_the\\_clean\\_water\\_act\\_section\\_401\\_certification\\_rule.pdf](https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf).  
26

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

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

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

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

19           44.     On July 15, 2021, USACE’s Sacramento District emailed the State Water  
20 Board, relaying guidance provided by USACE headquarters to USACE districts regarding  
21 interpretation of the 401 Rule. The email explained that USACE districts had been instructed  
22 that “in the absence of a ‘material change’ determination by the permitting agency [], proposed  
23 project modifications (if approved) may proceed subject to the terms and conditions of the  
24 existing [certification];” if, on the other hand, the permitting agency determines that proposed  
25 project modifications do constitute a ‘material change,’ a new certification is required, and all  
26



1 procedural requirements of the 401 Rule must be followed, beginning with a request for a pre-  
2 filing meeting. With regard to the Lake Fordyce project, USACE explained that it had  
3 determined that, absent additional information from PG&E or the State Water Board indicating  
4 that a water quality standard or standards established in the existing certification would be  
5 violated by PG&E's proposed changes, PG&E's proposed changes do not constitute a  
6 'material change.' USACE did not specify a timeline for providing this additional information,  
7 or a date on which its preliminary determination would become final. USACE did, however,  
8 state that unless it made a 'material change' determination for the Lake Fordyce project, if the  
9 State Water Board were to issue a certification amendment, USACE would not make that  
10 amendment a binding condition of the USACE permit. The USACE also thanked the State  
11 Water Board for its "continued patience and understanding" as USACE "navigate[s] the new  
12 401 WQC rule."

13 45. Due to USACE's changed position, the State Water Board found itself yet again  
14 faced with numerous questions left unanswered by U.S. EPA in the 401 Rule and  
15 accompanying explanatory text in the preamble to the 401 Rule. *See* 85 Fed. Reg. at 42,210-  
16 284.

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

22 47. Issuing an entirely new certification, including following the procedures and  
23 making the findings required by the 401 Rule, would require the State Water Board to devote  
24 much more time and resources than would be required for an amendment, even if there were  
25 no changes made to the project. If the State Water Board issues a new certification under the  
26

1 401 Rule, it would also run the risk that conditions of certification that are now in effect and  
2 uncontested will be deemed waived by USACE based on the USACE's interpretation of the  
3 limits on state authority adopted in the 401 Rule.

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

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

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

### 19 **B. Emergency Drought Salinity Barrier Project**

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

23 52. San Francisco Bay and the Sacramento–San Joaquin Delta Estuary (“Delta”) are  
24 the hub of California's water supply system and the most valuable estuary and wetlands system  
25 on the West Coast, serving cities, farms, fishing communities, boaters, and fish and wildlife.  
26

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

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

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

19 55. As the project includes the discharge of dredged and fill material into waters of  
20 the United States, DWR applied to USACE for a Clean Water Act Section 404 permit. DWR  
21 sought, and received, emergency authorization from the USACE under Regional General  
22 Permit 8 – Emergency Repair and Protection Activities (“RGP 8”) pursuant to Section 404. As  
23 determined by the USACE, an emergency situation is “one which would result in an  
24 unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and  
25 significant economic hardship if corrective action requiring a Department of the Army permit  
26

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

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

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

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

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

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

22 61. Later that day, USACE sent an email to the State Water Board stating: “. . .  
23 Conditions 10, 11, 15, 16, 20, 23, 24, and 25, do not contain a statement explaining why the  
24 condition is necessary to assure that the discharge from the proposed project will comply with  
25 water quality requirements. Therefore, these conditions do not meet the requirements of 40  
26

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

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

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

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

22 65. Three of the conditions USACE found to be waived (conditions 23, 24 and 25)  
23 are required by regulation to be included in water quality certifications. *See* Cal. Code Regs.  
24 tit. 23, § 3860. These conditions place the permittee on notice that the certification action may  
25 be modified or revoked following administrative or judicial review and ensure that any  
26

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

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

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

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

12 69. The speed with which this certification progressed and with which DWR began  
13 construction were in response to the urgent need for the Emergency Drought Salinity Barrier  
14 Project to address conditions during a state-declared emergency. The State Water Board  
15 expeditiously issued the certification consistent with past practices, its own regulations, and the  
16 specific circumstances before it. Citing the 401 Rule, however, the USACE effectively  
17 delayed an emergency drought project despite issuing its own emergency authorization for the  
18 project. The uncertainty regarding conditions that are permissible in a certification under the  
19 401 Rule (as well as variations in interpretations by different federal agencies or divisions of  
20 federal agencies) resulted in an unnecessary and undesirable delay for this critical project.

21 70. Equally of concern, the 401 Rule impairs the state's sovereignty by impeding  
22 the Water Boards' ability to impose conditions that will ensure that the proposed activity will  
23 comply with water quality standards and other appropriate requirements of state law. As an  
24 example, one of the conditions the USACE rejected based on 401 Rule provides that the  
25 certification may be revised as required by decisions on administrative appeal and judicial  
26

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

#### 4 **C. FERC-Licensed Hydropower Facilities**

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

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

20 73. Before the U.S. EPA completes its new Section 401 rulemaking in mid-2023,  
21 Board staff anticipates receiving multiple requests for certification associated with FERC-  
22 related projects, including FERC license applications, FERC-related maintenance projects, and  
23 drought-related requests for flow variances. For example, by December 2022, staff expects  
24 approximately four applications for FERC licenses, four applications for FERC-related  
25 maintenance projects, and at least six requests for flow variances. These expected requests for  
26

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

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

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

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

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

21 78. Prior to the 401 Rule, the State Water Board imposed, or considered the need  
22 for certification conditions to protect water quality on project activities that fall outside the  
23 typical understanding of point-source discharges, such as requirements for minimum instream  
24 flows and ramping rates; temperature management; aquatic invasive species management;  
25 plans for gravel replenishment, large woody material placement and other habitat measures;  
26



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

14         79. As one specific example, temperature management can be a material issue  
15 associated with hydropower facilities. Hydropower facilities (such as dams and reservoirs) and  
16 their associated operations alter the temperature regime of rivers, often to the detriment of  
17 cold-water species such as salmonids and other aquatic plants and animals that have adapted to  
18 colder waters. Water stored in reservoirs greatly increases the surface area exposed to solar  
19 heating and reduces the amount of water protected by shade. Large reservoirs “stratify” in  
20 summer: the water is warmer at the surface and cooler below the thermocline in deeper waters.  
21 Absent any control devices, or multi-level intakes, downstream temperature management is  
22 primarily achieved directly through flow management. In addition to changes in temperature  
23 due to reservoir storage and release, reservoirs also modify the temperature regime of  
24 downstream reaches by diminishing the volume of water below diversions for hydropower  
25 generation. Hydroelectric dams, which are generally built to take advantage of mountain  
26

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

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

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

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

4  
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6 Eileen Sobeck  
7 Executive Director  
8 State Water Resources Control Board  
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 6  
 7 *Attorneys for Plaintiff State of Washington*

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 9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12

13  
 14 In re

15 Clean Water Act Rulemaking

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

**DECLARATION OF LOREE’  
 RANDALL IN SUPPORT OF  
 PLAINTIFF STATES’ OPPOSITION  
 TO DEFENDANTS’ MOTION FOR  
 REMAND WITHOUT VACATUR**

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

ORAL ARGUMENT REQUESTED

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 22  
 23 I, Loree’ Randall, declare under penalty of perjury under the laws of the State of Washington  
 24 that the following is true and correct:

25 1. I am now and at all times mentioned herein have been a citizen of the United States  
 26 and a resident of the State of Washington, over the age of 18 years, and competent to make this  
 27 declaration. The following is based on my own personal knowledge and understanding.  
 28

1           2.       I am now and have been employed by the State of Washington, Department of  
2 Ecology (Ecology), since October, 1984. For the last 20 years (beginning April, 2001), I have been  
3 the Shorelands and Environmental Assistance Program Section 401/CZM Policy Lead. As the  
4 Section 401 Policy Lead, I am familiar with Ecology's procedures for processing Section 401  
5 certification requests. Part of my duties include providing training and guidance on Section 401,  
6 including recommendations to Ecology's upper management when new rules or policies are  
7 developed regarding section 401 certification. I also review requests for Section 401 Certification  
8 under the Clean Water Act, coordinate with other staff and programs within Ecology in performing  
9 that review, and draft section 401 decisions on behalf of Ecology. In addition, I review draft section  
10 401 decisions made by other staff within Ecology and provide comments and technical assistance  
11 to them.

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

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

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

**Scope:**

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

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

25           8.       Typically, Section 401 is one of the primary mechanisms by which Ecology would  
26 mitigate these water quality impacts—by including conditions necessary to assure compliance with  
27 any “appropriate” requirements of state law and applicable state water quality laws. For example,  
28

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

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

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

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

24 **Nationwide Permit Problems:**

25 12. Pursuant to 33 U.S.C. § 330.1(b), the Army Corps issues nationwide permits for  
26 activities occurring under section 404 of the Clean Water Act and section 10 of the Rivers and  
27 Harbors Act of 1899 with regard to certain activities that have "minimal impacts" to water quality.  
28

1           13. Nationwide permits are considered “general” permits, and certifying authorities  
2 typically make programmatic section 401 decisions that apply to all activities within their  
3 respective jurisdictions issued under a nationwide permit, thereby eliminating the need for project  
4 proponents covered under such a permit to seek individual section 401 certifications. Nationwide  
5 permits are valid for a period of no more than 5 years, after which they are renewed. 33 U.S.C. §  
6 1344(e)(2). Renewal triggers the need for re-certification under section 401.

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

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

25           16. Some of the implications of this were identified in a letter submitted by various  
26 states, including Washington, to the Army Corps on May 11, 2021. Attached hereto as Exhibit D  
27 is a true and correct copy of the May 11, 2021 letter to Lieutenant General Scott A. Spellmon, U.S.  
28



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

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

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

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

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

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

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

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

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

16 **Additional Harms:**

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

19 26. Overall, the 2020 Rule significantly shortens the amount of time Ecology has to  
20 process 401 certification requests and limits the amount of information Ecology can seek from  
21 project proponents resulting in unpredictable and increased workloads. Ecology has traditionally  
22 viewed the 401 timeline to begin when it receives a signed and completed Joint Aquatic Resource  
23 Permit Application (JARPA), which requires project proponents to submit a detailed suite of  
24 information related to the proposed project and its potential impacts, including impacts to water  
25 quality. The information required in a JARPA is substantially more in depth than what project  
26 proponents are now required to submit to start the 401 review clock pursuant to the Rule. In terms  
27 of project impacts, proponents of individual licenses or permits need only identify the location and  
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1 nature of potential discharges, along with the receiving water(s), and a description of how the  
2 proponent plans to monitor and “treat, control, or manage” the discharge. 40 C.F.R. § 121.5(b). For  
3 general licenses or permits, proponents need only identify the “number of discharges expected to  
4 be authorized by the proposed general license or permit each year.” 40 C.F.R. §121.5(c). Under the  
5 Rule, project proponents can submit this minimal information to certifying authorities well before  
6 information required in the JARPA is submitted.

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

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

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

25 30. On top of this, this year alone, Ecology has already received 387 pre-filing meeting  
26 requests (which are now required by the 2020 Rule without exception). Each request has multiple  
27 steps associated with it. This is a significant workload increase for staff, who receive these requests,  
28

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

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

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

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

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

Signature: /s/ Loree' Randall

Printed name: Loree' Randall

Address: 300 Desmond Drive, Lacey WA 98403

Phone Number: 360-485-2796

**ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1**

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

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

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

# **EXHIBIT A**

**October 14, 2020 Letter**



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

Regulatory Branch

October 14, 2020

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

Reference: 2020 Nationwide Permits  
401 Water Quality Certification

Dear Ms. Watson:

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

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

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

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

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

- 2 -

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

(3) Enclosed is a copy of the text of the proposed NWP's.

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

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

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

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

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

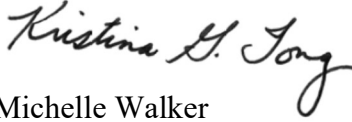
In accordance with the Corps' regulations at 33 CFR 330.4(c), if you deny water quality certification for certain activities authorized by the proposed NWP's where Ecology has 401 water quality certification authority in the State of Washington, then the Corps will deny without prejudice authorization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



- 3 -

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

Sincerely,

  
For Michelle Walker  
Chief, Regulatory Branch

Enclosures

# **EXHIBIT B**

**November 19, 2020 Letter**



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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

November 19, 2020

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

Dear Colonel Alexander Bullock:

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

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

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

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

Colonel Alexander Bullock

November 13, 2020

Page 2

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

Sincerely,

A handwritten signature in black ink, appearing to read "L. Watson", written in a cursive style.

Laura Watson

Director

# **EXHIBIT C**

**December 7, 2020 Letter**



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

DEC 07 2020

Regulatory Branch

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

Dear Ms. Watson:

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Xander L. Bullock".

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

# **EXHIBIT D**

**May 11, 2021 Letter**

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

May 11, 2021

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

**Re: State Section 401 Certifications of Nationwide Permits**

**INTRODUCTION**

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

**BACKGROUND**

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



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Page 2

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

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

### 1. "Decline to Rely" Letters

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

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

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

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

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Page 3

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

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

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

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

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<sup>1</sup> Note that this letter does not discuss all the States’ section 401 certification conditions that the Corps has “declined to rely on” on the ground that they constitute “re-openers” in the Nationwide Permits context. Rather, the letter focuses on the most common examples of purported “re-opener” language.

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Page 4

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

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

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

## **2. Waiver Determinations**

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

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

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

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

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

## CONCLUSION

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

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

**SIGNATURES**

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# **EXHIBIT E**

**July 8, 2021 Letter**



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

July 8, 2021

Governor Jay Inslee  
Washington

Dear Governor Inslee,

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

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

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

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

Thank you,

A handwritten signature in cursive script that reads "Brenda Mallory".

Brenda Mallory  
Chair



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13 *Attorneys for the State of Colorado*

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

16 In re

17 Clean Water Act Rulemaking

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

21 **DECLARATION OF AIMEE M.  
 22 KONOWAL IN SUPPORT OF PLAINTIFF  
 23 STATES' OPPOSITION TO  
 24 DEFENDANTS' MOTION FOR REMAND  
 25 WITHOUT VACATUR**

26 Courtroom: 12, 19<sup>th</sup> Floor  
 27 Date: August 26, 2021  
 28 Time: 8:00 A.M.

ORAL ARGUMENT REQUESTED

I, Aimee M. Konowal, declare as follows:

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

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

3  
4 2. I submit this declaration in support of the Plaintiffs States’ opposition to EPA’s motion for  
5 remand without vacatur. I have personal knowledge of the facts stated herein and can testify to them if  
6 called as a witness. The 401 certification rule promulgated by EPA in 2020 (the “2020 Rule”) threatens to  
7 strip Colorado of its ability to protect its valuable water resources from the operational impacts of large  
8 water supply projects. These projects are essential for providing water for various beneficial uses in our  
9 semi-arid state, and they will become even more critical as the state’s population continues to grow.  
10 Colorado relied on EPA’s prior rule of nearly 50 years to impose conditions on water supply projects to  
11 ensure they are protective of water quality both during construction and through long-term operation. Time  
12 is of the essence; Colorado cannot afford to operate under the 2020 Rule for an undefined period of time  
13 while EPA considers its regulatory options.

14  
15 3. Colorado has received an average of 14 certification requests per year since 2015. Since  
16 September 2020, Colorado has received 13 certification requests. As mentioned above, Colorado’s largest  
17 and most complex 401 certifications are conditional certifications of large water supply projects, which are  
18 triggered by the need for a 404 dredge and fill permit from the U.S. Army Corps of Engineers. Since  
19 2012, Colorado has issued 4 such certifications, and we are currently working on 3 projects of similar  
20 scope that will require 401 certifications in the relatively near future.

21  
22 4. The water quality impacts from water supply projects in Colorado fall within 3 broad  
23 categories: (1) water quality in new or expanded reservoirs; (2) changes to water quality downstream of  
24 new reservoir releases; and (3) changes to water quality as a result of increased diversions to fill new or  
25 expanded reservoirs. For each of our certifications of major water supply projects, we have included  
26 conditions addressing some or all these concerns. For example:

- 1 a. **New and Expanded Reservoirs:** In past certifications, Colorado has required multiple years of  
2 monitoring in expanded reservoirs following project completion, background data collection in  
3 new reservoirs beginning even before the reservoirs are full, and the development of adaptive  
4 management plans to address project-related water quality impairments if they occur in the future.  
5 These conditions are critical to ensuring that reservoir water quality can support aquatic life,  
6 recreational, agricultural, and drinking water uses. In addition, conditions requiring monitoring of  
7 fish tissue mercury help protect public health and are especially important in new or expanded  
8 reservoirs, where fish tissue mercury tends to increase shortly after the reservoir begins to fill.  
9
- 10 b. **Releases from Reservoirs:** Colorado has imposed certification conditions designed to prevent  
11 increases in water quality parameters, such as stream temperature, increases in the concentrations  
12 of heavy metals, and nutrients resulting from natural biogeochemical processes that occur at the  
13 bottom of reservoirs. These conditions have generally included monitoring, establishment of an  
14 adaptive management plan, and the development of plans to address project-related impairments,  
15 should they occur. These plans have often relied on the construction of multi-level outlet works to  
16 manage the quality of releases.  
17
- 18 c. **Increased Water Diversions:** Every water supply project Colorado involves increased diversions.  
19 Diversions change the relative proportion of streamflows that come from various sources; thus,  
20 increased diversions can have a major effect on water quality when they cause the proportion of  
21 downstream flow coming from relatively polluted sources to increase. Furthermore, diversions  
22 reduce the amount of flow available in the original waterbody, making streams more susceptible to  
23 warming and less hospitable for aquatic life. To account for these impacts, Colorado has imposed  
24 conditions requiring extensive temperature, aquatic life, *E. coli*, and nutrients monitoring along  
25 with the development of adaptive management strategies, ranging from curtailment of diversions  
26 to stream restoration and enhancement, to address project-related degradation in water quality.  
27
- 28 5. Under the 2020 Rule, Colorado likely does not have the ability to impose *any* of these

1 conditions because they concern the operation of the “activity as a whole” rather than the discharge that  
2 triggered the federal permitting requirement. As a result, Colorado is severely limited in its ability to  
3 protect its streams and reservoirs from the major impacts that water supply projects can have on stream  
4 temperature and water quality. Furthermore, project proponents now have less incentive to include  
5 protective measures, such as multi-level outlet works and environmental flow releases, in their project  
6 proposals. These costly, complex measures are critical to protecting water quality from project-related  
7 impacts and to developing adaptive management strategies. However, only the 401 certification provides a  
8 mechanism through which these measures can be enforced to ensure compliance with state water quality  
9 requirements; thus, in its absence, project proponents feel less regulatory pressure to incorporate these and  
10 other water quality mitigation measures in their projects from the outset. Besides the major implications  
11 for aquatic life downstream of water supply projects, such as increased stream temperatures, reduced  
12 flows, and higher concentrations of certain metals and nutrients related to increased diversions and/or  
13 reservoir releases, this also undermines public health given that most water supply projects are designed to  
14 increase public water supplies. For example, relatively pristine water is typically diverted to storage in  
15 reservoirs, where certain biogeochemical processes can reduce water quality. At the same time, reducing  
16 flows from high quality sources to the stream results in increased contributions from relatively low quality  
17 sources, such as stormwater outfalls, non-point sources (*e.g.*, agricultural fields), and tributaries flowing  
18 through developed areas. These impacts can lead to increased concentrations of arsenic, iron, and  
19 manganese above water supply diversions and to increased concentrations of *E. coli* in recreational areas.  
20 In addition, the unique aquatic environment in large, recently constructed or expanded reservoirs can lead  
21 to spikes in fish tissue mercury concentrations. These reservoirs are often open to public fishing. Under the  
22 2020 Rule, Colorado would lose its ability to condition new water supply projects to account for these  
23 impacts.  
24

25  
26 6. Colorado’s concern with the 2020 Rule is perhaps best illustrated by a conditional 401  
27 certification for the Northern Integrated Supply Project (NISP). The certification request was evaluated  
28 under previous federal rule, and the certification was issued in January 2020. NISP is a water supply

1 project involving the construction of two new reservoirs and increased diversions from a highly managed  
 2 river system. Proposed discharges into waters of the United States during construction triggered the need  
 3 for a 404 permit. Colorado coordinated with the applicant and the Army Corps of Engineers to formulate  
 4 30 conditions designed to protect water quality during construction and operation of the project:

- 5
- 6 • Conditions 1 through 7 require monitoring, modeling, and mitigation to address in-stream  
 7 temperature impacts associated with increased diversions and reservoir releases. Some reaches of  
 8 the stream are already impaired due to high temperatures, and modeling suggests that the project  
 9 could increase warming in certain locations. These impacts are primarily associated with increased  
 10 diversions.
- 11 • Conditions 8 and 9 involve baseline monitoring in the new reservoirs and require mitigation in the  
 12 event of water quality impairments. Protecting water quality in these reservoirs is necessary to  
 13 ensure that they can support their likely designated uses (drinking water, recreation, aquatic life,  
 14 and agriculture).
- 15 • Conditions 10 through 15 require monitoring for the potential impacts of reservoir releases on  
 16 water quality in downstream waters.
- 17 • Conditions 16 through 25 address the impacts of increased diversions on in-stream arsenic,  
 18 copper, *E. coli*, and nutrient concentrations. These conditions were necessary because the project  
 19 is expected to increase the proportion of stream flow that comes from relatively polluted sources,  
 20 not because of project-related discharges.
- 21 • Conditions 26 and 27 require monitoring for mercury in fish tissue. If mercury concentrations are  
 22 above standards, the project proponent must post fish consumption advisories. Mercury  
 23 concentrations in fish tissue are often high in new reservoirs, and notifying the recreating public is  
 24 critical to protecting public health.
- 25 • Conditions 28 and 29 require monitoring for macroinvertebrates to measure the effects of  
 26 mitigation strategies and to detect and mitigate for any project impacts on aquatic life. Such  
 27 impacts would be associated with project operations, such as diversions and reservoir releases.
- 28 • Condition 30 requires submission of relevant portions of the applicant’s stormwater management  
 plan for construction of water pipeline stream crossings and submission of any related monitoring  
 data.

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

26 7. In addition to the federal 401 framework, Colorado’s 401 certification program operates  
 27 pursuant to the Colorado Water Quality Control Commission’s Regulation #82 (5 C.C.R. 1002-82).  
 28

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

7  
8 8. Under Regulation #82, Colorado is required to perform antidegradation reviews for  
9 projects receiving 401 certifications. Antidegradation reviews for most water supply projects require  
10 protection against “significant degradation,” which is defined generally as degradation to water quality  
11 that erodes the difference between baseline conditions and the applicable standard; in other words,  
12 significant degradation occurs before water quality exceeds standards. Increased diversions and other  
13 changes in flow associated with water supply projects can cause significant degradation of temperature,  
14 nutrients, and other water quality constituents. Under the 2020 Rule, however, Colorado would be barred  
15 from developing conditions that address these impacts. In this way, Colorado could not comply with its  
16 own state water quality regulations because of the narrower scope of the 2020 Rule.

17  
18 9. Regulation #82 assumes that adaptive management is a permissible strategy for providing  
19 “reasonable assurance” that a project will comply with water quality standards. This is consistent with the  
20 prior rule, which required certifying authorities to provide “[a] statement that there is a reasonable  
21 assurance that the activity will be conducted in a manner which will not violate applicable water quality  
22 standards” as part of its certification. The 2020 Rule, by contrast, limits the scope of the state certification  
23 to “assuring that a discharge from a Federally licensed or permitted activity will comply with water quality  
24 requirements.” To the extent that the “will comply” language of the new rule precludes the “reasonable  
25 assurance” approach, both the language in Regulation #82 and the overall framework for certifying large  
26 water supply projects will need to be significantly altered. Regulation #82 frequently refers to developing  
27 conditions that address the potential impacts from operation of the project as a whole. The narrowed  
28

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

3  
4 10. If the 2020 Rule remains in place while EPA proceeds with a new rulemaking, Colorado  
5 will likely experience harm to its water resources as a result of the limited scope of conditions available  
6 for large water supply projects that are currently under development in our state. Colorado cannot afford  
7 to wait for EPA to undergo what could be a lengthy rulemaking process while the 2020 Rule remains in  
8 place.

9  
10 I declare under penalty of perjury under the laws of the United States that the foregoing is true and  
11 correct and that this declaration was executed on July 21, 2021.

12 Signature: 

13 Printed name: Aimee M. Konowal

14 Address: 4300 Cherry Creek Drive South Denver CO 80209

15 Phone Number: 720-284-2370

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10  
 11 IN THE UNITED STATES DISTRICT COURT  
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13  
 14  
 15 In re

16 Clean Water Act Rulemaking

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

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

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

ORAL ARGUMENT REQUESTED

17  
 18  
 19  
 20  
 21  
 22  
 23  
 24 I, Paul Wojoski, declare as follows:

25  
 26 1. I am the supervisor of the 401 and Buffer Permitting Branch of the Division of Water  
 27 Resources. I have been in this role since March of 2020 and previously served as the acting  
 28



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

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

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

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

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

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

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

5  
6 **The Rule Imposes Significant Unnecessary Burdens on North Carolina 401 Program.**

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

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

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

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

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

- 9
- 10 (1) "a description of the receiving waters, including type (creek, river, swamp, canal,  
11 lake, pond, or estuary) if applicable; nature (fresh, brackish, or salt); and wetland  
12 classification,"
- 13 (2) "a map(s) or sketch(es) with a scale(s) and a north arrow(s) that is legible to the  
14 reviewer and of sufficient detail to delineate the boundaries of the lands owned or  
15 proposed to be utilized by the applicant in carrying out the activity; the location,  
16 dimensions, and type of any structures erected or to be erected on the lands for use  
17 in connection with the activity; and the location and extent of the receiving waters,  
18 including wetlands within the boundaries of the lands," and
- 19
- 20 (3) an application fee.

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

22

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

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

9           13.     Notably, although the Rule sets forth several factors the Federal Agency is required  
10 to consider in determining what amount of time is needed, it does not reference the need for a public  
11 hearing as one of those factors. § 121.6(c). If there is significant public interest, North Carolina's  
12 401 certification rules requires a public hearing to be held. Public notice must issue at least thirty  
13 days before such a hearing, and the record must be open for public comment at least thirty days  
14 after such a hearing. *See* 15A NCAC 02H .0503(f). At least one federal agency, the Army Corps,  
15 has taken the position that the need for a public hearing *cannot be considered* in determining the  
16 reasonable period of time.

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

25           15.     North Carolina DWR has already been forced to hire an additional administrative  
26 staff person specifically to deal with the increased administrative burden of the Rule. It has also  
27 been forced to divert significant information technology and database management resources to  
28

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

3  
4 **The Rule Will Continue to Harm North Carolina's Water Quality By Limiting North  
5 Carolina's Authority to Condition 401 Certifications**

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

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

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

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

23 20. Because of these water quality concerns, North Carolina includes conditions in its  
24 401 certifications to address nutrient and sediment pollution from federally licensed projects.

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

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

4 22. The Final Rule limits the scope of a 401 certification to “assuring that a [point  
5 source] discharge from a federally licensed or permitted activity will comply with water quality  
6 requirements.” It calls into question the ability of North Carolina to include these conditions in its  
7 401 certifications.

8  
9 **Federal Agencies Are Continuing to Rely on the Rule to Inappropriately Curtail State  
Authority under Section 401.**

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

14 24. Although the existing NWPs that these new NWPs would replace do not expire until  
15 2022, the Corps’ 401 certification request dictated that DWR would have only 60 days to review  
16 *all 40 requests*. When DWR requested an extension based on the volume and complexity of the  
17 request, DWR’s request was denied without explanation.

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

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

1           27. After the January publication, DWR was notified of its omission. On February 19,  
2 2021, DWR formally requested to be allowed to supplement its 401 decision to include the basis  
3 for its denials. NCDWR explained that it had been on an unreasonably short deadline and the  
4 supplementation would cause no delay because the NWP's were not even slated to take effect until  
5 March 15.

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

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

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

15  
16 **North Carolina Will Suffer Undue Prejudice if the Rule is Left in Place.**

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

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

25           33. Casting doubt on this authority is particularly concerning due to the significant  
26 projects that are likely to be under review by the State in the coming years—including several  
27 significant highway projects. If the 401 certifications for those projects cannot be conditioned  
28

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

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

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

13  
14 I declare under penalty of perjury under the laws of the United States that the foregoing is  
15 true and correct and that this declaration was executed on [date] July 21, 2021.

16 Signature: Paul Wojoski

17 Printed name: Paul Wojoski

18 Address: 1617 Mail Service Center, Raleigh NC 27619

19 Phone Number: (919) 704-9015



# **Attachment A**



NORTH CAROLINA  
Environmental Quality

ROY COOPER  
Governor

MICHAEL S. REGAN  
Secretary

S. DANIEL SMITH  
Director

February 19, 2021

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

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

Dear Chief McLendon,

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

### BACKGROUND

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

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



certification request stated that the reasonable period of time for DWR's review for all of these NWP's was only 60 days.<sup>2</sup>

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

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

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

#### REQUEST TO ALLOW SUPPLEMENTATION

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

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

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

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

<sup>4</sup> *See* 40 CFR §121.7(e).

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

Please contact Paul Wojoski at 919-707-9015 or [Paul.Wojoski@ncdenr.gov](mailto:Paul.Wojoski@ncdenr.gov) with any questions.

Sincerely,

A handwritten signature in cursive script that reads "S. Daniel Smith".

S. Daniel Smith, Director  
Division of Water Resources

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

ADDENDUM TO DWR's DECEMBER 18, 2020 CERTIFICATION RESPONSE

**Nationwide Permit #17 – Hydropower Projects**

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required

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

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

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

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

**Nationwide Permit #21 – Surface Coal Mining Activities**

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

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

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

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

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

**Nationwide Permit #34 – Cranberry Production Activities**

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

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

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

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

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

**Nationwide Permit #38 – Cleanup of Hazardous and Toxic Waste**

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

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

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

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

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

### **Nationwide Permit #43 – Stormwater Management Facilities**

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

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

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

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

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

### **Nationwide Permit #49 – Coal Remining Activities**

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

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

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

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

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

### **Nationwide Permit #50 – Underground Coal Mining Activities**

DWR 401 Certification Decision:

Denied. Individual Water Quality Certification Required.

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

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

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

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





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

February 26, 2021

District Commander  
Wilmington District  
69 Darlington Avenue  
Wilmington, NC 28403

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

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

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

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

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

Sincerely,

*Scott McLendon*

Scott McLendon  
Chief, Regulatory Division  
Wilmington District



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

March 29, 2021

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

Dear Mr. Smith:

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

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

-2-

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

Sincerely,

*Scott McLendon*

Scott McLendon  
Chief, Regulatory Division  
Wilmington District

Electronic Copy furnished:

Todd Bowers, Region IV EPA (via e mail)

1 HECTOR BALDERAS  
 Attorney General of New Mexico  
 2 WILLIAM GRANTHAM  
 Assistant Attorney General  
 3 Office of the Attorney General  
 Office of the Attorney General  
 4 201 Third Street NW, Suite 300  
 Albuquerque, NM 87102  
 5 Telephone: (505) 717-3520  
 wgrantham@nmag.gov  
 6

7  
 8 IN THE UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10  
 11 In re

12 Clean Water Act Rulemaking

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

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

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

ORAL ARGUMENT REQUESTED

13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21 I, Rebecca Roose, state and declare as follows:

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

25 2. I am employed as the Deputy Cabinet Secretary of Administration at the New Mexico  
 26 Environment Department (Department or NMED).  
 27  
 28

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

18 4. The New Mexico Legislature designated the Water Quality Control Commission  
19 (Commission) as the "state water pollution control agency for this state for all purposes of the  
20 federal [Water Pollution Control] act." N.M. STAT. ANN. § 74-6-3(E) (2007). The  
21 Commission has the duty to "adopt water quality standards for surface and ground waters of the  
22 state" and to develop and implement a comprehensive water quality management program and  
23 continuing planning process. N.M. STAT. ANN. §§ 74-6-4(B) and (E) (2009). Since the  
24 Commission has no technical staff, responsibilities for water quality management activities are  
25 delegated to constituent agencies, primarily the Department. See N.M. STAT. ANN. § 74-6-  
26 4(F). Responsibilities for activities involving surface waters are delegated to the Department's  
27 Surface Water Quality Bureau.  
28

1 5. The Department serves as agent of the state in matters of environmental management and  
2 consumer protection. N.M. STAT. ANN. § 74-1-6(E) (2009). The purpose of the Department is  
3 "to ensure an environment that in the greatest possible measure will confer optimum health,  
4 safety, comfort and economic and social well-being on its inhabitants; will protect this  
5 generation as well as those yet unborn from health threats posed by the environment; and will  
6 maximize the economic and cultural benefits of a healthy people." N.M. STAT. ANN. § 74-1-2  
7 (1997).

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

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

24 8. Pursuant to Section 401 of the CWA, the Department is the state agency charged with  
25 certifying federal permits issued by EPA and U.S. Army Corps of Engineers (USACE). N.M.  
26  
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28

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

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

12 10. I have been involved in implementation of reviewed the EPA's Clean Water Act Section  
13 401 Certification Rule (401 Rule), which was published in the Federal Register on July 13,  
14 2020 and became effective September 11, 2020. I have knowledge and experience that allow  
15 me to understand the impacts of the 401 Rule on the Department and surface water quality in  
16 New Mexico.

17 11. As a state that does not have authority over CWA permitting programs within its borders,  
18 New Mexico is disproportionately impacted by the 401 Rule. For example, from 2017 through  
19 2019 the Department certified 46 federal CWA Section 402 permits, along with the NPDES  
20 Construction General Permit in 2019 and NPDES Multi-Sector General Permit in 2020, which  
21 combined cover over a thousand permitted discharges throughout New Mexico. In addition,  
22 during 2018 and 2019, the Department certified six federal CWA Section 404 standard  
23 individual permits (IPs), two Section 404 regional general permits (RGPs), and confirmed  
24 numerous Section 404 nationwide permits (NWPs), which represent the majority of  
25 certification actions under Section 404 in New Mexico. In December 2020, NMED certified or  
26 certified with conditions 56 proposed NWPs consistent with State law and regulations. Because  
27 the USACE rejected these NWP certifications as described in paragraph 22 below, currently,  
28

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

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

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

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

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



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

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

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

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

23 17. The 2020 401 Rule interprets CWA Section 401 to apply only to discharges. This  
24 interpretation diverges from past EPA positions and at least one Supreme Court opinion, which  
25 found CWA Section 401 certifications apply to *activities*, not merely discharges. *PUD No. 1 of*  
26 *Jefferson County and City of Tacoma v Washington Department of Ecology*, 511 U.S. 700  
27 (1994). In addition, nearly 50 years of state and federal practice, as well as numerous Court of  
28 Appeals decisions (e.g., *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997)), support

1 previous interpretations and reasoning, contrary to the 2020 401 Rule. This deficiency in the  
 2 2020 Rule is most pronounced under Section 404, but also impacts the NPDES program. The  
 3 Department typically conditions best management practices (BMPs) in the state’s 401  
 4 certifications related to the relevant regulated “activity.”

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

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

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

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

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

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

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

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

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

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

1 certification in October 2020. The USACE cited the preamble to the 2020 Rule at 85 Fed. Reg.  
2 42210, 42279 in finding that New Mexico's certification of these permits was invalid because it  
3 contained a purported "re-opener" clause. As a result, the USACE is requiring individual  
4 certifications for all activities that would otherwise fall under the 16 NWP's finalized and issued  
5 by the USACE in March 2021. USACE has stated its intention to finalize later this year the  
6 remaining NWP's covered by New Mexico's December 2020 certification, at which time the  
7 USACE will similarly "decline to rely on" the state's certification, thereby rejecting state  
8 conditions to protect surface waters. Moreover, despite entreaties from New Mexico's  
9 Governor, Attorney General, and Congressional delegation, the USACE has refused to allow  
10 the Department to revise, reconsider, or amend its certification.

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

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

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

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

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

20  
21 I declare under penalty of perjury under the laws of the United States that the foregoing is true  
22 and correct and that this declaration was executed on July 22, 2021.

23 Signature: \_\_\_\_\_

24 Printed name: Rebecca Roose

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

26 Phone Number: (505) 827-2855

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

11 In re

12 Clean Water Act Rulemaking

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

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

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

ORAL ARGUMENT REQUESTED

21 I, PAUL COMBA, declare as follows:

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

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

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

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

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

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

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

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

22           9.       The US Environmental Protection Agency’s 2020 401 Certification Rule has the  
23 potential to cause harm to Nevada’s waterways. Although we anticipate other State of Nevada  
24 environmental statutes and local jurisdictions may be able to require steps to prevent potential water  
25 quality impacts identified herein as examples, NDEP’s position is that this weakening of the  
26 401 State Certification program does not meet the requirements or intent of the Clean Water Act.

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

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

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

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

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



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

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

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

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

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

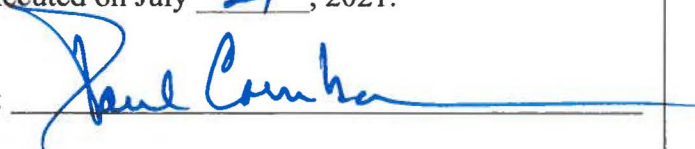
<b>Condition</b>	<b>RTC Southeast Connector (Pre-2020 401 Rule)</b>	<b>Talus Valley Planned Unit Development (Post-2020 401 Rule)</b>	<b>Difference</b>
Project Modification	401 Certification conditioned that any modifications to the original project submittal be reviewed and approved by staff before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

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

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

Signature: 

Printed name: Paul Comba, Chief, Environmental Programs

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

Phone Number: (775) 687-9455

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 Attorneys for Plaintiff State of New York  
 9

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

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 13 In re  
 14 Clean Water Act Rulemaking  
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Case No. 3:20-cv-04636-WHA  
 (consolidated)  
 Applies to all actions

**DECLARATION OF CORBIN J.  
 GOSIER IN SUPPORT OF PLAINTIFF  
 STATES' OPPOSITION TO  
 DEFENDANTS' MOTION FOR  
 REMAND WITHOUT VACATUR**

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

ORAL ARGUMENT REQUESTED

21 **DECLARATION OF CORBIN J. GOSIER**

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

25 1. I am the Aquatic Habitat Program Manager within the Division of Fish and Wildlife  
 26 in the New York State Department of Environmental Conservation (DEC). I submit this  
 27  
 28

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

3 **I. SUMMARY**

4 2. I understand that EPA has announced its intent to revisit and either revise or replace  
5 the 2020 Rule. However, I also understand that EPA has asked this Court to leave the 2020 Rule  
6 in effect until a new rule is promulgated, which EPA does not expect to occur until at least 2023.  
7

8 3. As explained below, the 2020 Rule is causing harm right now. By limiting DEC to  
9 regulating point-source discharges into navigable waterways, the 2020 Rule has the effect of  
10 casting doubt upon the propriety of conditions that DEC has historically determined to be  
11 necessary to ensure compliance with state water quality standards. In particular, conditions that  
12 DEC deems necessary to omit or limit in order to comply with the 2020 Rule will become part of  
13 any federal permit issued during this period, which could include multi-decade licenses for a  
14 number of largescale hydroelectric projects.  
15

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

19 **II. PERSONAL BACKGROUND AND EXPERIENCE**

20 5. I am the Aquatic Habitat Program Manager within the Division of Fish and Wildlife.  
21 I have held this position since 2018. My duties include providing direction for DEC’s Protection  
22 of Waters program which includes Permitting of Stream Disturbance and Excavation / Filling  
23 within Navigable Waters, 401 Water Quality Certificates, Instream Flow, Wild, Scenic and  
24 Recreational Rivers Act, Hydroelectric Power, and Renewable Energy.  
25

26 6. I received a Bachelor of Science degree in Environmental and Forest Biology from  
27 the State University of New York, College of Environmental Science and Forestry in 2000.  
28

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

5  
6           8. Over my career at DEC, I have reviewed dozens of projects involving the issuance of  
7 a Section 401 Water Quality Certificate. Between 2004 and 2018, I was one of three DEC  
8 biologists working under New York's Environmental Remediation Programs tasked with the  
9 review of various remediation and restoration projects (both state and federally led projects) to  
10 ensure substantive requirements of waterbody (ECL Article 15) and wetland (ECL Article 24)  
11 regulations were met. For most of these projects individual 401 WQCs were required.

12  
13           9. Currently, I provide support to DEC's nine regions on matters related to Protection of  
14 Waters permitting, including WQCs. Recently, I was in a lead role for the Division of Fish and  
15 Wildlife in discussions with the two local Army Corps of Engineers districts (Buffalo and New  
16 York) regarding the development of regional conditions and DEC's December 2020 blanket  
17 Section 401 Water Quality Certificate. Additionally, I oversee the ecological review hydropower  
18 projects reviewed by the Federal Energy Regulatory Commission (FERC) and have been  
19 involved in the review of other major energy generation projects, primarily wind and solar.

20  
21           **III. NEW YORK STATE'S SECTION 401 PROGRAM BEFORE THE 2020 RULE**

22           10. New York State is rich in water resources. Its freshwater resources include more than  
23 87,000 miles of rivers and streams, nearly 7,900 lakes and ponds totaling about 690,000 acres  
24 (not including Great Lakes), and over 400 miles of Great Lakes coastline. The marine waters of  
25 the state include more than 1,530 square miles of estuaries, as well as about 120 linear miles of  
26 Atlantic Ocean coastline. Additionally, approximately six million residents draw drinking water  
27 from abundant groundwater resources in the state and rely on that water source to be free of  
28

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

### 15 **Hydropower Projects**

16 11. Most Section 401 Water Quality Certifications involve the review of relatively small  
17 projects with limited impacts on aquatic resources. However, some projects involve the potential  
18 for significant impacts on water quality and require significant staff time and effort. For example,  
19 the review of individual hydropower licenses requires significant staff effort because of the  
20 complicated FERC review process and because the projects involve the potential for significant  
21 impacts on aquatic resources. A standard hydropower license is issued for thirty years, meaning  
22 any impacts from operation of the hydroelectric project will last for thirty years before being  
23 subject to renewal and additional review. A section 401 water quality certification is the primary  
24 way that DEC ensures that a federally licensed hydroelectric project will comply with state water  
25 quality requirements. As of the date of this declaration, DEC is reviewing 40 projects in various  
26  
27

28 <sup>1</sup> See 6 N.Y.C.R.R. Part 701.



1 stages of the hydroelectric licensing process. Sixteen of these projects are going through the  
2 critical study and/or settlement stages of the FERC review process where New York relies on its  
3 401 authority to protect natural resources.

4 12. DEC has historically used its authority under Section 401 to obtain information  
5 necessary to ensure that hydropower projects will comply with state water quality requirements.  
6 Licenses to construct and operate hydropower projects are generally issued by the Federal Energy  
7 Regulatory Commission (FERC), meaning opportunity for state review and approval may be  
8 limited.  
9

10 13. Hydroelectric projects can have significant adverse impacts on state water quality  
11 from construction and operational activities. Construction impacts can include the release of  
12 sediment during excavation or other construction activities located in or near the waterbody. In  
13 some cases, these sediments are contaminated with harmful chemicals or heavy metals further  
14 exacerbating the impacts on water quality. Of particular concern are operational impacts that are  
15 not limited to point source discharges but can include alterations of flow downstream of  
16 hydroelectric dams, fluctuations of water levels within the impoundment created by hydroelectric  
17 dams, mortality of fish passing through the turbines generating electric power, and prevention of  
18 upstream movement by fish and other water or wetland dependent wildlife.  
19

20 14. DEC has used the Section 401 Water Quality Certification process to require  
21 alterations in project operations to protect state water quality. For example, many hydropower  
22 licenses include conditions requiring “run of river” operations where projects maintain similar  
23 upstream and downstream flows. These flow characteristics are drastically different from  
24 “pulsing” operations where downstream water is released in an intermittent manner. Pulsing  
25 projects can have significant impacts on aquatic organisms from drastic changes in water flow  
26 and impoundment water levels.  
27  
28

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

### 18   **Natural Gas Pipeline Projects**

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

24           17. Natural gas pipelines and related infrastructure also have a variety of adverse impacts  
25 on state water quality. Because they are linear projects traversing long, continuous stretches of  
26 right of way, they generally cross a large number of streams, wetlands, and other waterbodies.  
27 Each of these crossings may impact water quality, as the pipeline developer must either dig  
28

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

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

#### 12 **Dredging Projects**

13  
14  
15 19. New York State relies on the Section 401 Water Quality Certification process to  
16 ensure that New York water quality standards are maintained when the Army Corps conducts  
17 navigational dredging. Federal dredging projects can have a profound impact on New York's  
18 waterways and the only tool available to influence those projects and ensure state water quality  
19 standards are being maintained is the 401 certification.

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

1           21. The conditions DEC imposed in the 2017 blanket 401 Water Quality Certificate  
2 issued for the Army Corps of Engineer’s Nationwide Permits highlights the need for protections  
3 beyond the minimum federal requirements. The 2017 blanket 401 Water Quality Certificate for  
4 the Army Corps of Engineer’s Nationwide Permits included conditions that were substantially  
5 more restrictive than the general conditions or the regional conditions provided by the Army  
6 Corps of Engineers. The Nationwide Permits provide an easy regulatory path for applicants  
7 seeking approval to conduct what the Army Corps of Engineers believes are straightforward and  
8 environmentally benign when conducted in accordance with all their general and regional  
9 conditions. However, to meet state water quality standards, DEC could not merely issue a blanket  
10 water quality certification and had to deny blanket coverage for some projects<sup>2</sup> and require more  
11 stringent conditions for other projects. For many cycles of nationwide permitting, DEC has set  
12 stringent disturbance thresholds by not allowing blanket coverage for more than a ¼ acre of fill or  
13 more than 300 linear feet of disturbance. Blanket coverage of activities without these stringent  
14 requirements would not categorically meet New York water quality standards.  
15

16  
17           **IV. HARMS RELATED TO LEAVING THE 2020 RULE IN PLACE UNTIL 2023**

18                           **Hydropower Projects**

19           22. The Rule will severely limit the ability of New York to protect its water quality as  
20 part of the licensing of hydropower projects. Despite years of precedent and an established  
21 process, the Rule puts into question the validity of established conditions that ensure compliance  
22 with New York water quality standards and the protection of natural resources. FERC could  
23 determine that the explanations provided by DEC are insufficient and a failure to satisfy the  
24

25  
26  
27                   <sup>2</sup> For example, Nationwide Permit 17 for hydropower projects, Nationwide Permits 21,  
28 44, 49, and 50 for mining projects, and Nationwide Permit 38 for the clean up of hazardous and  
toxic waste.

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

3         23. DEC is currently reviewing 40 projects for hydropower relicensing. At least ten of  
 4 these projects have section 401 certification requests pending before DEC or anticipated to be  
 5 submitted in the near future. The Rule could restrict the Department’s ability to review and  
 6 minimize adverse impact to water quality that are not related to point source discharges for these  
 7 projects, and could limit the Department’s ability to complete its review. Even if the Rule is  
 8 ultimately struck down by the Courts, these hydropower projects will have received 30-year  
 9 operating licenses that are insufficient to protect state water quality, resulting in long-term or  
 10 permanent impacts to state water quality.  
 11

12   **Pipelines**

13         24. The Department also expects to receive section 401 requests for new natural gas  
 14 pipeline infrastructure before EPA projects it will promulgates a replacement rule in 2023. For  
 15 example, in March 2021, Transcontinental Gas Pipe Line Company, LLC told FERC that it  
 16 intended to submit a new section 401 request for the Northeast Supply Enhancement (NESE)  
 17 project “later this year,” despite have previous section 401 requests denied by both New York and  
 18 New Jersey.<sup>3</sup> If the 2020 Rule remains in effect until 2023 and the applicant follows through on  
 19 its stated intent to FERC, the new section 401 request would be subject to the limitations of the  
 20 2020 Rule.  
 21  
 22

23   **Dredging Projects**

24         25. The Rule jeopardizes the incorporation of requirements and conditions necessary to  
 25 protect state water quality into dredging permits issued to the Army Corps. Under the Rule, the  
 26 Corps could unilaterally make the determination that the certification failed to comply with the  
 27

28                         

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        <sup>3</sup> 86 Fed. Reg. at 16,200.

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

6  
7 26. Historically there has been tension between New York and Army Corps regarding the  
8 appropriate use of work windows to protect fish and other aquatic organisms. While overlapping  
9 exclusion periods can be difficult, the Rule jeopardizes New York’s ability to protect fish best  
10 usages of New York’s waters by giving Army Corps the final decision regarding what is beyond  
11 the scope of certification.

12 **V. CONCLUSION**

13  
14 27. The 2020 Rule is harming New York State right now. Leaving it in place until at least  
15 early 2023 will exacerbate these harms as DEC tries to comply with a rule EPA has already  
16 announced it intends to revise or replace. This Court should vacate the 2020 Rule and return the  
17 regulatory status quo in effect for the 50 years prior to promulgation of the 2020 Rule.

18  
19 I declare under penalty of perjury under the laws of the United States that the foregoing is  
20 true and correct and that this declaration was executed on July 22, 2021.

21  
22 Signature: Corbin J. Gosier

23 Printed name: Corbin J. Gosier

24 Address: New York State Department of  
25 Environmental Conservation  
26 625 Broadway  
27 Albany, NY 12233-4756

28 Phone Number: (518) 402-8872

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 9

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

11  
 12 In re  
 13  
 14 Clean Water Act Rulemaking  
 15  
 16  
 17  
 18  
 19  
 20

Case No. 3:20-cv-04636-WHA  
 (consolidated)  
 Applies to all actions

**DECLARATION OF SCOTT E.  
 SHEELEY IN SUPPORT OF  
 PLAINTIFF STATES' OPPOSITION TO  
 DEFENDANTS' MOTION FOR  
 REMAND WITHOUT VACATUR**

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

ORAL ARGUMENT REQUESTED

21 **DECLARATION OF SCOTT E. SHEELEY**

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

25 1. I am the Chief Permit Administrator in the New York State Department of  
 26 Environmental Conservation (DEC). I submit this declaration to demonstrate the harms that the  
 27  
 28

1 State of New York will experience if the “Clean Water Act Section 401 Certification Rule” (the  
2 2020 Rule) remains in effect until at least 2023.

3 **I. SUMMARY**

4 2. For decades, DEC used its authority under section 401 of the Clean Water Act, 33  
5 U.S.C. § 1341, in conjunction with state administrative procedures and authority, to protect the  
6 physical, chemical, and biological health of New York’s waterways and wetlands. EPA  
7 promulgated the 2020 Rule over the objections of the State of New York, and apparently without  
8 regard to how the 2020 Rule would impact state water quality and administrative procedures. I  
9 understand that EPA has announced its intent to revisit and either revise or replace the 2020 Rule.  
10 However, I also understand that EPA has asked this Court to leave the 2020 Rule in effect until a  
11 new rule is promulgated, which EPA does not expect to occur until at least 2023.  
12

13 3. As explained below, the 2020 Rule is causing harm right now by increasing  
14 administrative burdens for DEC employees who are responsible for reviewing the thousands of  
15 section 401 certification requests. Staff time that could be devoted to other important program  
16 activities must instead be devoted to complying with the requirements of the 2020 Rule, even  
17 though EPA expects to revise the rule. Additionally, the 2020 Rule has created confusion for  
18 applicants for section 401 certifications, resulting in unnecessary delay and additional –  
19 sometimes duplicative – work for applicants. Moreover, because the 2020 Rule was promulgated  
20 without regard to state administrative procedures, DEC staff and applicants alike are forced to  
21 follow one set of procedures for section 401 certification requests, and a separate set of  
22 procedures for other permit applications.  
23

24 4. The harms described herein could be avoided by vacating the 2020 Rule and restoring  
25 the federal-state status quo that was in effect for almost 50 years prior to the issuance of the 2020  
26 Rule.  
27  
28



1           **II. PERSONAL BACKGROUND AND EXPERIENCE**

2           5. I am the Chief Permit Administrator in the New York State Department of  
3 Environmental Conservation (DEC). Working in DEC’s central office headquarters in Albany,  
4 New York I am responsible for developing policy and guidance for the Division of  
5 Environmental Permits in the processing of environmental permit applications, including  
6 applications for Section 401 Water Quality Certification. Most permit applications are processed  
7 by the Division of Environmental Permits in DEC’s regional offices, of which there are nine, each  
8 supervised by a Regional Permit Administrator. I provide guidance on permitting matters to the  
9 nine Regional Permit Administrators, including guidance on the processing of applications for  
10 Section 401 Water Quality Certification.  
11

12           6. I have a Bachelor of Science degree in Biology/Environmental Science from Taylor  
13 University in Upland, Indiana, and a Master of Science degree in Environmental and Forest  
14 Biology from the State University of New York, College of Environmental Science and Forestry  
15 in Syracuse, New York.  
16

17           7. I have been an employee of DEC since 1998, working in the Division of  
18 Environmental Permits as an Environmental Analyst since that time. I have worked 10 years in  
19 the DEC Region 3 office in New Paltz, New York, 11 years in the DEC Region 8 office in Avon,  
20 New York, and 2 years in the DEC Central Office in Albany, NY. Since 2003 I have also been  
21 designated as a Permit Administrator<sup>1</sup>, with authority to review and issue decisions on all state  
22 environmental permits subject to the provisions of the New York State Uniform Procedures Act,  
23 including those applications processed by subordinate staff who are not designated as Permit  
24

25  
26  
27           <sup>1</sup> Deputy Regional Permit Administrator 2003-2008 in DEC Region 3, Deputy Regional  
28 Permit Administrator 2008-2010 in DEC Region 8, Regional Permit Administrator 2010-2019 in  
DEC Region 8, Deputy Chief Permit Administrator 2019-2020 in DEC Central Office, and Chief  
Permit Administrator 2020-Present in DEC Central Office.

1 Administrators. In addition to Section 401 Water Quality Certifications, environmental permits  
2 subject to the provisions of the New York State Uniform Procedures Act include state-regulated  
3 freshwater wetlands; state-regulated tidal wetlands; state-regulated protected streams and  
4 navigable waters; state-regulated wild, scenic and recreational rivers; coastal erosion  
5 management; taking of state-listed threatened and endangered species; mined land reclamation;  
6 dam safety; water withdrawal; solid waste management; state pollutant discharge elimination  
7 system (SPDES); air pollution control; hazardous waste management; and radiation control.

8 Processing these applications includes, where necessary, meeting with applicants and regulatory  
9 agency partners, ensuring public notice requirements are met, responding to public comments and  
10 inquiries, ensuring requirements related to historic preservation and coastal zone management are  
11 met, and ensuring that all applications subject to the Uniform Procedures Act for a given project  
12 are reviewed together.  
13  
14

15 8. During my work in DEC's regional offices, I have reviewed and issued individual  
16 Section 401 Water Quality Certifications for various projects and verified project coverage under  
17 DEC's applicable blanket Section 401 Water Quality Certifications. Since 1998 I have personally  
18 been assigned the processing of over 400 applications for Section 401 Water Quality Certification  
19 and have been the reviewer and responsible for issuing the final decision on hundreds more  
20 applications. In my role as the Chief Permit Administrator in DEC's Central Office, I am also  
21 responsible for the review and issuance of decisions on blanket Section 401 Water Quality  
22 Certifications for regional and nationwide permits issued by the U.S. Army Corps of Engineers  
23 under Section 404 of the Clean Water Act.  
24  
25  
26  
27  
28

1           **III. NEW YORK STATE WATER QUALITY REQUIREMENTS AND ADMINISTRATIVE**  
2           **PROCEDURES**

3                           **New York Water Quality Requirements**

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

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

16           11. The New York State Legislature enacted the Freshwater Wetlands Act (ECL Article  
17 24) in 1975 with the intent to preserve, protect and conserve freshwater wetlands and their  
18 benefits, consistent with the general welfare and beneficial economic, social, and agricultural  
19 development of the state. *See* ECL § 24-0103. New York’s Freshwater Wetlands Act was enacted  
20 after the Clean Water Act became law and works in tandem with the Clean Water Act by  
21 regulating activities of a select number of larger wetlands more stringently. Sections 401 and 404  
22 of the Clean Water Act are necessary to protect freshwater wetlands that fall below the standard  
23  
24  
25  
26  
27

28           <sup>2</sup> 6 N.Y.C.R.R. Parts 608, 700-706, 750, 663, and 661

<sup>3</sup> *See, e.g.*, ECL §§ 15-0105, 17-0103, 24-0103, 24-0105, 25-102.

1 12.4-acre threshold contained in the State’s Freshwater Wetlands Act, or otherwise lie outside the  
2 Freshwater Wetlands Act.

3 12. The New York State Legislature enacted the Protection of Waters Act (ECL Article  
4 15, Title 5) in 1972 to regulate physical disturbance and filling in certain waterbodies, including  
5 protected streams and navigable waterways. *See* ECL §§ 15-0501, 15-0505. Article 15 recognizes  
6 that New York is rich with valuable water resources, and directs the Department, as stewards of  
7 the environment, to preserve and protect certain lakes, rivers, streams, and ponds. These rivers,  
8 streams, lakes, and ponds are necessary for fish and wildlife habitat; drinking and bathing; and  
9 agricultural, commercial and industrial uses. In addition, New York's waterways provide  
10 opportunities for recreation; education and research; and aesthetic appreciation. Certain human  
11 activities can adversely affect, even destroy, the delicate ecological balance of these important  
12 areas, thereby impairing the uses of these waters.

13 13. New York State regulates physical disturbance to the bed and banks of about 43% of  
14 New York Streams under ECL § 15-0501 by limiting jurisdiction to certain streams, namely  
15 streams with a water quality classification or standard of AA, AA(T), AA (TS), A, A(T), A(TS),  
16 B, B(T), B(TS), C(T), or C(TS). The designation of “T” describes waters that provide habitat in  
17 which trout can survive and grow while “TS” describes waters that provide conditions for trout to  
18 spawn and reproduce. Physical disturbance to the bed or banks of the remaining 57% of the  
19 streams with a classification of “C” or “D” are not regulated under section 15-0501. Although an  
20 additional 10-15% of streams are afforded some protection under another section of state law  
21 through the regulation of excavation and fill below mean high water (ECL § 15-0505), roughly  
22 40% of streams in New York are not protected from physical disturbance under New York State  
23 Law. As part of a comprehensive strategy, New York has used Section 401 of the Clean Water  
24 Act to span the gap in regulatory controls to protect water quality in these streams. Without this  
25  
26  
27  
28

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

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

#### 12 **New York State Administrative Procedures**

13  
 14  
 15 15. DEC’s permitting process follows procedures established by the Uniform Procedures  
 16 Act (UPA), *see* ECL article 70, and implementing regulations, *see* 6 N.Y.C.R.R. part 621. The  
 17 goals of the UPA include: “fair, expeditious and thorough administrative review of regulatory  
 18 permits”; elimination of “inconsistencies and redundancies”; establishment of “reasonable time  
 19 periods for administrative agency action on permits”; encouragement of “public participation in  
 20 government review and decision-making processes”; and replacement of individual permit  
 21 reviews with “a comprehensive project review approach.” ECL § 70-0103. As described below,  
 22 the UPA’s goals are now being thwarted by the 2020 Rule.  
 23  
 24  
 25  
 26

27 <sup>4</sup> 6 N.Y.C.R.R. § 608.9.

<sup>5</sup> ECL § 15-0501

<sup>6</sup> ECL § 15-0505

28 <sup>7</sup> 6 N.Y.C.R.R. §§ 701.1, 703.2

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

9  
10           17. Section 401 certification applications are specifically listed as being subject to the  
11 UPA. ECL § 70-0107(d); 6 N.Y.C.R.R. § 621.1(e). In addition to the general application  
12 requirements of the UPA, DEC may request that the applicant for a section 401 certification  
13 provide “a properly completed application and supporting documentation for any required federal  
14 permits or licenses.” 6 N.Y.C.R.R. § 621.4(e)(2).

15  
16           **IV. NEW YORK STATE’S SECTION 401 PROGRAM PRIOR TO THE 2020 RULE**

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

24  
25           19. DEC generally issues permits, including Section 401 Water Quality Certificates, with  
26 conditions to assure compliance with regulatory standards. In rare situations, DEC is forced to  
27  
28

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

3         20. Many applications received by DEC involve the concurrent review and issuance of  
4 permits and certifications using authority granted under state statutes (e.g., Article 15-Protection  
5 of Waters, Article 24-Freshwater Wetlands, Article 25-Tidal Wetlands) and under federal statutes  
6 (e.g., Section 401 of the Clean Water Act). Annually, DEC processes approximately 4,300 Article  
7 15 applications, 1,270 Article 24 applications, and 1,180 Article 25 applications. In addition,  
8 DEC issues approximately 4,050 individual Section 401 Water Quality Certificates each year.  
9 Historically, the vast majority of section 401 requests have been granted within 60 days from  
10 receipt of a complete application.  
11

12         21. During the almost 50 years between enactment of section 401 and promulgation of  
13 the 2020 Rule, DEC relied upon section 401 to ensure that applicants for federally licensed  
14 projects provided sufficient information to DEC to ensure that they would comply with state  
15 water quality requirements. DEC also relied upon section 401 to ensure that federally licensed  
16 projects would comply with conditions sufficient to protect state water quality. The 2020 Rule has  
17 hampered DEC's ability to comply with its own administrative requirements or fulfill with its  
18 substantive obligation to protect state water quality.  
19

20  
21         **V. NEW YORK STATE'S EXPERIENCE WITH IMPLEMENTING THE 2020 RULE**

22         22. The 2020 Rule became effective in September 2020, and almost immediately created  
23 confusion and uncertainty in DEC's section 401 program. Procedures that had been relied upon  
24 since section 401 was enacted had to be revised. The result has been an increase in workload,  
25 delays, and confusion for DEC staff and applicants alike.

26         23. Of the more than 4,000 section 401 certification requests DEC receives each year, the  
27 vast majority are for small-scale projects with limited water quality impacts. Many applicants  
28

1 must apply for multiple federal and state permits for the same project. Additionally, many  
2 applicants are homeowners or other individuals with little experience with DEC’s administrative  
3 process. Accordingly, DEC has developed procedures to streamline these applications. For  
4 example, DEC and the Army Corps developed a “Joint Application” form that could be used by  
5 an applicant to apply to DEC and Army Corps for any necessary permits.  
6

7 24. The 2020 Rule establishes a list of nine specific pieces of information that must be  
8 included in a section 401 certification request. 40 C.F.R. § 121.5(b). This list was promulgated  
9 without regard to DEC’s existing Joint Application form or its requirements for permit  
10 applications, which includes a variety of additional information but does not necessarily include  
11 some of the specific language dictated by the 2020 Rule. *See, e.g.*, 6 N.Y.C.R.R. § 621.3(a)(7) (a  
12 permit application is not complete until any required environmental review under the State  
13 Environmental Quality Review Act (SEQRA) is complete); *id.* § 621.4(e) (specific requirements  
14 for section 401 requests). Accordingly, the Department has been forced to develop a  
15 “supplemental” form that applicants must complete in addition to the Joint Application. In other  
16 words, the 2020 Rule has *increased* the administrative burden on applicants and the Department.  
17

18 25. The 2020 Rule also *mandates* that at least 30 days prior to submitting a section 401  
19 request, applicants submit a request for a pre-filing meeting with DEC. 40 C.F.R. § 121.4(a).  
20 Although applicants are encouraged to request preapplication conferences under state law, 6  
21 N.Y.C.R.R. § 621.5, such a request is not mandatory nor is there a required 30-day “waiting  
22 period.” Thus, this is an additional regulatory burden imposed upon applicants. Many section 401  
23 applicants are not familiar with the pre-filing process or with administrative procedures in  
24 general, and justifiably assume that by submitting a complete Joint Application form they can  
25 commence DEC review. Unfortunately, under the 2020 Rule DEC must reject these applications  
26 for failure of the applicant to request a pre-filing meeting. The applicant must then request a pre-  
27  
28



1 filing meeting and then wait 30 days to re-file their section 401 request. The result is that DEC's  
2 review is delayed and the applicant is often frustrated and confused. The 2020 Rule also includes  
3 no process by which the 30-day pre-filing request requirement can be waived if, for example, an  
4 emergency requires prompt review of a section 401 request. Although the UPA allows DEC to  
5 issue emergency authorizations, including water quality certifications, to address situations that  
6 pose an immediate threat to life, health, property, or natural resources, 6 N.Y.C.R.R. § 621.12, the  
7 2020 Rule includes no such exception to the 30-day pre-filing meeting request requirement.  
8

9       26. The 2020 Rule has also increased the workload for DEC staff reviewing section 401  
10 requests, meaning that they have less time to perform other programmatic duties necessary to  
11 protect the State's environment. For example, the 2020 Rule establishes a list of information that  
12 must be included in any state section 401 decision. 40 C.F.R. § 121.7. A section 401 decision that  
13 does not include this information could be rejected by the relevant federal licensing agency. 40  
14 C.F.R. § 121.8. In effect, the 2020 Rule imposes federal requirements on state administrative  
15 procedures. Accordingly, in addition to following all applicable state procedures, DEC staff now  
16 must take additional steps to ensure that section 401 decisions comply with the 2020 Rule.  
17

18       27. To take one example, the 2020 Rule requires that any section 401 certification that  
19 includes conditions include "[a] statement explaining why the condition is necessary to assure  
20 that the discharge from the proposed project will comply with water quality requirements" and a  
21 citation to the relevant state law. 40 C.F.R. § 121.7(d). "Water quality requirements" is defined to  
22 mean various Clean Water Act provisions "and state or tribal regulatory requirements for point  
23 source discharges into waters of the United States." *Id.* § 121.1(n).  
24

25       28. Historically, DEC could impose conditions on section 401 certifications necessary to  
26 ensure that a project, as a whole, would comply with "any appropriate" requirements of state law,  
27 which would include, among other things, water quality requirements under the Freshwater  
28

1 Wetlands Act and the Protection of Waters Act. Under the 2020 Rule, in order to ensure a section  
2 401 certification is accepted by a federal permitting agency, DEC must first determine whether  
3 the specific state law at issue qualifies as a “water quality requirement” under EPA’s restrictive  
4 definition and then must explain how a condition is related to that requirement. Accordingly, even  
5 standard conditions require a substantial time commitment for administrative review if DEC does  
6 not want to risk having a certification rejected by the relevant federal agency.  
7

8 29. The 2020 Rule also provides no mechanism for an applicant to request and for a  
9 certifying agency to modify an issued section 401 certification. Historically, if the scope or extent  
10 of a proposed project changes, the applicant could provide supplemental information to DEC,  
11 which could then be used to review and issue a modification to the previously issued certification.  
12 However, EPA guidance provided on the 2020 Rule<sup>8</sup> indicates that the Rule includes no  
13 mechanism for an applicant to request modification of an existing a water quality certification nor  
14 for a certifying authority to grant such a request. This has created significant administrative  
15 uncertainty for DEC and for applicants. DEC has effectively been forced to require that applicants  
16 submit entirely new water quality requests (after complying with the mandatory 30-day prefiling  
17 request requirement) solely for the modified elements, resulting in two water quality certifications  
18 for the same project. This is a waste of DEC’s resources and the applicant’s time.  
19

20  
21 30. Not only does the 2020 Rule upend state administrative procedures, generating  
22 additional work for DEC staff, but it imposes strict time limits on DEC’s review. Under the 2020  
23 Rule, the timeframe for DEC’s review is dictated not by state administrative procedures, but by  
24 the federal licensing agency. *See* 40 C.F.R. § 121.6. Army Corps has taken this invitation to  
25 enforce a 60-day time limit for state review. *See* 33 C.F.R. § 325.2(b). Prior to the 2020 Rule,  
26

27  
28 <sup>8</sup> EPA state and tribal webinars provided in 2020 and posted on the EPA website at  
<https://www.epa.gov/cwa-401/2020-rule-implementation-materials>

1 Army Corps had given state agencies significant latitude to determine when a “valid” section 401  
2 request had been submitted and the period of time for review began. Now, however, Army Corps  
3 generally requires a decision within 60 days, even for potentially significant permitting decisions.  
4

5 31. As one example of the impacts of the 2020 Rule, in October 2020 – less than a month  
6 after the 2020 Rule became effective – Army Corps proposed to re-issue all of its nationwide  
7 permits, which are blanket authorizations for a variety of projects that Army Corps determines do  
8 not require project-specific permits. DEC was required to determine whether to grant, condition,  
9 or deny these nationwide permits within 60 days. Although DEC requested an extension of time  
10 to complete its review, Army Corps denied that request. Accordingly, DEC had to review the  
11 modified nationwide permits, make initial decisions on whether to grant, condition or deny  
12 certification, publish public notice and review public comments, and issue final decisions that  
13 complied with both state administrative procedures and the 2020 Rule, all within 60 days. The  
14 Department completed this task, but it required a significant increase in staff resources over prior  
15 certification decisions for nationwide permits. Additionally, Army Corps ultimately decided *not*  
16 to re-issue all of the nationwide permits, meaning some of DEC’s water quality decisions were  
17 unnecessary.  
18

## 19 VI. HARMS RELATED TO LEAVING THE 2020 RULE IN PLACE UNTIL 2023

### 20 Administrative Procedures

21  
22 32. As described in the preceding section, adapting the 2020 Rule to state administrative  
23 procedures is a time-consuming and imprecise process. First, DEC staff must ensure that a section  
24 401 request was preceded by at least 30 days by a pre-filing meeting request. Second, DEC staff  
25 must ensure that a section 401 request includes the nine specific pieces of information and  
26 boilerplate language required by the 2020 Rule. Third, DEC staff must work with their  
27 supervisors and program attorneys to ensure that any decision on the section 401 request complies  
28

1 with the timeframe and content requirements of the 2020 Rule. Meanwhile, DEC staff must  
2 continue to process applications for any related permits pursuant to the UPA. At each step of this  
3 process, the 2020 Rule requires additional staff and agency resources over and above DEC's  
4 historical section 401 process, which had been subject to natural development and streamlining  
5 over the preceding 50 years. 34. In addition to these administrative burdens, the Rule significantly  
6 impedes DEC's CWA 401 authority by limiting the impacts that DEC can evaluate to point source  
7 discharges, and by limiting the types of state law that can be considered in order to protect water  
8 quality. Additionally, by giving federal agencies the authority to veto conditions or certifications  
9 for ostensibly procedural violations, the Rule raises the possibility that certification conditions  
10 and denials will be ignored by federal agencies.

11  
12 33. The 2020 Rule will also constrain DEC's ability to fully evaluate the water quality  
13 impacts of proposed projects. Under the 2020 Rule, the "reasonable period" for DEC's review of  
14 a water quality request – 60 days in the case of Army Corps permits, longer in other instances –  
15 commences when DEC receives nine specific pieces of information. 40 C.F.R. § 121.5. But the  
16 minimum requirements for a section 401 request under the 2020 Rule fails to include information  
17 essential to evaluating water quality impacts of a project. For example, the 2020 Rule lacks any  
18 requirement that an applicant accurately identify the extent of the waters affected by the proposal,  
19 a fundamental component of any project requiring a jurisdictional determination from the Army  
20 Corps.  
21

22  
23 34. The 2020 Rule also fails to require that an applicant wait until an environmental  
24 review pursuant to SEQRA or NEPA has been completed prior to applying for a water quality  
25 certification, leaving DEC without an important piece of information mandated by statute and  
26 regulation. *See* ECL § 70-0105(2); 6 N.Y.C.R.R. § 621.3(a)(7). Also unlike the UPA, 6  
27  
28

1 N.Y.C.R.R. § 621.4(e)(2), the 2020 Rule does not even provide for DEC to obtain the same  
2 information from the applicant that has submitted to the federal licensing agency.

3 35. Finally, for many non-energy projects regulated by New York State, a stormwater  
4 pollution prevention plan is required and essential to determining whether impacts to water  
5 quality will be adequately addressed. The 2020 Rule does not require any of this information or  
6 provide a method for DEC to obtain it, leaving open the possibility that applicants will trigger the  
7 waiver period with barebones requests that comply with the 2020 Rule but do not include  
8 sufficient information for DEC to evaluate the project's water quality impacts.

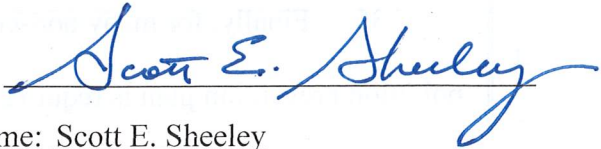
9  
10 36. Even the provision of the 2020 Rule requiring EPA to determine whether proposed  
11 projects will impact neighboring jurisdictions, 40 C.F.R. § 121.12, has been slowing the  
12 implementation of 401 certifications. Under that provision, Army Corps or other federal agencies  
13 must wait *at least* 30 days before accepting and implementing a water quality certification issued  
14 by a certifying authority, to give EPA an opportunity to make a determination regarding impacts  
15 to neighboring jurisdictions. *Id.* § 121.12(b). In cases where EPA finds that an impact may occur,  
16 implementation of the certification in the federal agency's decision is delayed a further 60 days  
17 while the neighboring state reviews the project impacts. *Id.* § 121.12(c). The result is that federal  
18 agencies cannot accept and implement a water quality certification for between 30 and 90 days  
19 after DEC issues it. This delay is somewhat ironic considering Army Corps generally gives DEC  
20 just 60 days to issue, condition, or deny certification.

## 23 VII. CONCLUSION

24 37. The 2020 Rule is harming New York State right now. Leaving it in place until at least  
25 early 2023 will exacerbate these harms as DEC tries to comply with a rule EPA has already  
26 announced it intends to revise or replace. This Court should vacate the 2020 Rule and return the  
27 regulatory status quo in effect for the 50 years prior to promulgation of the 2020 Rule.  
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on July 22, 2021.

Signature: 

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

10 In re  
11 Clean Water Act Rulemaking

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

**DECLARATION OF STEVE MRAZIK  
IN SUPPORT OF PLAINTIFF STATES'  
OPPOSITION TO DEFENDANTS'  
MOTION FOR REMAND WITHOUT  
VACATUR**

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

**ORAL ARGUMENT REQUESTED**

**DECLARATION OF STEVE MRAZIK**

**I, Steve Mrazik, under penalty of perjury, declare as follows:**

21 1. I am currently employed by the Oregon Department of Environmental Quality  
22 (ODEQ) as the Watersheds and Section 401 Certifications Manager. In that position, I supervise  
23 staff that review applications for certifications described in Section 401 of the Federal Water  
24 Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341, to decide whether to issue or deny  
25 the certifications. Previously, I have been employed by the Department in several other positions,  
26 including as Technical Services Manager, Technical Services Project Manager, Water Quality  
27 Monitoring Coordinator, and Water Quality Specialist. I hold a bachelor's degree in Zoology  
28 from the University of Wisconsin – Madison.

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

3           3.     The primary state policy regarding water quality is stated in Or. Rev. Stat.  
4 § 468B.015 as follows:

5           Whereas pollution of the waters of the state constitutes a menace to public health and  
6 welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life and  
7 impairs domestic, agricultural, industrial, recreational and other legitimate beneficial  
8 uses of water, and whereas the problem of water pollution in this state is closely  
9 related to the problem of water pollution in adjoining states, it is hereby declared to  
10 be the public policy of the state:

11           (1) To conserve the waters of the state through innovative approaches, including  
12 but not limited to the appropriate reuse of water and wastes;

13           (2) To protect, maintain and improve the quality of the waters of the state for  
14 public water supplies, for the propagation of wildlife, fish and aquatic life and for  
15 domestic, agricultural, industrial, municipal, recreational and other legitimate  
16 beneficial uses;

17           (3) To provide that no waste be discharged into any waters of this state without  
18 first receiving the necessary treatment or other corrective action to protect the  
19 legitimate beneficial uses of such waters;

20           (4) To provide for the prevention, abatement and control of new or existing water  
21 pollution; and

22           (5) To cooperate with other agencies of the state, agencies of other states and the  
23 federal government in carrying out these objectives.

24           4.     The Department performs the Water Quality Certifications described in Section 401  
25 of the Clean Water Act as part of its work to fulfill the primary state policy stated above in Or.  
26 Rev. Stat. § 468B.015.

27           5.     In September of 2020 EPA promulgated a significantly revised Clean Water Act  
28 Section 401 Rule (Rule). The Rule introduced significant procedural and substantive changes  
that impact how ODEQ engages with applicants and develops and enforces certifications intended  
to protect water quality and in doing so results in harm to the environment and economy.

          6.     One procedural change included in the Rule is a mandatory 30-day request for a pre-  
filing meeting prior to an application. This requirement became immediately problematic for  
Oregon as the Rule went into effect while Oregon was experiencing historic widespread wildfires  
in the fall of 2020. Once fires were contained and individuals and communities focused on



1 recovery, the 30-day prefiling meeting request requirement became a regulatory hurdle as the  
2 Rule contained no provisions for addressing emergency permitting requests. Even if the agency  
3 decides not to meet with the applicant, an application cannot be filed until 30 days following the  
4 request from the applicant. As a result, important restoration and recovery projects were delayed  
5 so that the new Rule processes could be implemented.

6 7. The Rule requires federal agencies to set deadlines and dictate limits on the time the  
7 state agency has to issue a certification or waive review, which often results in challenges for  
8 agency-applicant coordination. Oregon has had an extremely significant increase in the number  
9 of certification denials issued under the Rule due to lack of sufficient information provided by  
10 applicants to demonstrate compliance, and a subsequent lack of time for applicants to provide  
11 additional information to address such deficiencies. From September 2019 to June 2021 Oregon  
12 issued approximately 102 denials. In the prior twenty years (1999-2019) Oregon issued  
13 approximately five denials. Under the prior rule, DEQ would work with applicants on identifying  
14 and resolving outstanding information needs in order to complete review of the project. This new  
15 requirement, combined with missing information or unavoidable final changes to project details,  
16 is resulting in applicants needing to re-start the clock and re-do the entire certification application  
17 process. This need for denials and new applications results in inefficiencies and additional costs  
18 for applicants and agency resources.

19 8. The Rule attempts to limit the state's ability to review impacts to water quality that  
20 may arise from the project through the narrowed definition of a "discharge." Limiting the state's  
21 review in this way could reduce state's ability to consider important impacts such as those arising  
22 from changes to stormwater patterns or increased water temperature resulting from overall project  
23 impacts. This aspect of the Rule could result in significant environmental harm to the state of  
24 Oregon.

25 9. The Rule limits state enforcement options by giving the federal action agency the  
26 authority and discretion to enforce state requirements. Federal agencies often lack staff capacity  
27 and water quality expertise to realistically undertake enforcement or inspection activities beyond  
28 their existing inspection and inspection efforts. These changes could undermine states' authority

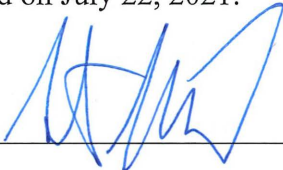
1 to enforce the conditions of the state certification and in doing so render the certifications  
2 ineffective to protect water quality and cause environmental harm to the state of Oregon.

3 10. The Rule will require that Oregon expend state resources to update its current  
4 Section 401 Water Quality Certifications rules at Oregon Administrative Rules at Chapter 340,  
5 Division 48. Oregon’s existing rules provide a minimum timeline for review of applications at  
6 OAR 340-048-0042 and lists requirements for applications at OAR 340-048-0020 that are now  
7 inconsistent with the Federal Rule. These inconsistencies are leading to confusion for applicants  
8 and will require that Oregon expend state resources in reviewing and revising the regulations.

9 11. For the reasons described above the Rule is causing environmental and economic  
10 harm to the state of Oregon.

11 12. I understand that EPA has now announced its intent to revise the Rule. However,  
12 EPA has not yet proposed any specific changes to the Rule. Moreover, EPA projects that final  
13 revised rule will not be in place until *at least* 2023. I understand that EPA has asked to keep the  
14 Rule in place while it is reviewed. If this occurs, the harms and confusion created by the Rule  
15 will continue for at least another two years.

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

18  
19 Signature:  \_\_\_\_\_

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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17 In re  
18 Clean Water Act Rulemaking

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

(consolidated)

21 **AMERICAN RIVERS' OPPOSITION TO**  
22 **EPA'S MOTION FOR REMAND**  
23 **WITHOUT VACATUR**

24 Courtroom: 12, 19th Floor  
Date: August 26, 2021  
Time: 12:00 P.M. (via telephone)

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    A. The Court should order vacatur, because EPA has not met its burden of demonstrating that remand without vacatur is warranted.....2

        1. The seriousness of the 2020 Rule’s errors requires vacatur. ....4

            a. The 2020 Rule unlawfully limits the scope of Section 401 certification.....5

            b. The 2020 Rule unlawfully constrains and interferes with state certification procedures.....7

            c. The 2020 Rule unlawfully empowers federal agencies to review, and overturn, certification decisions. ....9

        2. Granting remand *without* vacatur and leaving the 2020 Rule in effect would have disruptive consequences across the nation.....10

    B. In the alternative, the Court should deny EPA’s motion for remand.....15

        1. Remand is not appropriate because EPA has not demonstrated its commitment to a changed approach.....15

        2. Granting EPA’s motion would deprive American Rivers of its right to judicial review.....17

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20 *Clean Water Act Section 401 Certification Rule,*  
 21 85 Fed. Reg. 42,210 (July 13, 2020).....1, 6, 16

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 23 86 Fed. Reg. 29,542 (June 2, 2021) ..... *passim*

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 28 84 Fed. Reg. 15,495 (April 10, 2019) .....11



**INTRODUCTION**

1  
2 Plaintiffs American Rivers, American Whitewater, California Trout, and Idaho Rivers  
3 United (“American Rivers”) hereby respectfully oppose the motion for remand without vacatur  
4 of the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020)  
5 (“2020 Rule”), filed by Defendants U.S. Environmental Protection Agency and Michael S.  
6 Regan (collectively “EPA”). Dkt. No. 143. American Rivers has challenged EPA’s unlawful rule  
7 2020 Rule because it impinges on the authority of states, tribes, and the public to protect their  
8 rivers, lakes, wetlands, and coastal waters, sensitive fish and habitat, and the communities that  
9 rely on healthy, functioning ecosystems. EPA promulgated the 2020 Rule under the guise of  
10 streamlining processes for state and tribal certification under Section 401 of the Clean Water  
11 Act, but went much further than that. The 2020 Rule unlawfully narrows the applicability of  
12 Section 401; circumscribes the scope of review of the certifying state or tribe; limits the  
13 information on the proposed federal project made available to states and tribes to inform their  
14 decision whether to issue certification; restricts the conditions states and tribes may impose to  
15 ensure requirements of state or tribal law are met, and; empowers the federal licensing or  
16 permitting agency to effectively overrule a state or tribal determination of whether state or tribal  
17 laws are met.

18 EPA essentially admits as much, acknowledging “substantial concerns” that the 2020  
19 Rule does not comply with Section 401 and the principles of cooperative federalism  
20 undergirding it—*see Notice of Intention to Reconsider and Revise the Clean Water Act Section*  
21 *401 Certification Rule*, 86 Fed. Reg. 29,542 (June 2, 2021); *and* Dkt. No. 143 at 2<sup>1</sup>—as well as  
22 the need to “restore the balance of state, Tribal, and federal authorities” through a new rule, Dkt.  
23 No. 141 at 3. And yet, EPA asks the Court to dismiss all plaintiffs’ complaints with prejudice,  
24 Dkt. No. 143-2, while leaving the 2020 Rule in place for at least 19 more months, Dkt. No. 143-1  
25 at 7, with no guarantee of a new rule by any date certain, no promise of a different rule after  
26  
27

28 <sup>1</sup> Here and throughout, American Rivers uses internal pagination and not ECF pagination.

1 rulemaking is complete, and no way for any of the plaintiffs to reopen their cases should EPA  
2 fail to comply with its suggested schedule.

3 In the meantime, projects continue to move forward under the illegal 2020 Rule, leaving  
4 states and tribes between a rock and a hard place: follow the 2020 Rule and give up the ability to  
5 halt or condition projects in order to protect local communities, waters, and wildlife, or disregard  
6 the 2020 Rule and face lawsuits from its industry proponents and a potential veto any  
7 certification by the federal licensing agency. The uncertain and likely divergent way states and  
8 tribes navigate this dilemma not only creates far greater regulatory confusion than ever existed  
9 before the 2020 Rule and unnecessarily opens the door to untold numbers of cases burdening  
10 state and federal courts, but also causes concrete and substantial harm to American Rivers’  
11 mission advocacy and its members’ interests in enjoying and preserving clean waters nationwide.

12 Because EPA fails to satisfy the standards for a voluntary remand without vacatur, the  
13 Court should order remand *with* vacatur. In the alternative, the Court should deny EPA’s motion  
14 altogether if remand with vacatur is not warranted, so that this litigation may proceed. Either  
15 way, the unlawful 2020 Rule should not remain in effect indefinitely while EPA revisits it.

## 16 ARGUMENT

### 17 A. The Court should order vacatur, because EPA has not met its burden of 18 demonstrating that remand without vacatur is warranted.

19 The Ninth Circuit has held that vacatur of an agency action ordinarily accompanies  
20 remand of that action to the agency. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532  
21 (9th Cir. 2015) (courts grant remand without vacatur leaving the remanded rule in place only in  
22 “limited circumstances,” and “only ‘when equity demands’ that we do so”) (internal quotations  
23 and citations omitted). The exception to this rule arises only in “rare circumstances” where it is  
24 “advisable that the agency action remain in force until the action can be reconsidered or  
25 replaced[.]” *Humane Soc’y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010). Where an agency  
26 requests voluntary remand without vacatur but fails to show that vacatur is not warranted, courts  
27 may grant the motion in part, and order remand with vacatur. *See, e.g., All. for the Wild Rockies*  
28 *v. Marten*, No. CV 17-21-M-DLC, 2018 WL 2943251, \*4 (D. Mont. June 12, 2018) (granting in

1 part and denying in part agency’s motion for remand without vacatur, and vacating the decision  
2 because the case did not “present the exceptional circumstance where ‘equity demands’ that the  
3 Court exercise judicial restraint by declining to vacate the [challenged action] upon remand.”).

4 The Ninth Circuit has adopted a two-factor test for determining when to remand without  
5 vacatur. *Cal. Cmities. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (adopting the test  
6 from *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir.  
7 1993)). Under the *Allied-Signal* test, whether remand without vacatur is warranted depends on  
8 (1) “how serious the agency’s errors are,” and (2) “the disruptive consequences of an interim  
9 change that may itself be changed.” *Id.* (quoting *Allied-Signal*, 988 F.2d at 150–51). This  
10 equitable balancing test applies equally where the agency has requested voluntary remand and  
11 the court has not yet ruled on the merits. *ASSE Int’l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064  
12 (C.D. Cal. 2016) (“Courts faced with a motion for voluntary remand employ ‘the same equitable  
13 analysis’ courts use to decide whether to vacate agency action after a “rul[ing] on the merits.”)  
14 (quoting *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D.  
15 Cal. 2002)); *see also Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D.  
16 Colo. 2011) (because “[v]acatur is an equitable remedy . . . and the decision whether to grant  
17 vacatur is entrusted to the district court’s discretion . . . vacation of an agency action without an  
18 express determination on the merits is well within the bounds of traditional equity jurisdiction.”)  
19 (quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir.  
20 2010)).

21 The agency defendant bears the burden of showing “that compelling equities demand  
22 anything less than vacatur.” *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D.  
23 Idaho 2020); *see also Ctr. for Env’tl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL  
24 3383954, \*13 (N.D. Cal. June 20, 2016) (“given that vacatur is the presumptive remedy . . . it is  
25 Defendants’ burden to show that vacatur is unwarranted.”). Here, EPA has failed even to address  
26 the *Allied-Signal* factors, and falls short of meeting its burden. Rather, both factors weigh in  
27 favor of the ordinary remedy of remand with vacatur.

1           **1. The seriousness of the 2020 Rule’s errors requires vacatur.**

2           Under the Clean Water Act, the States are “the ‘prime bulwark in the effort to abate water  
3 pollution,’ and Congress expressly empowered them to impose and enforce water quality  
4 standards that are more stringent than those required by federal law.” *Keating v. F.E.R.C.*, 927  
5 F.2d 616, 622 (D.C. Cir. 1991) (quoting *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir.  
6 1983)). Thus, when enacting the Clean Water Act Congress expressly sought “to recognize,  
7 preserve, and *protect the primary responsibilities and rights of States* to prevent, reduce, and  
8 eliminate pollution, to plan the development and use (including restoration, preservation, and  
9 enhancement) of land and water resources.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 909 F.3d  
10 635, 647 (4th Cir. 2018) (quoting 33 U.S.C. § 1251(b), emphasis original). A central pillar of this  
11 authority is the requirement that “[a]ny applicant for a Federal license or permit to conduct any  
12 activity” that “may result in any discharge into the navigable waters” must “provide the licensing  
13 or permitting agency a certification from the State” that “any such discharge will comply” with  
14 applicable water quality requirements. 33 U.S.C. § 1341(a)(1). “No license or permit shall be  
15 granted if the certification has been denied by the State[.]” *Id.* The 401 certification process is  
16 “essential in the scheme to preserve state authority to address the broad range of pollution[.]”  
17 *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 386 (2006). The certification  
18 requirement ensures that “[n]o polluter will be able to hide behind a Federal license or permit as  
19 an excuse for a violation of water quality standard[s].” *Id.* (quoting 116 Cong. Rec. 8984 (1970)  
20 (Sen. Muskie)).

21           In assessing the seriousness of error under the first *Allied-Signal* factor, courts look to  
22 “whether the agency would likely be able to offer better reasoning or whether by complying with  
23 procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in  
24 the agency’s decision make it unlikely that the same rule would be adopted on remand[.]”  
25 *Pollinator*, 806 F.3d at 532; see *Allied-Signal*, 988 F.2d at 151 (declining to vacate where there is  
26 a “serious possibility that the [agency would] be able to substantiate its decision on remand.”).

27           The flaws in the 2020 Rule are not the kind of mere procedural rulemaking slip-ups that,  
28 once corrected, would allow EPA to make the same decision on remand. See *Idaho Farm Bureau*

1 *v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (federal agency’s procedural error in not  
 2 providing public with opportunity to review provisional report before comment period’s close  
 3 was unlikely to alter agency’s final decision). Rather, fundamental substantive flaws in the 2020  
 4 Rule will necessarily prevent EPA from promulgating the same rule on remand. *See North*  
 5 *Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir. 2008) (EPA rule “must” be vacated where  
 6 “fundamental flaws” prevent EPA from promulgating same rule following remand). As  
 7 established below, EPA acted contrary to the text, structure, and intent of the Clean Water Act,  
 8 and exceeded its statutory authority, when it placed limits on state and tribal authority under  
 9 Section 401.

10 **a. The 2020 Rule unlawfully limits the scope of Section 401 certification.**

11 The narrow scope of review for 401 certifications permitted under the 2020 Rule is  
 12 inconsistent with the Clean Water Act. Under the regulations, the “scope of a Clean Water Act  
 13 section 401 certification is limited to assuring that a discharge from a Federally licensed or  
 14 permitted activity will comply with water quality requirements.” 40 C.F.R. § 121.3. However,  
 15 the definitions EPA has provided for what is a “discharge” and what are “water quality  
 16 requirements” bear little resemblance to how the Clean Water Act defines those terms.

17 To begin with, the 2020 Rule limits a certifying authority’s review to water quality  
 18 impacts to only “point source” discharges. *See* 40 C.F.R. § 121.1(f) (defining “discharge” to  
 19 mean “a discharge from a point source into a water of the United States.”). In doing so, this  
 20 provision disregards the plain language of the statute, as well as binding Supreme Court  
 21 precedent. *PUD No. 1 of Jefferson Cty. v. Washington Dep’t of Ecology*, 511 U.S. 700 (1994).  
 22 Section 401(a)(1) requires that “the State in which the discharge originates or will originate”  
 23 certify that “any such discharge will comply with the applicable provisions of” specified sections  
 24 of the Clean Water Act. 33 U.S.C. § 1341(a)(1). In turn, Section 401(d) allows the certifying  
 25 authority to impose conditions in order “to assure that any applicant for a Federal license or  
 26 permit will comply” with applicable provisions of the Clean Water Act and “any other  
 27 appropriate requirement” of state or tribal law. 33 U.S.C. § 1341(d). These two provisions  
 28 establish plainly that “additional conditions and limitations” may be imposed “on the activity as

1 a whole once the threshold condition, the existence of a discharge, is satisfied.” *PUD No. 1*, 511  
 2 U.S. at 712.

3 However, contrary to the statute’s plain meaning, and the Supreme Court’s explanation in  
 4 *PUD No. 1*, the 2020 Rule narrows the scope of state and tribal review under Section 401(a), and  
 5 the range of conditions they may impose under Section 401(d), to the potential environmental  
 6 impacts from any point source discharges associated with the project. 40 C.F.R. § 121.3.

7 Tellingly, in the preamble to the 2020 Rule, EPA acknowledges its interpretation goes against  
 8 the Supreme Court’s construction in *PUD No. 1*. 85 Fed. Reg. 42,231 (instead adopting the logic  
 9 of Justice Thomas’s dissent).<sup>2</sup> And EPA now admits in its notice that “the rule’s narrow scope of  
 10 certification and conditions may prevent state and tribal authorities from adequately protecting  
 11 their water quality,” and asks “whether the agency should revise its interpretation of scope to  
 12 include potential impacts to water quality not only from the ‘discharge’ but also from the  
 13 ‘activity as a whole’ consistent with Supreme Court case law.” 86 Fed. Reg. at 29,543. While  
 14 American Rivers appreciates EPA’s abstract concern, as long as the rule remains in effect,  
 15 American Rivers and its members continue to be demonstrably harmed. *See* Dkt. No. 75 (First  
 16 Amended Complaint) ¶¶ 18–39 (describing the harm application of the 2020 Rule will cause the  
 17 plaintiff organizations and their members).

18 Similarly, EPA’s definition of “water quality requirements” in the 2020 Rule is  
 19 inconsistent with the text of Section 401(d), which explicitly authorizes states and tribes to use  
 20 certification to ensure federal projects comply with “other appropriate requirements of State  
 21 law.” 33 U.S.C. § 1341(d). In contrast, the 2020 Rule limits the scope of review to whether the  
 22 discharges from points sources at a project will comply with “applicable provisions of §§ 301,  
 23

24 <sup>2</sup> EPA’s interpretation also contravenes the interpretations of numerous state courts, which are  
 25 the appropriate forum for assessing the proper scope of review under section 401. *See, e.g.,*  
 26 *Arnold Irrigation Dist. v. Dep’t of Env’tl. Quality*, 717 P.2d 1274, 1279 (Or. Ct. App. 1986), *rev*  
 27 *denied* 726 P.2d 377 (Or. 1986) (“Only if a goal or plan provision has absolutely no relationship  
 28 to water quality would it not be an ‘other appropriate requirement of State law’ within the  
 meaning of Section 401(d)); *accord Dep’t of Ecology v. PUD No. 1 of Jefferson Cty.*, 849 P.2d  
 646, 652 (Wash. 1993), *aff’d* 511 U.S. 700 (1994); *accord In re Morrisville Hydroelectric*  
*Project Water Quality*, 224 A.3d 473, 492 (Vt. 2019); *see also City of Tacoma v. F.E.R.C.*, 460  
 F.3d 53, 67 (D.C. Cir. 2006) (state courts are charged with reviewing the legality of certification  
 decisions); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) (same).

1 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for  
 2 point source discharges into waters of the United States.” 40 C.F.R. § 121.1(n) (defining “Water  
 3 quality requirements”). By limiting the scope of Section 401 review to whether the discharges  
 4 from the points sources will comply with the specific requirements under the Clean Water Act,  
 5 EPA has unlawfully written state and tribal authority to ensure compliance with “other  
 6 appropriate requirements of State law” in Section 401(d) out of the statute. EPA’s reading of the  
 7 statute violates the “basic and unexceptional rule that courts must give effect to the clear  
 8 meaning of statutes as written, giving each word its ordinary, contemporary, common meaning.”  
 9 *Artis v. District of Columbia*, 138 S. Ct. 594, 603 n.8 (2018) (internal quotation marks and  
 10 punctuation omitted); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (canon against  
 11 surplusage “is strongest when an interpretation would render superfluous another part of the  
 12 same statutory scheme”).

13  
 14 **b. The 2020 Rule unlawfully constrains and interferes with state certification procedures.**

15 The 2020 Rule impermissibly intrudes on the states’ and tribes’ ability to effectively  
 16 manage their 401 certification programs and meaningfully review federally licensed projects. To  
 17 ensure states and tribes are able to fulfill this primary responsibility of protecting water quality,  
 18 Congress enacted Section 401 to fill a potential gap in the overall regulatory structure of the  
 19 Clean Water Act—namely, federally licensed activities that may otherwise escape compliance  
 20 with requirements of state law to protect water quality. *S.D. Warren*, 547 U.S. at 386 (“Changes  
 21 in the river like these fall within a State’s legitimate legislative business, and the Clean Water  
 22 Act provides for a system that respects the States’ concerns.”). Thus, through Section 401, states  
 23 and tribes have the right to review the potential impacts of proposed federally licensed projects  
 24 that “may result in any discharge into the navigable waters” and the obligation to “set forth any  
 25 effluent limitations and other limitations, and monitoring requirements necessary to assure that  
 26 any applicant for a Federal license or permit will comply with any applicable [water quality  
 27 requirements under the Clean Water Act] and with any other appropriate requirement of State  
 28 law.” 33 U.S.C. §§ 1341(a)(1) & (d). And with respect to how the states and tribes use this

1 authority, the Clean Water Act defers to states and tribes to establish “the water quality  
2 certification process.” *City of Fredericksburg v. F.E.R.C.*, 876 F.2d 1109, 1112 (4th Cir. 1989).

3 The 2020 Rule makes several changes to the certification process that unlawfully  
4 circumscribe the certifying authority’s control over its process. First, the 2020 Rule purports to  
5 establish both the process the certifying agency must follow, and the information a certifying  
6 authority can require from an applicant to initiate a “request” for certification. 40 C.F.R. §§  
7 121.4 & 121.5. The rule then dictates that the timeline for review starts immediately when the  
8 applicant submits this package, regardless of what the certifying agency may actually need to  
9 initiate its review. *Id.* §§ 121.5 & 121.6. Second, once the timeline for certification begins, it  
10 cannot be paused or restarted, even if, for example, the applicant fails to provide necessary or  
11 requested information. *Id.* § 121.6(e). Finally, the 2020 Rule authorizes federal licensing and  
12 permitting agencies—rather than the state or tribe—to define what constitutes a “reasonable  
13 period of time” for a state or tribe to act on a certification request. *Id.* § 121.6(a).

14 “State Agencies have broad discretion when developing the criteria for their Section 401  
15 Certification.” *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir.  
16 2019)). Again, the primary goal of the Clean Water Act generally and Section 401 specifically is  
17 to preserve state authority over federal projects that may impact their waters, and State autonomy  
18 for how to address those concerns, consistent with minimums established in the Act. 33 U.S.C. §  
19 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary  
20 responsibilities and rights of States to prevent, reduce, and eliminate pollution”); *S.D. Warren*,  
21 547 U.S. at 386 (Section 401 is “essential in the scheme to preserve state authority to address the  
22 broad range of pollution”). To this end, Congress spoke clearly when it instructed that states and  
23 tribes—not EPA or federal licensing and permitting agencies—set the procedure for certification.  
24 *See* 33 U.S.C. § 1341(a)(1) (states and tribes “shall establish procedures for public notice in the  
25 case of all applications for certification by it and, to the extent it deems appropriate, procedures  
26 for public hearings in connection with specific applications.”). EPA has exceeded its authority by  
27 intruding on state and tribal authority to manage the certification processes. *See Nw. Envtl.*



1 *Advocates v. EPA*, 537 F.3d 1006, 1019, 1025–26 (9th Cir. 2008) (EPA cannot write regulations  
2 in excess of its statutory authority and that are contrary to the statutory scheme).

3 With respect to these changes, EPA now admits it “is concerned that the rule does not  
4 allow state and tribal authorities a sufficient role in setting the timeline for reviewing  
5 certification requests and limits the factors that federal agencies may use to determine the  
6 reasonable period of time.” 86 Fed. Reg. at 29,543. And yet despite these numerous serious  
7 errors, EPA asks the Court to leave the rule in place indefinitely. The Court should decline. *See*  
8 *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) (where  
9 agency action fails “to follow Congress’s clear mandate the appropriate remedy is to vacate that  
10 action”).

11 **c. The 2020 Rule unlawfully empowers federal agencies to review, and  
12 overturn, certification decisions.**

13 The 2020 Rule unlawfully empowers federal permitting and licensing agencies to  
14 overturn a state’s or a tribe’s denial of certification, or to refuse to include the terms and  
15 conditions included in a certification, if the federal agency determines the certifying authority did  
16 not comply with the Rule’s procedural requirements. 40 C.F.R. §§ 121.9(a)(2) & 121.10(a).  
17 Giving federal permitting and licensing agencies that ultimate authority conflicts with the plain  
18 language of Section 401.

19 Section 401 prohibits the issuance of any federal license or permit before certification has  
20 either been granted or waived, prohibits the issuance of any federal license or permit where  
21 certification has been denied. 33 U.S.C. § 1341(a)(1); *see also* H.R. Rep. 92-911, 122 (March 11,  
22 1972), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of*  
23 *1972*, U.S. GPO No. 93-1, Vol. 1, 809 (Jan. 1973) (“Denial of certification by a State, interstate  
24 agency, or the Administrator, as the case may be, results in a complete prohibition against the  
25 issuance of the Federal license or permit”); S. Rep. 92-414, 69 (Oct. 28, 1971), *reprinted in A*  
26 *Legislative History*, Vol. 2, 487 (Section 401 “continues the authority of the State or interstate  
27 agency to act to deny a permit and thereby prevent a Federal license or permit from issuing . . .  
28 should such an affirmative denial occur no license or permit could be issued . . . unless the State  
action was overturned in the appropriate courts of jurisdiction”). In addition, Section 401

1 expressly requires that any terms or conditions that the certifying authority includes as part of a  
 2 certification “shall become a condition on any Federal license or permit subject to the provisions  
 3 of this section.” 33 U.S.C. § 1341(d); Sen. Conf. Committee Rep. (Oct. 4, 1972), *reprinted in A*  
 4 *Legislative History*, Vol. 1, 183 (any federal agency granting a license or permit “shall accept as  
 5 dispositive the determinations” of the states under Section 401, with respect to necessary  
 6 conditions); *see also Tacoma*, 460 F.3d at 67 (agencies lack authority to second-guess a state’s  
 7 certification determination or the conditions it has imposed).

8 EPA admits “that a federal agency’s review may result in a state or tribe’s certification or  
 9 conditions being permanently waived as a result of nonsubstantive and easily fixed procedural  
 10 concerns identified by the federal agency.” 86 Fed. Reg. at 29,543. Yet, allowing for such a result  
 11 is atently inconsistent with the “unequivical” plain language and intent of section 401, which  
 12 does not permit the federal agency to “decide that substantive aspects of state-imposed  
 13 conditions are inconsistent with the terms of § 401.” *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99,  
 14 107 (2d Cir. 1997). This error, like the others, is serious. The first *Allied-Signal* factor militates  
 15 in favor of vacatur.

16  
 17 **2. Granting remand *without* vacatur and leaving the 2020 Rule in effect would  
 have disruptive consequences across the nation.**

18 Again, to determine whether vacatur is appropriate, the Court must “weigh the  
 19 seriousness of the agency’s errors against the disruptive consequences of an interim change that  
 20 may itself be changed.” *Nat’l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020)  
 21 (quoting *Pollinator*, 806 F.3d at 532). Here, vacating the 2020 Rule would expedite the return of  
 22 the regulatory scheme that governed Section 401 certifications for the past 50 years. *See Paulsen*  
 23 *v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to  
 24 reinstate the rule previously in force.”). While it is true that EPA *may* propose a new regulation  
 25 in 2023, leaving the 10-month old 2020 Rule in place in the interim is an “invitation to chaos.”  
 26 *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). The ongoing  
 27 frustration of Plaintiffs’ efforts to limit the environmental impacts of federally approved projects  
 28 will only worsen over time if the Court leaves the 2020 Rule in place.

1 States and tribes subject to the 2020 Rule are facing an impossible choice: (1) comply  
2 with EPA's regulations or (2) heed EPA's admissions that the regulations are flawed and comply  
3 with their duty under the Clean Water Act. They likely cannot do both. For example, most states  
4 and tribes have not updated their regulations to comply with the new standards. As such, if an  
5 agency reviews a certification request under its existing regulations, it faces potential lawsuits  
6 from the applicant for failing to follow the 2020 Rule. Or, there is a potential that the federal  
7 permitting agency may veto any terms or conditions a state or tribe requires in order to protect its  
8 water quality and ensure compliance with state or tribal law. *See* 40 C.F.R. § 121.9(b) ("A  
9 condition for a license or permit shall be waived upon the certifying authority's failure or refusal  
10 to satisfy the requirements of § 121.7(d)"). On the other hand, the certifying agency could decide  
11 to change its regulations and policies, to bring them into compliance with a regulation that,  
12 according to EPA itself, likely violates the "cooperative federalism principles and Clean Water  
13 Act section 401's goal of ensuring that states are empowered to protect their water quality." 86  
14 Fed. Reg. at 29,542. Thus, any changes to a state's or tribe's regulations to conform to the 2020  
15 Rule is effectively an admission that the state or tribe is voluntarily participating in a scheme to  
16 limit its statutory authority to prevent harm to its waters. And if a state or tribe makes that  
17 choice—notwithstanding the significant environmental consequences it engenders—it will likely  
18 face the prospect of revising its regulations in order to comply with new regulations almost as  
19 soon as that process is complete.

20 The federal agencies that license or permit activities subject to state or tribal certification  
21 are in no better position. To date, it does not appear that *any* federal agency has amended its  
22 regulations to comply with the 2020 Rule. Notably, the executive order that kick-started this  
23 rulemaking process—Executive Order 13,868: *Promoting Energy Infrastructure and Energy*  
24 *Growth*, 84 Fed. Reg. 15,495 (April 10, 2019)—directed that once the rule was complete, EPA  
25 was to convene an "interagency review, in coordination with the head of each agency that issues  
26 permits or licenses subject to the certification requirements of section 401" to evaluate the  
27 agency's current regulations and propose rulemakings where necessary "to ensure the[]  
28 respective agencies' regulations are consistent with the" 2020 Rule. *Id.* at 15,496. But this never

1 occurred. Indeed, the Army Corps of Engineers is the only federal agency to announce that it is  
 2 currently considering such a rulemaking, proposing to issue an advanced notice of proposed  
 3 rulemaking this fall. OMB, Unified Regulatory Agenda, RIN: 0710-AB27, Clean Water Act  
 4 Section 401: Water Quality Certification for U.S. Army Corps of Engineers Projects.<sup>3</sup> However,  
 5 the Corps notes that it “will reevaluate the path forward on this rulemaking action pending future  
 6 actions by EPA.” *Id.* Thus, should the 2020 Rule remain in place, it and other federal agencies  
 7 will attempt to simultaneously apply two sets of rules: their current regulations and the flawed  
 8 2020 Rule.

9 Moreover, American Rivers—and other members of the public trying to navigate this  
 10 regulatory morass—will be harmed. EPA suggests that American Rivers and others will be able  
 11 to mitigate this harm by “challeng[ing] individual 401 certifications or federal actions taken  
 12 pursuant to the Certification Rule as they arise, to the extent they may threaten imminent,  
 13 concrete harm to a party or its members in the future.” Dkt. 143 at 12. This invitation to add  
 14 countless new cases to state and federal courts across the country, in fact, misses at least two of  
 15 the most insidious ways the 2020 Rule may work to harm the public and the environment. First,  
 16 as noted above, a failure to comply with the 2020 Rule would open the certifying state or tribe to  
 17 a challenge by an applicant, and the potential that the federal licensing or permitting agency may  
 18 veto any terms and conditions. As a result, some states or tribes will try to comply with the 2020  
 19 Rules and write certifications that fall short of what is necessary to protect water quality and  
 20 ensure compliance with state or tribal laws. Challenging such a decision would require groups,  
 21 such as American Rivers, to comply with the state’s administrative proceedings and then  
 22 navigate the state courts, explaining why the agency erred by applying the 2020 Rule. *See, e.g.,*  
 23 *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 665–67 (Wash. 2004) (*en banc*)

24  
 25 <sup>3</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0710-AB27> (last  
 26 accessed July 26, 2021). A court may take notice of information found on agency websites.  
 27 *Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (taking judicial notice of  
 28 document because it is “available on [an agency] website”); *Nat. Res. Def. Council v. McCarthy*,  
 No. 16-cv-02184-JST, 2016 WL 6520170, at \*2 (N.D. Cal. Nov. 3, 2016) (taking judicial notice  
 of documents because “they are matters of public record available on a governmental agency  
 website”).

1 (summarizing the four-year process, beginning with a ten-day administrative hearing, two levels  
2 of state judicial appeal and a separate federal lawsuit, to resolve a dispute over the terms and  
3 conditions of a 401 certification). This is a near-impossible task in many instances. *Cf. id.* at 672  
4 (noting under Washington law, the courts “must give great weight to [an agency’s] interpretation  
5 of the laws that it administers”); *Bldg. Indus. Ass’n of San Diego Cty. v. State Water Res. Control*  
6 *Bd.*, 22 Cal. Rptr. 3d 128, 137 n.9 (Cal. Ct. App. 2004), *as modified on denial of reh’g* (Jan. 4,  
7 2005) (“under governing state law principles, we do consider and give due deference to the  
8 Water Boards’ statutory interpretations”). It also vastly overestimates the resources of  
9 conservation groups like American Rivers, which simply lack the means to bring countless as-  
10 applied challenges. Realistically, many actions by states and tribes taken under the unlawful  
11 2020 Rule are likely to go unchallenged.

12         Second, other certifying states and tribes, seeing the limited information they will receive  
13 at the outset of the process, the narrow scope of review, the limited ability to impose meaningful  
14 conditions, the threat of a federal agency veto, and the prospect of being sued by the applicant  
15 for failing to follow fundamentally flawed rules, may—understandably—find trying to write a  
16 certification not worth the effort. If a state or tribe waives its authority in such a situation, the  
17 public may have no recourse to challenge that decision.

18         Moreover, the 2020 Rule will allow some projects to go forward, escaping meaningful  
19 review of their water quality impacts. Indeed, in many instances, a state’s or tribe’s certification  
20 is considered the definitive word on whether a project will impact water quality. For example,  
21 the Army Corps of Engineers’ regulations governing the scope of its review in deciding whether  
22 to grant permits under Section 404 of the Clean Water Act highlights the far-reaching impacts of  
23 the 2020 Rule. The Corps’ regulations state that “[c]ertification of compliance with applicable  
24 effluent limitations and water quality standards required under provisions of section 401 . . . will  
25 be considered conclusive with respect to water quality considerations unless [EPA], advises of  
26 other water quality aspects to be taken into consideration.” 33 C.F.R. § 320.4(d). Thus, if a state  
27 or tribe certifies a project under the 2020 Rule that requires a Section 404 permit, and consistent  
28 with the 2020 Rule does not address the impacts caused by the project, the Corps will not

1 consider the project’s impacts, including those caused by nonpoint source discharges—no matter  
2 how dire—as part of its public interest review process. *See Friends of the Earth v. Hintz*, 800  
3 F.2d 822, 834 (9th Cir. 1986); *Sierra Club*, 909 F.3d at 646 (“The plain language of the statute  
4 does not authorize the Corps to replace a state condition with a meaningfully different alternative  
5 condition, even if the Corps determines that the alternative condition is more protective of water  
6 quality.”).<sup>4</sup> Such a foreseeable outcome demonstrates the 2020 Rule’s disruptive ripple effects  
7 across the federal regulatory web.

8 On the other side of the ledger, no party has argued that vacating the rule will be  
9 disruptive. *See ASSE Int’l*, 182 F. Supp. 3d at 1065 (ordering vacatur, after finding “no indication  
10 that the [agency] or anyone else would be seriously harmed or disrupted” by vacatur). Vacating  
11 the 2020 Rule would merely restore the workable status quo that existed for nearly five decades  
12 until the prior presidential administration upended it: the law would revert to the regulations and  
13 guidance that predated the Rule. *Paulsen*, 413 F.3d at 1008.

14 Moreover, no party has argued, or could seriously contend, that vacatur of the 2020 Rule  
15 would damage the purpose of the Clean Water Act—to “restore and maintain the chemical,  
16 physical, and biological integrity of the Nation’s waters[,]” and to “recognize, preserve, and  
17 protect the primary responsibilities and rights of States to prevent, reduce, and eliminate  
18 pollution[,]” 33 U.S.C. §§ 1251(a)–(b). Or cause the type of environmental harm or other  
19 significant public harm that in the past has lead the courts to leave other rules in place with on  
20 remand. *See Idaho Farm Bureau*, 58 F.3d at 1405–06 (declining to vacate the listing of a snail  
21 species as endangered under the ESA on account of a procedural error under the APA, because  
22 doing might result in the extinction of that species); *Cal. Cmities. Against Toxics*, 688 F.3d at 994  
23 (ordering remand without vacatur because vacating a rule revising a state implementation plan  
24 would exacerbate air pollution causing “severe” public harms undermining the goals of the Clean  
25 Air Act); *W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (declining to vacate a

26  
27 <sup>4</sup> Some courts have also suggested that federal agencies may rely on a state's 401 Certification  
28 to satisfy the “hard look” requirement with respect to water quality issues under the National  
Environmental Policy Act. *See, e.g., Little Lagoon Pres. Soc., Inc. v. U.S. Army Corps of Eng’rs*,  
No. CIV.A. 06-0587-WS-C, 2008 WL 4080216, at \*19 (S.D. Ala. Aug. 29, 2008).

1 rule because doing so would “thwart[] in an unnecessary way the operation of the Clean Air Act  
 2 in the State of California”). Here, it is remand *without* vacatur that would accomplish such  
 3 damage, and the potential environmental harm that will result.

4 **B. In the alternative, the Court should deny EPA’s motion for remand.**

5 If the Court decides to not order vacatur, it should deny EPA’s motion for remand  
 6 altogether. The D.C. Circuit has denied voluntary remand where “EPA made no offer to vacate  
 7 the rule; thus EPA’s proposal would have left petitioners subject to a rule they claimed was  
 8 invalid.” *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000). Here, too,  
 9 remand without vacatur would force American Rivers and the other plaintiffs to live indefinitely  
 10 with the “harmful effects” of the 2020 Rule. Because remand without vacatur would “prejudice  
 11 the vindication of [Plaintiffs’] claim[s],” *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414,  
 12 436 (D.C. Cir. 2018), EPA’s motion should be denied. Moreover, granting EPA’s request to  
 13 dismiss this action would abdicate the Court’s obligation to exercise the jurisdiction conferred to  
 14 it by Congress and the Constitution. EPA has failed to identify which of the extremely narrow  
 15 exceptions to federal jurisdiction allows for involuntary dismissal, or provide any legal basis for  
 16 the drastic measure of dismissal with prejudice.

17  
 18 **1. Remand is not appropriate because EPA has not demonstrated its  
 commitment to a changed approach.**

19 In the Ninth Circuit, courts generally look to the Federal Circuit’s decision in *SKF USA*  
 20 *Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001) for guidance when reviewing requests for  
 21 voluntary remand. *See, e.g., Cal. Cmities. Against Toxics*, 688 F.3d at 992; *United States v.*  
 22 *Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. C–09–4029 EMC, 2011 WL 3607790, at  
 23 \*3 (N.D. Cal. Aug. 16, 2011). *SKF* describes five positions an agency may take in response to  
 24 judicial review of an agency action. *SKF*, 254 F.3d at 1028–29. EPA’s request for remand is of  
 25 the fourth type under *SKF*: “even in the absence of intervening events, the agency may request a  
 26 remand, without confessing error, to reconsider its previous position.” *Id.* at 1029. In this  
 27 scenario, remand may be denied if the agency fails to demonstrate its request was made in good  
 28 faith and is not frivolous. *Id.* “[B]ad faith may be demonstrated when an agency’s position does

1 not demonstrate a commitment to a changed approach.” *N. Coast Rivers All. v. U.S. Dep’t of*  
2 *Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 11372492, at \*2 (E.D. Cal. Sept. 23, 2016).

3 Here, EPA’s statements of “substantial concern” over the rule alone do not justify remand  
4 without vacatur, because its actions will impermissibly leave plaintiffs “subject to a rule they  
5 claimed was invalid.” *Chlorine Chemistry Council*, 206 F.3d at 1288. Here, while American  
6 Rivers certainly agrees EPA’s “substantial concern” is justified, the *process* EPA has laid out to  
7 address those concerns does not demonstrate a genuine commitment to a changed rule that will  
8 address all of those concerns. Instead, to date, EPA has only committed to an initial process of  
9 “initiat[ing] a series of stakeholder outreach sessions and invit[ing] written feedback on how to  
10 revise the requirements for water quality certifications under the Clean Water Act.” 86 Fed. Reg.  
11 at 29,451. This, however, is only the beginning of a lengthy rulemaking progress that EPA  
12 expects to run well into 2023. *See* Dkt. No. 143 at 6. During this time, if EPA follows through on  
13 the steps it has outlined, it will go through two rounds of public comment and several additional  
14 layers of review with the administration. EPA’s current goal is to develop a rule “that promotes  
15 efficiency and certainty in the certification process, that is well informed by stakeholder input on  
16 the 401 Certification Rule’s substantive and procedural components, and that is consistent with  
17 the cooperative federalism principles central to CWA Section 401.” 86 Fed. Reg. at 29,542. Yet,  
18 that is virtually the same thing EPA said when promulgating the 2020 Rule, which it stated were  
19 “intended to make the Agency’s regulations consistent with the current text of CWA section 401,  
20 increase efficiencies, and clarify aspects of CWA section 401 that have been unclear or subject to  
21 differing legal interpretations in the past.” 85 Fed. Reg. at 42,236. There is nothing in EPA’s  
22 proposed process preventing the agency from landing right back in the same place it started.

23 If EPA were genuinely committed to a changed approach, it would be reasonable to  
24 expect EPA to request vacatur and provide more clarity regarding the steps it will take to address  
25 the legal errors that permeate the 2020 Rule. *Cf. Meeropol v. Meese*, 790 F.2d 942, 953 (D.C.  
26 Cir. 1986) (“what is expected of a law-abiding agency is that it admit and correct error when  
27  
28



error is revealed”).<sup>5</sup> Its unwillingness to provide more leaves all involved unable to discern whether, and to what degree, EPA has truly committed to a change in approach.

Moreover, the fact that American Rivers’ challenge concerns “the scope of the [agency’s] statutory authority” and “is intertwined with any exercise of agency discretion going forward” makes remand without vacatur all the more imprudent. *Util. Solid Waste Activities Grp.*, 901 F.3d at 436–37. A ruling on the merits will provide important guidance to EPA’s ongoing and future implementation of the Clean Water Act. As the Fourth Circuit has observed, “remand without vacatur principally is relevant in matters where agencies have ‘inadequately supported rule[s]’” and not for situations where the agency “exceeded [their] statutory authority.” *Sierra Club*, 909 F.3d at 655 (quoting *Allied-Signal*, 988 F.2d at 150). This is especially true here, because EPA exceeded its statutory authority in a manner that directly impinges on other sovereigns’ statutory authority under the Clean Water Act. American Rivers is unaware of *any* case where an agency rule was left in place during remand under such circumstances. For these additional reasons, the Court should decline EPA’s request for remand without vacatur.

## 2. Granting EPA’s motion would deprive American Rivers of its right to judicial review.

Even if remand without vacatur were appropriate, the procedural vehicle selected by EPA—dismissal with prejudice—is unwarranted. The Ninth Circuit has held that “[b]ecause dismissal with prejudice is a harsh remedy, our precedent is clear that the district court ‘should first consider less drastic alternatives.’” *Hearns v. San Bernardino Police Dep’t*, 530 F.3d 1124, 1132 (9th Cir. 2008) (quoting *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996)). EPA fails to provide any legal basis for its request for dismissal with prejudice.<sup>6</sup> In fact, EPA does not

<sup>5</sup> Although refusing to formally confess error is not dispositive, *N. Coast Rivers Alliance*, 2016 WL 11372492, at \*2, it is a factor courts take into account. See *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (noting that the agency refused to confess error, in denying “last second” remand motion).

<sup>6</sup> Involuntary dismissal with prejudice is appropriate only when the following factors favor it: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002). EPA has not shown, nor can it, that any of these

1 identify a single case—and American Rivers is not aware of any—where a court dismissed a  
 2 case with prejudice after determining that remand was appropriate. Nor has EPA demonstrated  
 3 that less drastic alternatives are unavailable.<sup>7</sup>

4 EPA’s proposed order of dismissal with prejudice would leave American Rivers and the  
 5 other plaintiffs in this litigation injured by the unlawful 2020 Rule with no recourse if EPA  
 6 delays its reconsideration, or indeed if EPA never completes its reconsideration of the 2020 Rule  
 7 at all. It is unclear whether EPA’s proposed order would even allow American Rivers to bring  
 8 as-applied challenges to interim decisions made by federal agencies under the 2020 Rule. EPA’s  
 9 proposed order would render EPA unaccountable to judicial process, and would leave American  
 10 Rivers’ existing injuries unremedied and its future injuries without redress.

11 American Rivers has a right to judicial review of the 2020 Rule and for relief from the  
 12 rule following a judgment on the merits. 5 U.S.C. §§ 702, 704, 706(2). Granting EPA’s motion  
 13 for remand without vacatur—whether effectuated through dismissal with prejudice or  
 14 otherwise—would infringe this right.<sup>8</sup> More fundamentally, EPA seeks an end-run around  
 15 federal jurisdiction. With its motion, EPA invites the Court to abdicate its “virtually unflagging  
 16 obligation . . . to exercise the jurisdiction given [it].” *Colo. River Water Cons. Dist. v. United*  
 17 *States*, 424 U.S. 800, 817 (1976). The Court should decline EPA’s invitation.

### 18 **Conclusion.**

19 For these reasons, the Court should either grant in part and deny in part EPA’s motion for  
 20 remand and order that the 2020 Rule be remanded with vacatur, or deny EPA’s motion for  
 21

22 factors warrant the drastic and extraordinary measure of dismissal with prejudice.

23 <sup>7</sup> EPA has not attempted to show that even a less drastic measure, such as an involuntary stay, is  
 24 warranted. *See Nat. Res. Def. Council v. Norton*, No. 1:05-cv-01207-OWW-LJO, 2007 WL  
 25 14283, at \*13–16 (E.D. Cal. Jan. 3, 2007) (denying agency’s request for remand and a stay,  
 26 because “Plaintiffs are entitled to have their complaint decided on the merits, particularly given  
 27 the fact that Defendants continue to rely on the challenged [agency rules] as if they were lawfully  
 28 enacted”); *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936) (a litigant seeking a stay “must  
 make out a clear case of hardship or inequity in being required to go forward, if there is even a  
 fair possibility that the stay for which he prays will work damage to someone else.”).

<sup>8</sup> Ordering remand with vacatur, as discussed *supra* § I, would effectively grant American  
 Rivers the relief it seeks and render its first amended complaint jurisdictionally moot, and  
 therefore would not infringe its right of judicial review.

1 remand. If the Court decides to grant EPA's motion for remand without vacatur, it should not  
2 dismiss this case with prejudice, but retain jurisdiction.

3 Date: July 26, 2021.

Respectfully submitted,

4 /s/ Andrew Hawley

5 Andrew Hawley

Peter M. K. Frost

6 Sangye Ince-Johannsen

7 Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Opposition to EPA’s Motion for Remand Without Vacatur was electronically filed with the Clerk of the Court on July 26, 2021, using the Court’s electronic filing system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court’s system.

/s/ Andrew Hawley  
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14 **IN THE UNITED STATES DISTRICT COURT**  
 15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 16 **SAN FRANCISCO DIVISION**

17 In re

18 Clean Water Act Rulemaking

19 \_\_\_\_\_  
 20 This Document Relates to:

21 ALL ACTIONS

Case No. 3:20-cv-04636-WHA  
 (consolidated)

**EPA’S REPLY IN SUPPORT OF  
 MOTION FOR REMAND WITHOUT  
 VACATUR**

Courtroom: 12, 19<sup>th</sup> Floor  
 Date: August 26, 2021  
 Time: 8:00 a.m. PDT

1 Pursuant to Civil L.R. 7-2 and this Court’s Order of June 21, 2021 (Dkt. No. 142),  
2 Defendants, the United States Environmental Protection Agency and Michael S. Regan, in his  
3 official capacity as the Administrator of the United States Environmental Protection Agency  
4 (collectively, “EPA”), submit this reply brief in support of their motion to remand the Clean  
5 Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (the  
6 “Certification Rule” or the “Rule”) to EPA without vacatur. *See* EPA’s Mot. for Remand, Dkt.  
7 No. 143 (“Motion”).

8 The Court should grant EPA’s motion for remand without vacatur and decline Plaintiffs’  
9 requests for the Court to vacate the Certification Rule or set an expedited schedule for merits  
10 briefing. *See* Dkt. No. 146 (“State Plaintiffs Opp’n”); Dkt. No. 145 (“Suquamish Tribe Opp’n”);  
11 Dkt. No. 147 (“Am. Rivers Opp’n”).<sup>1</sup> Neither vacatur of the Certification Rule nor setting a  
12 schedule for merits briefing is warranted in these circumstances. EPA is commencing a new  
13 notice-and-comment rulemaking that will allow Plaintiffs’ concerns to be addressed in a  
14 thorough and transparent process that will be informed by input from all interested stakeholders.  
15 On remand, Plaintiffs are free to press forward with their arguments during the notice-and-  
16 comment period for the new rulemaking and are likewise free to challenge the new rule once it  
17 has been issued.

18 Conversely, further consideration of the merits in this case would waste the Court’s and  
19 the parties’ resources debating the substance of a rule that is subject to significant change. In  
20 addition, further merits proceedings would risk asking EPA to opine about issues that are  
21 currently the subject of a new rulemaking, potentially forcing EPA to improperly prejudge

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22  
23 <sup>1</sup> For brevity, where the arguments of the plaintiffs in each of the three related cases are  
24 referenced separately, EPA refers to the States of Washington, California, Connecticut,  
25 Maryland, New Mexico, Oregon, Nevada, Colorado, New York, North Carolina, New Jersey,  
26 Rhode Island, Vermont, Minnesota, Michigan, Wisconsin, Illinois, and Maine, the District of  
27 Columbia, and the Commonwealths of Virginia and Massachusetts, as the “State Plaintiffs” or  
28 “Plaintiff States.” EPA refers to Plaintiffs Suquamish Tribe, Pyramid Lake Paiute Tribe,  
Orutsararmut Native Council, Columbia Riverkeeper, and Sierra Club as the “Suquamish  
Tribe.” EPA refers to Plaintiffs American Rivers, American Whitewater, California Trout, and  
Idaho Rivers United as “American Rivers.”

1 substantive aspects of the rule under consideration. EPA’s requested remand without vacatur is  
 2 appropriate because it will enable EPA to complete its issuance of a new rule governing Section  
 3 401 certification *before* judicial review on the merits. From a practical standpoint, remand would  
 4 conserve the parties’ limited resources and would best serve the interest of judicial economy  
 5 because EPA’s new rule may resolve or moot some or all of the claims presented in this  
 6 litigation. For these reasons, this Court should follow the other two district courts in which  
 7 challenges to the Rule were filed, both of which have already remanded the Certification Rule to  
 8 EPA without vacatur. *See S.C. Coastal Conservation League v. EPA*, No. 2:20-cv-03062-BHH,  
 9 Order (D.S.C. Aug. 2, 2021) (Exhibit A to the Declaration of Leslie M. Hill); *Delaware*  
 10 *Riverkeeper Network v. EPA*, No. 2:20-cv-03412-MMB, Memorandum re Remand and Order  
 11 (E.D. Pa. Aug. 6, 2021) (Exhibit B to the Hill Decl.).

### ARGUMENT

#### **1. Remand without vacatur is proper because EPA has announced its intention to reconsider and revise the Certification Rule.**

15 Remand without vacatur is proper because EPA has announced its intention to reconsider  
 16 and revise the Certification Rule. *See Notice of Intention to Reconsider and Revise the Clean*  
 17 *Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,541 (June 2, 2021) (“Notice”).<sup>2</sup> In  
 18 *SKF USA Inc. v. United States*, the Federal Circuit described five possible positions that an  
 19 agency might take when an agency action is reviewed by the courts. 254 F.3d 1022, 1027-30  
 20 (Fed. Cir. 2001) (“*SKF USA*”). Relevant here is the fourth category, in which an agency may  
 21 request a voluntary remand—in advance of a ruling on the merits—without confessing error, “in  
 22 order to reconsider its previous position.” 254 F.3d at 1029. “It might argue, for example, that it  
 23 wished to consider further the governing statute, or the procedures that were followed. It might  
 24 simply state that it had doubts about the correctness of its decision or that decision’s relationship

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26 <sup>2</sup> To the extent Plaintiffs seek and this Court is inclined to grant nationwide vacatur, EPA would  
 27 request the opportunity for additional briefing on the scope of the vacatur. *See California v.*  
 28 *Texas*, 141 S. Ct. 2104, 2115 (2021) (citation omitted) (remedies “ordinarily ‘operate with respect to specific parties.’”).

1 to the agency’s other policies.” *Id.* In such a situation, the “reviewing court has discretion over  
2 whether to remand.” *Id.* Such a “remand may be refused if the agency’s request is frivolous or in  
3 bad faith,” but “if the agency’s concern is substantial and legitimate, a remand is usually  
4 appropriate.” *Id.*

5 Consistent with *SKF USA*, the Ninth Circuit has recognized that “[g]enerally, courts only  
6 refuse voluntarily requested remand when the agency’s request is frivolous or made in bad  
7 faith.” *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *SKF*  
8 *USA*, 254 F.3d at 1029); see *N. Coast Rivers All. v. United States Dep’t of the Interior*, No. 11-  
9 CV-00307-LJO-MJS, 2016 WL 8673038, at \*3 (E.D. Cal. Dec. 16, 2016) (noting that courts in  
10 the Ninth Circuit “generally look to the Federal Circuit’s decision in *SKF USA* for guidance  
11 when reviewing requests for voluntary remand”). Such requests are normally granted as long as  
12 the agency’s concern is substantial and legitimate. *SKF USA*, 254 F.3d at 1029; accord *United*  
13 *States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. C-09-4029 EMC, 2011 WL  
14 3607790, at \*3 (N.D. Cal. Aug. 16, 2011); *Amalgamated Transit Union, Int’l v. United States*  
15 *Dep’t of Labor*, No. 2:20-CV-00953-KJM-DB, 2021 WL 2003104, at \*2 (E.D. Cal. May 19,  
16 2021).

17 Of the three Plaintiff groups, only American Rivers has suggested that EPA’s request is  
18 somehow frivolous or not made in good faith, arguing that the Agency’s position does not  
19 demonstrate a commitment to a changed approach because EPA’s “statements of ‘substantial  
20 concern’ over the rule” are insufficient. Am. Rivers Opp’n at 15-16 (quoting *N. Coast Rivers All.*  
21 *v. United States Dep’t of Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 11372492, at \*2 (E.D.  
22 Cal. Sep. 23, 2016)). American Rivers takes issue with EPA’s statement of intent to follow the  
23 rulemaking process in reconsidering the Certification Rule, arguing that “[i]f EPA were  
24 genuinely committed to a changed approach, it would be reasonable to expect EPA to request  
25 vacatur and provide more clarity regarding the steps it will take to address the legal errors that  
26 permeate the 2020 Rule.” Am. Rivers Opp’n at 16 (emphasis added). But that position reflects a  
27 misunderstanding of administrative rulemaking. Under American Rivers’ theory, there is no  
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1 scenario under which an agency could demonstrate good faith or a lack of frivolity in its request  
2 unless it were to impermissibly prejudge the outcome of its rulemaking process or fail to comply  
3 with the Administrative Procedure Act rulemaking process, 5 U.S.C. § 555, *et seq.* *See, e.g., Cal.*  
4 *v. Bernhardt*, 472 F. Supp. 3d 573, 590-91 (N.D. Cal. 2020) (explaining that the “notice and  
5 comment requirements likewise apply when an agency seeks to amend or repeal a rule that has  
6 previously been promulgated.”).

7 Contrary to American Rivers’ suggestion, EPA’s detailed notice of its intent to reconsider  
8 the Certification Rule and the process laid out in the Goodin Declaration demonstrate both  
9 EPA’s “substantial concern” regarding the Rule and its express intent to reconsider numerous  
10 topics in the Certification Rule, including every challenged aspect of the Certification Rule. EPA  
11 Motion at 2-5, 10; *see also* Dkt. No. 143-1, Declaration of John Goodin ¶¶ 9-27 (“Goodin  
12 Decl.”). Further undercutting American Rivers’ suggestion of bad faith is the fact that EPA is  
13 already progressing through the reconsideration process. The initial stakeholder outreach period  
14 has already concluded, and the tribal consultation period is nearing its end. *See* Goodin Decl. ¶¶  
15 17-18. EPA is now reviewing stakeholder and tribal input, and in September the Agency will  
16 begin drafting a proposed rule based on that review. *See id.* ¶¶ 20-21. In other words, EPA has  
17 demonstrated through action that its stated intention to review every challenged aspect of the  
18 Certification Rule is in good faith. Thus, where, as here, none of the Plaintiffs has made a  
19 showing of bad faith or lack of sufficient commitment to reconsider the Rule, the Court should  
20 defer to the administrative process underway to revise the Rule.

21 Suquamish Tribe Plaintiffs incorrectly assert that EPA’s request falls within the fifth *SKF*  
22 *USA* category, i.e., a voluntary remand request associated with a change in agency policy or  
23 interpretation. Suquamish Tribe Opp’n at 6. Suquamish Tribe posits that the Agency has already  
24 changed its policies or interpretation regarding the Certification Rule. That understanding is  
25 incorrect. Instead, as the Goodin Declaration explains in detail, EPA intends to faithfully follow  
26 the APA rulemaking requirements and reconsider, without prejudging, every challenged aspect  
27 of the Rule raised by Plaintiffs in this litigation. Goodin Decl. ¶¶ 11-14.

1 Plaintiffs also contend that EPA’s request must be resolved on the basis of a two-factor  
2 analysis that requires consideration of “how serious the agency’s errors are ‘and the disruptive  
3 consequences of an interim change that may itself be changed,’” referred to as the *Allied-Signal*  
4 analysis. *Cal. Communities Against Toxics*, 688 F.3d at 992 (quoting *Allied-Signal, Inc. v.*  
5 *United States Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). This test  
6 for whether an agency action should be vacated is inapplicable here because the *Allied-Signal*  
7 analysis necessarily requires a determination on the merits. *Allied-Signal*, 988 F.2d at 150  
8 (applying the two-factor test only after holding that the agency actions at issue “cannot be  
9 viewed as reasoned decision-making”). Consideration of the first *Allied-Signal* factor, the  
10 seriousness of an agency’s errors, cannot occur here because there has been no ruling on the  
11 merits. And, for the reasons we explain above and below, proceeding to a merits ruling here  
12 would be both inappropriate and inefficient.

13 State Plaintiffs and American Rivers cite *ASSE International, Inc. v. Kerry*, 182 F. Supp.  
14 3d 1059, 1064 (C.D. Cal. 2016), for the proposition that the *Allied-Signal* analysis applies to  
15 requests for remand both before and after a ruling on the merits. State Plaintiffs Opp’n at 22;  
16 Am. Rivers Opp’n at 3, 14-15. Although *ASSE International* did include such a statement, the  
17 proposition is both dicta and, in any event, incorrect. First, the statement is dicta because the  
18 *ASSE International* court was considering a motion for remand from an agency after the Ninth  
19 Circuit had already identified an error of law and sent the case back to district court. 182 F.  
20 Supp. 3d at 1062 (explaining that the Ninth Circuit had found a due process violation and  
21 remanded to the district court to make certain determinations). Second, although the *ASSE*  
22 *International* court relied upon *Natural Resources Defense Council, Inc. v. United States*  
23 *Department of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002) (“*NRDC*”), for the  
24 proposition that “[c]ourts faced with a motion for voluntary remand employ ‘the same equitable  
25 analysis’ courts use to decide whether to vacate agency action after a ‘rul[ing] on the merits,’”  
26 *ASSE Int’l*, 182 F. Supp. 3d at 1064, that proposition is a misreading of *NRDC*. In *NRDC*, an  
27 agency sought a remand to reevaluate its decision in light of a ruling from another Circuit Court  
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1 that cast doubt upon the decision. 275 F. Supp. 2d at 1141-42. The district court in *NRDC* noted  
2 that it was not ruling on the merits of the agency action, but concluded that it should apply the  
3 “test for whether to remand *an arbitrary and capricious rule*” without vacatur, i.e., the *Allied-*  
4 *Signal* test, in those circumstances. 275 F. Supp. 2d at 1143 (citing *Int’l Union, United Mine*  
5 *Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). The *ASSE*  
6 *International* court’s conclusion that the same test applies to voluntary requests for remand  
7 before any merits determination or admission of error is misplaced.

8 Notably, in each of the cases cited by Plaintiffs suggesting applicability of the *Allied-*  
9 *Signal* analysis, there had already been a ruling on the merits, a concession by the agency that an  
10 intervening court decision cast doubt on the agency’s action, or at least some basis upon which  
11 the reviewing court could identify and evaluate the agency’s errors such that the court could  
12 assess the seriousness of those errors.<sup>3</sup> That is not the case here, so the *Allied-Signal* framework  
13 is inapplicable.

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17 <sup>3</sup> See *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 528 (9th Cir. 2015) (considering  
18 whether to vacate after the court “cannot conclude that the unconditional registration [of the  
19 challenged pesticide] is supported by the record as a whole”); *Cal. Communities Against Toxics*,  
20 688 F.3d at 992-93 (considering whether to vacate after finding that EPA’s rules was both  
21 procedurally and substantively invalid); *ASSE Int’l, Inc. v. Kerry*, 182 F. Supp. 3d at 1063  
22 (considering whether to vacate sanctions issued by the State Department after remand from a  
23 Ninth Circuit panel that found a due process violation); *Idaho Farm Bureau*, 58 F.3d at 1405-06  
24 (declining to vacate the listing of a snail species as endangered after determining that the  
25 agency’s action was based on a procedural error under the APA); *W. Oil & Gas Ass’n v. EPA*,  
26 633 F.2d 803, 813 (9th Cir. 1980) (declining to vacate EPA air quality designations after finding  
27 that EPA had failed to comply with APA notice and comment procedures in issuing the  
28 designations); *N. Coast Rivers All. v. United States Dep’t of the Interior*, No. 116-CV-00307-  
LJO-MJS, 2016 WL 8673038, at \*5 (E.D. Cal. Dec. 16, 2016) (granting motion for voluntary  
remand where agency acknowledged that its action would not pass muster under intervening  
Ninth Circuit decision); *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic & Atmospheric*  
*Admin. Nat’l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1240 (N.D. Cal. 2015) (considering  
whether to vacate Endangered Species Act incidental take permits that the court had already  
determined were issued arbitrarily and capriciously).

1 Indeed, EPA has presented a classic case for remand without vacatur. The administrative  
2 rulemaking process that is already underway, not judicial review, is the appropriate course for  
3 EPA to address its concerns with the Certification Rule. Courts “have recognized that  
4 ‘[a]dministrative reconsideration is a more expeditious and efficient means of achieving an  
5 adjustment of agency policy than is resort to the federal courts.’” *B.J. Alan Co. v. ICC*, 897 F.2d  
6 561, 562-63 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d  
7 1187, 1194 (D.C. Cir. 1978)). “Remand has the benefit of allowing agencies to cure their own  
8 mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both  
9 sides acknowledge to be incorrect or incomplete.” *Util. Solid Waste Activities Grp. v. EPA*, 901  
10 F.3d 414, 436 (D.C. Cir. 2018) (internal quotations omitted). Here, EPA seeks remand because  
11 it intends to reconsider and revise the implementing regulations for state certification of federal  
12 licenses and permits that may result in any discharge into waters of the United States pursuant to  
13 section 401 of the Clean Water Act, 33 U.S.C. § 1341. To that end, EPA has commenced a new  
14 rulemaking, which will allow it to address the alleged legal and policy flaws in the Certification  
15 Rule in a comprehensive and transparent manner, with full participation by interested members  
16 of the public.

17 **2. Remand without vacatur, and not a merits adjudication, is procedurally**  
18 **appropriate and efficient.**

19 Granting remand and dismissal has the added benefit of conserving both the parties’ and  
20 the Court’s resources because it will resolve the current litigation and allow EPA to focus its  
21 limited resources on a new rule that may well address Plaintiffs’ concerns, thereby preventing  
22 additional litigation. EPA has already commenced the process to promulgate a revised rule. Yet  
23 Plaintiffs ask this Court to undertake a burdensome and potentially lengthy merits consideration  
24 of a rule that will likely cease to exist in its current form by spring 2023, about one and a half  
25 years from the filing of this motion. *See Goodin Decl.* ¶ 27. Continuing with merits proceedings,  
26 as Plaintiffs request, would interfere with and undoubtedly delay EPA’s new rulemaking. EPA is  
27 entitled to commence a new rulemaking to govern Section 401 certification, and the Court  
28 should defer to this process. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125

1 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned  
2 explanation for the change.”).

3 Remand without vacatur would not unduly prejudice Plaintiffs, who are able to  
4 participate in the notice-and-comment opportunities provided by the new rulemaking. Nor would  
5 remand serve to deny Plaintiffs judicial review, as they are free to challenge any certification  
6 decisions issued under the current Rule, and to challenge the new rule once it has been issued.  
7 That the Rule will remain in effect while EPA revises it pursuant to the required process of the  
8 Administrative Procedure Act should not be considered “undue” prejudice. Indeed, the  
9 rulemaking requirements of the Administrative Procedure Act serve to provide stability and  
10 mitigate against the disruptive consequences of frequent changes in regulatory schemes. EPA has  
11 set forth a reasoned timeline for a proposed rule in spring 2022 and final rule in spring 2023.  
12 Goodin Decl. ¶¶ 23, 27. *Compare with* State Plaintiffs Opp’n at 2 (asserting without support that  
13 remand without vacatur would “leav[e] the Rule in place for at least an additional two years”).  
14 During the rulemaking period, EPA is committed to providing technical assistance to all  
15 stakeholders regarding interpretation and implementation of the Certification Rule and working  
16 with its federal agency partners to address implementation concerns raised by Plaintiffs. Goodin  
17 Decl. ¶¶ 29-30. In sum, because EPA is commencing a new rulemaking to address Plaintiffs’  
18 concerns with the Certification Rule, the Court should grant EPA’s motion for voluntary remand  
19 without vacatur instead of potentially requiring EPA to litigate the merits of a rule that it has  
20 committed to reconsider and revise.

21 American Rivers and Suquamish Tribe allege they will suffer harm or undue prejudice if  
22 the Court does not vacate the Certification Rule.<sup>4</sup> State Plaintiffs present numerous declarations  
23 describing the alleged harm that they will suffer and even suggest that it would be appropriate to  
24 set an expedited briefing schedule if the Court does not remand the Rule.<sup>5</sup> Plaintiffs filed this  
25  
26

27 <sup>4</sup> Am. Rivers Opp’n at 10-15; Suquamish Tribe Opp’n at 9-11.

28 <sup>5</sup> State Plaintiffs Opp’n at 4-14 and Dkt. No. 146-1 to 146-9.

1 litigation in summer 2020,<sup>6</sup> after the final Rule was issued on July 13, 2020. 85 Fed. Reg. at  
2 42,210. Yet, despite their protestations of alleged harm if the Rule is not quickly vacated now,  
3 Plaintiffs took no actions in 2020 to indicate that time was of the essence; in fact, their actions  
4 have prolonged the litigation. None of the Plaintiffs sought preliminary relief from the Court in  
5 2020 to maintain the status quo. More than one year has passed; yet, now Plaintiffs suggest that  
6 allowing the Certification Rule to remain in place until EPA completes its reconsideration and  
7 promulgates a revised rule in the spring of 2023 is too long. *See* Am. Rivers Opp’n at 14  
8 (arguing that “[v]acating the 2020 Rule would merely restore the workable status quo”).  
9 Furthermore, Plaintiffs rejected the opportunity to expedite this action by agreeing to file  
10 summary judgment briefs based on EPA’s administrative record, as EPA requested. *See* Dkt. No.  
11 84 § 17(b) (requesting a schedule that would have provided for a summary judgment hearing as  
12 early as February 11, 2021). Plaintiffs instead stalled merits briefing by demanding  
13 supplementation of the record, giving rise to a lengthy process that required EPA to review large  
14 numbers of internal communications and produce privilege logs and additional documents. Dkt.  
15 No. 84, § 17(a). Dkt. No. 115. Against that backdrop of delay, Plaintiffs’ allegations that severe  
16 harm will occur during the rulemaking period, such that vacatur is the only option, are  
17 unconvincing.

### 18 CONCLUSION

19 For the foregoing reasons, and for the reasons identified in EPA’s motion to remand,  
20 EPA respectfully asks the Court to remand the Certification Rule without vacatur and to dismiss  
21 this case rather than requiring EPA to litigate a rule that may be substantially revised or replaced.

22 Respectfully submitted this 12th day of August 2021.

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27 <sup>6</sup> *See* Dkt. No. 1 in Case No. 3:20-cv-4636 (American Rivers); Dkt. No. 1 in original Case No.  
28 3:20-cv-04869 (State Plaintiffs); and Dkt. No. 1 in original Case No. 3:20-cv-06137 (Suquamish  
Tribe).

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U.S. Environmental Protection Agency

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

In re  
Clean Water Act Rulemaking

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This Document Relates to:  
ALL ACTIONS

Case No. 3:20-cv-04636-WHA  
(consolidated)

**DECLARATION OF LESLIE M.  
HILL IN SUPPORT OF EPA’S  
REPLY IN SUPPORT OF EPA’S  
MOTION FOR REMAND WITHOUT  
VACATUR**

I, Leslie M. Hill, hereby declare as follows:

1. I am a Trial Attorney for the United States Department of Justice and counsel of record for Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, “EPA”), in this action. I am admitted to practice in the District of Columbia. Pursuant to Civil L.R. 6-3(a), I make this declaration in support of the EPA’s Reply in Support of its Motion for Remand Without Vacatur. I have personal knowledge of the facts herein, and if called upon to testify, I could and would do so.

2. Attached as Exhibit A is a true and correct copy of an order issued in *S.C. Coastal Conservation League v. EPA*, No. 2:20-cv-03062-BHH (D.S.C.) on August 2, 2021 (Dkt. No. 69).

3. Attached as Exhibit B is a true and correct copy of the memorandum and order regarding remand issued in *Delaware Riverkeeper Network v. EPA*, No. 2:20-cv-03412-MMB, Memorandum re Remand and Order (E.D. Pa.) on Aug. 6, 2021 (Dkt. No. 74 & 75).

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1 I declare under penalty of perjury under the laws of the United States of America, that  
2 the foregoing is true and correct. Executed on August 12, 2021, at Washington, D.C.

3  
4 /s/ Leslie M. Hill

5 LESLIE M. HILL (D.C. Bar No. 476008)

6 U.S. Department of Justice

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8 Environmental Defense Section

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**aUNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION**

SOUTH CAROLINA COASTAL  
CONSERVATION LEAGUE, *et al.*,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and MICHAEL  
S. REGAN,<sup>1</sup> in his official capacity as the  
Administrator of the United States  
Environmental Protection Agency,

Defendants,

AMERICAN PETROLEUM INSTITUTE,  
*et al.*,

Defendant-Intervenors,

NATIONAL HYDROPOWER  
ASSOCIATION,

Defendant-Intervenors,

STATE OF LOUISIANA, *et al.*,

Defendant-Intervenors.

Civil Action No. 2:20-cv-03062-BHH

**ORDER GRANTING EPA'S MOTION  
FOR REMAND WITHOUT VACATUR**

Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), moved to remand the *Clean Water Act Section*

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<sup>1</sup> EPA Administrator Michael Regan is automatically substituted for Andrew Wheeler pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

*401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (the “Certification Rule”), to the EPA without vacatur. (ECF No. 67.) Having considered the EPA’s motion and Plaintiffs’ response in opposition, and otherwise being sufficiently advised, the Court hereby GRANTS the EPA’s motion. It is therefore ORDERED that the Certification Rule is remanded to EPA without vacatur. All other pending motions are hereby denied as moot and this action is dismissed, with all parties to bear their own attorneys’ fees and costs.

**IT IS SO ORDERED.**

/s/Bruce Howe Hendricks  
United States District Judge

August 2, 2021  
Charleston, South Carolina

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p><b>DELAWARE RIVERKEEPER NETWORK, et al.</b></p> <p style="text-align: center;">v.</p> <p><b>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.</b></p>	<p><b>CIVIL ACTION</b></p> <p><b>NO. 20-3412</b></p>
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**MEMORANDUM RE REMAND**

**Baylson, J.**

**August 6, 2021**

**I. Introduction**

In this case brought by an environmental organization against the United States Environmental Protection Agency (EPA) regarding an environmental regulation, Defendants have filed a Motion to Remand without vacatur arguing that the agency should have the opportunity to review and revise the regulation on its own. For the reasons stated below, Defendants' Motion to Remand without vacatur will be granted. Defendant Intervenors Motion to Strike will be denied.

**II. Facts and Procedural History**

Plaintiffs are the Delaware Riverkeeper Network (DRN), an environmental and community organization and Maya Van Rossum, the leader of DRN. Defendants are the EPA and Michael Regan, the new EPA Administrator, who has been substituted for Andrew Wheeler as a Defendant. Plaintiffs brought this case seeking the rescission of the "Certification Rule" promulgated during the Trump Administration. The Certification Rule concerns the process for permitting activities that may affect water quality. This Court previously denied Defendants' Motion to Dismiss based on standing. On January 20, 2021, President Biden issued Executive Order 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. 86 Fed.

Reg. 7037 (Jan. 25, 2021). Executive Order 13,990 stated that it is the policy of the new administration:

to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

Id. at 7037. This Executive Order directs federal agencies to “immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” Id. The Biden Administration has specifically stated that the Certification Rule is a regulation which it intends to review for potential revision or rescission. In response to the Administration announcing its intentions to review the Rule, the parties agreed to hold the case in abeyance to provide the EPA more time to determine a course of action. ECF 57, 61, 64. At this point, the EPA has completed its initial review of the Certification Rule and determined that it will undertake a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule. The EPA expects a proposed rule detailing revisions to the Certification Rule will be published in the Federal Register in Spring 2022. Following the public comment period on the proposed rule, EPA plans to review comments and other input, develop the final rule, and submit it to OMB for interagency review, with a final rule in Spring 2023.

Defendants filed the present Motion to Remand without vacatur on July 1, 2021 (ECF 67). Plaintiffs responded on July 22, 2021, arguing that the Court should remand with vacatur, or in the

alternative, that the case should proceed (ECF 68). Defendant Intervenors filed a Joint Motion to Strike on August 4, 2021, seeking to strike the Plaintiffs response to the extent it seeks remand with vacatur (ECF 70). Defendants filed a Reply in support of their Motion (ECF 71), and Plaintiffs filed a response to Defendant Intervenors Motion to Strike on August 5, 2021 (ECF 72).

### III. Legal Standard

An “agency may request a remand (without confessing error) in order to reconsider its previous position.” SKF USA, Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001). “[T]he reviewing court has discretion over whether to remand.” Id. Courts “generally grant an agency’s motion to remand so long as the agency intends to take further action with respect to the original agency decision on review” because it “has the benefit of allowing agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources.” Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414, 436 (D.C. Cir. 2018).

The decision to vacate the Rule or leave it in place while the agency reconsiders its decision is also a matter within the Court’s discretion. Checkosky v. SEC, 23 F.3d 452, 465 (D.C. Cir. 1994). The Third Circuit, as well as this Court, has cited the D.C. Circuit’s Allied-Signal test when considering whether vacatur is appropriate. See Prometheus Radio Proj. v. Fed. Comm. Comm’n, 824 F.3d 33, 52 (3d Cir. 2016); Comite de Apoyo a los Trabajadores Agricolas v. Solis, 933 F. Supp. 2d 700, 713–16 (E.D. Pa. 2013). Under that test, “[t]he decision whether to vacate depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

In Allied-Signal, the D.C. Circuit found that “[a]n inadequately supported rule . . . need not necessarily be vacated.” Id. at 150. In that case, the deficiencies were the failure of the agency to

adequately state its reasoning, and thus not “serious” because the agency, on remand, might be able to easily provide the necessary explanation. Id. at 151. In addition, the consequences of an interim rule change would have been extremely disruptive as it would have required the agency to refund all the fees that had been collected under the rule at issue. Id.

In SKF USA Inc. v. United States, the D.C. Circuit reviewed five general circumstances in which an agency action is review by the Courts. 254 F.3d 1022, 1028–29 (Fed. Cir. 2001). In its discussion of the circumstance most relevant here, the D.C. Circuit stated:

[T]he agency may request a remand because it believes that its original decision is incorrect on the merits and wishes to change the result. That is the present situation. Remand to an agency is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations. The more complex question, however, involves a voluntary remand request associated with a change in agency policy or interpretation. If there is a step one Chevron issue - that is, an issue as to whether the agency is either compelled or forbidden by the governing statute to reach a different result - a reviewing court again has considerable discretion. It may decide the statutory issue, or it may order a remand. For example, in Steele v. FCC, No. 84-1176 (D.C. Cir. Oct. 31, 1985) (en banc), as described in Lamprecht v. FCC, 294 U.S. App. D.C. 164, 958 F.2d 382, 385 (D.C. Cir. 1992), the Court of Appeals for the District of Columbia Circuit granted the FCC’s motion to remand when the FCC admitted that its decision was contrary to the Communications Act and the Constitution. Although a court need not necessarily grant such a remand request, remand may conserve judicial resources, or the agency’s views on the statutory question, though not dispositive, may be useful to the reviewing court.

Where there is no step one Chevron issue, we believe a remand to the agency is required, absent the most unusual circumstances verging on bad faith. Under Chevron, agencies are entitled to formulate policy and make rules “to fill any gap left, implicitly or explicitly, by Congress.” Chevron, 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)). Furthermore, an agency must be allowed to assess “the wisdom of its policy on a continuing basis.” Id. at 864. Under the Chevron regime, agency discretion to reconsider policies does not end once the agency action is appealed. See Auer v. Robbins, 519 U.S. 452, 462-63 (1997) (deferring to agency’s interpretation of its own regulation advanced in litigation).

Id. at 1029 (citations omitted).

#### **IV. Parties' Arguments**

The EPA argues first that remand without vacatur is appropriate because the EPA has publicly announced its intention to reconsider and revise the Rule. It argues that where there is no showing of bad faith, the Court should allow the agency to revise the Rule on its own, relying on SKF USA. It also argues that remand without vacatur conserves the parties and the Court's resources by resolving the current litigation and would not prejudice Plaintiffs who will have the opportunity to participate in the rule making process. It argues that allowing the Rule to remain in place in the process is not undue prejudice to Plaintiffs because going through the rulemaking process is the best way to promote stability under the APA. The EPA states it is committed to providing assistance to stakeholders and working with agency partners to address Plaintiff's concerns in the interim.

Plaintiffs seek remand with vacatur, or in the alternative, for the case to proceed on the merits. Plaintiffs argue that vacatur is appropriate because the Rule has serious deficiencies and would not be disruptive. Plaintiffs also argue that they would be prejudiced by allowing the Rule to remain in place because they will have to continue to suffer the harms alleged under the Rule for at least two years for the new Final Rule is promulgated. They contend that Defendants cannot argue that the harms are too speculative, as this Court struck down such arguments in its opinion on standing.

#### **V. Discussion**

To begin, the Court finds that remand to the EPA is appropriate here, where the agency has indicated its clear intent to revise the Rule on its own. It would not serve interests of judicial



economy to continue a case regarding a Rule that will likely no longer be law once the agency makes its revisions. Thus, the key question here is whether vacatur of the Rule is appropriate.

The discussion of remand in SKF USA is most relevant here, as it discusses a situation in which the agency seeks to revise a decision based on its belief that the substance of its prior decision was incorrect, as opposed to a procedural or clerical issue. SKF USA does not concern a Rule but the calculation of a tax by the Department of Commerce. Therefore, the opinion does not discuss vacatur specifically. However, under the principles described by the D.C. Circuit in this case, allowing the agency to use its discretion to revise the Rule here would be appropriate.

This case is somewhat distinct from the other cases which discuss vacatur specifically. In Comite de Apoyo a los Trabajadores Agricolas v. Solis, the Court laid out the usual circumstances in which remand is sought:

The practical effect of remand without vacatur is that an invalid rule remains in place while an agency works to correct its errors. This approach is often sensible where an agency promulgates a substantively valid rule through an invalid process and the agency will likely promulgate the same rule through a proper process on remand. Nonetheless, remand without vacatur is far less logical where, as here, a court finds that a rule directly contradicts an agency's authority and the agency expresses no intention of timely correcting its error. In such circumstances, to leave an invalid rule in place is for a reviewing court to legally sanction an agency's disregard of its statutory or regulatory mandate.

933 F. Supp. 2d 700, 714 (E.D. Pa 2013) (Davis, J.). The present situation does not fit into either of these circumstances. The Rule is not being remanded based on an invalid process, and it has also not been found to be invalid at this stage in the case. The parties have also not pointed to other specific consequences of vacatur. As the Court has not yet, and will not, make a finding on the substantive validity of the Certification Rule, the principles discussed in SKF-USA support a remand without vacatur.

## **VI. Motion to Strike**

There are several intervenors in this case: the States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming, American Petroleum Institute, Interstate Natural Gas Association of America, and National Hydropower Association. The intervenors have filed a collective Motion to Strike the Plaintiffs' Response to the extent that Plaintiffs request remand with vacatur.

Intervenor Defendants argue that Plaintiffs request that the Court remand without vacatur is procedurally improper because it seeks affirmative relief through a response, as opposed to filing a Motion as required. Intervenor Defendants argue that by filing a response seeking affirmative relief and making arguments which go to the validity of the Rule, they have deprived the Intervenor Defendants of the opportunity to oppose their Motion and make arguments in response. Plaintiffs argue that their response does not seek affirmative relief and is an appropriate response to the Motion by Defendants. Plaintiffs also point out that the Intervenor Defendants were aware of Plaintiffs intention to oppose Defendants' Motion for Remand without vacatur and had the opportunity to file a brief in support.

The Court will deny Defendant Intervenor's Motion to Strike because they had the opportunity to present arguments in support of Defendants Motion and/or in opposition to Plaintiffs and chose not to. There is no basis for striking Plaintiffs' Response.

## **VII. Conclusion**

For the reasons stated above, the EPA's Motion to Remand without vacatur is granted. Defendant Intervenor's Motion to Strike is denied. An appropriate Order follows.

/

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>DELAWARE RIVERKEEPER NETWORK, et al.</b>	<b>CIVIL ACTION</b>
<b>v.</b>	<b>NO. 20-3412</b>
<b>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.</b>	

**ORDER RE REMAND**

**AND NOW**, this 6<sup>th</sup> day of August, 2021, upon consideration of Defendants Environmental Protection Agency and Michael Regan's Motion for Remand without vacatur (ECF 67), Plaintiffs Delaware Riverkeeper Network and Maya Van Rossum's Response (ECF 68), Defendants Reply (ECF 71), Defendant Intervenors Motion to Strike (ECF 70), and Plaintiffs Response (ECF 72), for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that:

1. Defendants Motion for Remand without vacatur is **GRANTED**.
2. For the benefit of all who rely on the Delaware River for business, recreation, and public health, the EPA shall expedite the resolution of this process so that any new rule will become effective as soon as possible.
3. Defendant Intervenors Motion to Strike is **DENIED**.

**BY THE COURT:**

/s/ **MICHAEL M. BAYLSON**

**MICHAEL M. BAYLSON, U.S.D.J.**

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*Attorneys for Intervenor Defendant  
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**Additional Counsel listed in signature blocks**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

In re: Clean Water Act Rulemaking

Lead Case No. 3:20-CV-04636-WHA

Related Case Nos.  
3:20-CV-04869-WHA  
3:20-CV-06137-WHA

**INTERVENOR DEFENDANTS'  
REPLY IN SUPPORT OF MOTION TO  
STRIKE**

Hearing Date: August 26, 2021  
Time: 12:00 PM  
Courtroom: AT&T Conference Line  
Judge: The Hon. William H. Alsup

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1 The States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia,  
 2 and Wyoming (collectively the “State Defendants”), American Petroleum Institute (“API”),  
 3 Interstate Natural Gas Association of America (“INGAA”), and National Hydropower  
 4 Association (“NHA”) (collectively “intervenor defendants”) respectfully submit this reply in  
 5 support of their motion to strike plaintiffs’ oppositions, Dkts. 145, 146, and 147, to the extent that  
 6 plaintiffs request an unmoved-for remand with vacatur in the above-captioned case.

7 As intervenor defendants explained in their motion to strike, under this Court’s rules and  
 8 practices, if a party seeks relief from this Court—such as vacatur of a rule adopted through  
 9 notice-and-comment rulemaking—that party must file a motion asking for such relief. *See* Dkt.  
 10 148 at 3–5. EPA here properly filed a motion for remand without vacatur. Intervenor defendants  
 11 do not oppose the relief that EPA sought, and thus had no reason to file a responsive brief by the  
 12 Court-ordered deadline. *See* Dkt. 148 at 3. Plaintiffs thereafter filed an opposition, but did not  
 13 limit themselves to arguing that this Court should proceed with this case. Instead, they  
 14 improperly asked this Court to give them all of the relief that they sought in this case by vacating  
 15 the Rule, with some plaintiffs making this their lead argument. *See* Dkt. 148 at 3.

16 In their opposition to the motion to strike, plaintiffs take the remarkable position that  
 17 intervenor defendants should have anticipated that plaintiffs would seek an unmoved-for vacatur  
 18 in plaintiffs’ upcoming opposition to EPA’s motion for remand without vacatur, and then  
 19 *preemptively* defended the legality of the Rule in response to EPA’s motion, before ever seeing  
 20 plaintiffs’ opposition. *See* Dkt. 154 at 4–6 & n.2. That makes no sense. Intervenor defendants  
 21 had no reason to mount a legal defense of the Rule because they had no objection to the relief that  
 22 EPA requested. *See* Dkt. 143. Contrary to plaintiffs’ claim, Dkt. 154 at 5, intervenor defendants  
 23 could not have guessed that plaintiffs would implausibly seize upon EPA’s statement that it “will  
 24 undertake a new rulemaking effort to propose revisions due to substantial concerns with the  
 25 existing Rule,” Dkt. 143 at 2, *see* 7–8, essentially to claim that EPA violated the American  
 26 Procedure Act (“APA”) by conceding the illegality of the Rule in discussing a *proposed*  
 27 rulemaking, during which the agency must consider all relevant issues with an open mind, *see*  
 28 *Rural Cellular Ass’n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (“The opportunity for

1 comment must be a meaningful opportunity, and we have held that in order to satisfy this  
 2 requirement, an agency must also remain sufficiently open-minded.” (citation omitted); *accord*  
 3 *State of Cal. v. Bureau of Land Management*, 286 F.Supp.3d 1054, 1071 (N.D. Cal. 2018).

4 If plaintiffs want this Court to vacate the Rule as part of a remand—which would require,  
 5 at the absolute minimum, consideration of the “seriousness” of the Rule’s claimed “deficiencies,”  
 6 *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993),  
 7 as well as the “disruptive consequences” of vacatur, *id.*; *accord* Dkt. 146 at 18–19 & n.7  
 8 (plaintiffs relying upon *Allied-Signal*); Dkt. 147 at 3–4 (same)—there are proper avenues for  
 9 them to ask for this relief. Most obviously, plaintiffs could file a motion for remand with vacatur  
 10 and make arguments as to the claimed legal deficiencies in the Rule. Then intervenor defendants  
 11 could oppose those arguments in an orderly process. Alternatively, if this Court decides to, in  
 12 plaintiffs’ words, “deny EPA’s motion for remand outright and allow the parties to proceed to the  
 13 merits,” Dkt. 154 at 2, plaintiffs could file a motion for summary judgment making those same  
 14 merits arguments against the Rule, and intervenor defendants could oppose those arguments as  
 15 well. But here, plaintiffs have asked this Court to deprive intervenor defendants of their right to  
 16 defend the Rule from vacatur, *without this Court ever receiving adversarial briefing on whether*  
 17 *there is any basis in law to vacate the Rule*. Although EPA did file a reply brief in support of its  
 18 motion for remand without vacatur, as plaintiffs note, Dkt. 154 at 6, given that EPA is in the  
 19 middle of its rulemaking process, EPA did not say anything as to the Rule’s merits because such  
 20 “issues [ ] are currently the subject of new rulemaking,” Dkt. 153 at 1.

21 Rather than citing any rule, local practice, or decision of this Court permitting them to ask  
 22 for vacatur of a rule without filing a motion, plaintiffs argue that this Court’s rules against seeking  
 23 relief through opposition briefs are subject to an exception for unmoved-for relief “[ ]tethered  
 24 from the original motion.” Dkt. 154 at 4. There is, of course, no such exception in this Court’s  
 25 rules and plaintiffs do not point to any authority indicating that type of exception exists.

26 Plaintiffs seek to change the subject to certain decisions from other courts, but those cases  
 27 do not support plaintiffs’ efforts to obtain vacatur of a rule adopted through notice-and-comment  
 28 rulemaking without adversarial briefing on the Rule’s legality. *See* Dkt. 154 at 3–5. None of the

1 cases that plaintiffs cite deprived a party opposing vacatur of the opportunity to brief the  
 2 underlying merits of the rule, over that party’s objection. Plaintiffs’ lead authority—*North Coast*  
 3 *Rivers Alliance v. U.S. Department of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 U.S. Dist.  
 4 LEXIS 174481 (E.D. Cal. Dec. 16, 2016)—illustrates the point. There, a coalition of  
 5 environmental organizations alleged that a federal agency had issued a deficient environmental  
 6 assessment connected to the approval of certain interim contracts. *Id.* at \*1–2. Westlands Water  
 7 District (“Westlands”), a party to one of the contracts at issue, intervened to defend its contract.  
 8 *Id.* at \*3 & n.2. The agency moved for voluntary remand without vacatur, and the environmental  
 9 organizations opposed through a “parallel request to vacate both the [environmental assessment]  
 10 and the interim Contracts.” *Id.* at \*16. The district court then specifically ordered supplemental  
 11 briefing on “the question of vacatur,” including “the seriousness of an agency’s errors.” 2016  
 12 U.S. Dist. LEXIS 130781, at \*9–10 (E.D. Cal. Sept. 23, 2016). The other cases that plaintiffs rely  
 13 upon that involved intervenors in support of the agency’s underlying action similarly permitted  
 14 intervening parties the opportunity to present briefing on the vacatur issue *after* another party  
 15 made a vacatur request. *See Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1240  
 16 (D. Colo. 2011) (federal agency filed a motion seeking remand *with vacatur*, which intervenor  
 17 defendants then opposed); *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d  
 18 1136, 1137–38 & n.27 (C.D. Cal. 2002) (intervenor defendants filed supplemental briefing on the  
 19 parties’ motions for remand and, separately, for vacatur, while supporting vacatur).

20 Unlike in *North Coast Rivers Alliance*, plaintiffs’ circumvention of this Court’s rules  
 21 would leave intervenor defendants without any opportunity to defend the Rule. Intervenor  
 22 defendants thus respectfully request that this Court strike plaintiffs’ opposition to the extent it  
 23 asks for vacatur of any aspect of the Rule. Alternatively, if this Court does decide to consider  
 24 vacating the Rule without any motion from plaintiffs, intervenor defendants respectfully ask that  
 25 this Court provide them with the opportunity to file supplemental briefing to respond to plaintiffs’  
 26 unmoved-for vacatur request, giving intervenor defendants here the same opportunity as the  
 27 intervenor defendants received in plaintiffs’ lead authority, *North Coast Rivers Alliance*.

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Respectfully submitted,

Dated: August 19, 2021

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\* Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other Signatories. */s/ Elizabeth Holt Andrews*