No. ______

In the Supreme Court of the United States

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

APPENDIX TO APPLICATION FOR STAY PENDING APPEAL
VOLUME IV OF IV

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

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

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

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

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

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

Attorneys for Applicants

[Additional counsel on following page.]

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

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

Elizabeth B. Murrill,
Solicitor General
Joseph S. St. John,
Deputy Solicitor
Louisiana Department
of Justice
1885 N. Third Street
Baton Rouge, LA 70804
(225) 326-6739
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Attorneys for Applicant State of Louisiana

Charles Sensiba
Troutman Pepper
Hamilton Sanders LLP
401 9th Street NW
Suite 1000
Washington, DC 20004-2146

Elizabeth Holt Andrews
Troutman Pepper
Hamilton Sanders LLP
Three Embarcadero Center
Suite 800
San Francisco, CA 94111-4057

Attorneys for Applicant National Hydropower Association

James Kaste
Deputy Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002

Additional Counsel:

AUSTIN KNUDSEN
Attorney General of Montana

KEN PAXTON
Attorney General of Texas

PATRICK MORRISEY
Attorney General of West Virginia

LESLIE RUTLEDGE
Attorney General of Arkansas

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

Attorneys for Applicants

TABLE OF CONTENTS

Volume I

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

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

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

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

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

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

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

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

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

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

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

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

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

Volume II

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

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

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

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

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

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

Volume III

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

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

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

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

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

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

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

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

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

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

Volume IV

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

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

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

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

No. 21-16958

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

IN RE: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED; COLUMBIA RIVERKEEPER; SIERRA CLUB; SUQUAMISH TRIBE; PYRAMID LAKE PAIUTE TRIBE; ORUTSARARMIUT NATIVE COUNCIL; STATE OF CALIFORNIA; STATE WATER RESOURCES CONTROL BOARD; STATE OF OREGON; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF MARYLAND; STATE OF RHODE ISLAND; STATE OF COLORADO; DISTRICT OF COLUMBIA; STATE OF NORTH CAROLINA; COMMONWEALTH OF VIRGINIA; STATE OF NEW MEXICO; STATE OF VERMONT; STATE OF MINNESOTA; STATE OF CONNECTICUT; STATE OF WASHINGTON; STATE OF MICHIGAN; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEVADA; STATE OF WISCONSIN; STATE OF MAINE; *and* STATE OF ILLINOIS,
PLAINTIFFS-APPELLEES,

v.

ANDREW R. WHEELER *and* U.S. ENVIRONMENTAL PROTECTION AGENCY,
DEFENDANTS,

and

AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *and* NATIONAL HYDROPOWER ASSOCIATION,
INTERVENORS-DEFENDANTS-APPELLANTS

AND

STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; *and* STATE OF TEXAS,
INTERVENORS-APPELLANTS.

On Appeals from the U.S. District Court
for the Northern District of California
Case Nos. 3:20-cv-04636-WHA, -04869-WHA, -06137-WHA
The Honorable William H. Alsup, Judge

INTERVENOR-DEFENDANTS-APPELLANTS' AND INTERVENORS-APPELLANTS' MOTION FOR STAY PENDING APPEAL

[Counsel Listed On Following Pages]

No. 21-16958

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

DIERDRE G. DUNCAN
ERICA N. PETERSON
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1932
epeterson@huntonak.com

CLARE ELLIS
HUNTON ANDREWS KURTH LLP
50 California Street
Suite 1700
San Francisco, CA 94111
(415) 975-3708
(415) 975-3701 (fax)
cellis@huntonak.com

Attorneys for Intervenor-Defendants-Appellants American Petroleum Institute and Interstate Natural Gas Association of America

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

CHARLES SENSIBA
TROUTMAN PEPPER HAMILTON SANDERS LLP
401 9th Street NW
Suite 1000
Washington, DC 20004-2146
(202) 274-2850
(202) 274-2994 (fax)
charles.sensiba@troutman.com

ELIZABETH HOLT ANDREWS
TROUTMAN PEPPER HAMILTON SANDERS LLP
Three Embarcadero Center
Suite 800
San Francisco, CA 94111-4057
(415) 477-5700
(415) 477-5710 (fax)
elizabeth.andrews@troutman.com

Attorneys for Intervenor Defendant-Appellant National Hydropower Association

No. 21-16958

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

Attorneys for Intervenor Defendant-Appellant State of Louisiana

JAMES KASTE
DEPUTY ATTORNEY GENERAL
WYOMING ATTORNEY GENERAL'S
OFFICE
109 State Capitol
Cheyenne, WY 82002
(307) 777-7895 (phone)
(307) 777-3542 (fax)
james.kaste@wyo.gov

Additional Counsel:

LESLIE RUTLEDGE
Attorney General of Arkansas

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

KEN PAXTON
Attorney General of Texas

PATRICK MORRISEY
Attorney General of West Virginia

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1(a), American Petroleum Institute states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

Dated: December 15, 2021

/s/ George P. Sibley, III
GEORGE P. SIBLEY, III

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Interstate Natural Gas Association of America states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

Dated: December 15, 2021

/s/ George P. Sibley, III
GEORGE P. SIBLEY, III

Pursuant to Federal Rule of Appellate Procedure 26.1(a), National Hydropower Association states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

Dated: December 15, 2021

/s/ Misha Tseytlin
MISHA TSEYTLIN

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

A. Clean Water Act 2

B. Certain States Abused Their Section 401 Certification Authority 3

C. EPA Adopts The Section 401 Certification Rule 4

D. This Lawsuit And The Order Vacating The Rule 6

ARGUMENT 8

I. This Court Should Stay The District Court's Vacatur Decision Pending Appeal 8

A. Intervenors Are Likely—Indeed, Certain—To Succeed On The Merits Of Their Appeal 9

1. The APA Requires A Complete Administrative Record And Full Briefing On The Merits Before A Reviewing Court May Set Aside Agency Action 9

2. The District Court's Application Of The *Allied-Signal* Factors Was Erroneous 14

B. Intervenors Will Suffer Irreparable Harm Absent A Stay, While Neither Plaintiffs Nor the Public Will Suffer Harm If This Court Grants A Stay 19

II. This Court Has Appellate Jurisdiction 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

OTHER CASES

Al Otro Lado v. Wolf
952 F.3d 999 (9th Cir. 2020) 8

Alcoa Power Generating Inc. v. FERC
643 F.3d 963 (D.C. Cir. 2011) 4, 17

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission
988 F.2d 146 (D.C. Cir. 1993) .... passim

Alsea Valley All. v. Dep't of Commerce
358 F.3d 1181 (9th Cir. 2004) 26, 27, 28

Am. Ironworks v. N. Am. Constr.
248 F.3d 892 (9th Cir. 2001) 26

Beveridge v. City of Spokane
No. 20-35848, 2021 WL 3082003 (9th Cir. July 21, 2021) 26

Cal. Cmtys. Against Toxics v. U.S. EPA
688 F.3d 989 (9th Cir. 2012) 16

Califano v. Yamasaki
442 U.S. 682 (1979) 25

Carlson v. Postal Regulatory Comm'n
938 F.3d 337 (D.C. Cir. 2019) 15, 17

City of Milwaukee v. Ill. & Mich.
451 U.S. 304 (1981) 3

Consumer Energy Council of Am. v. FERC
673 F.2d 425 (D.C. Cir. 1982) 20

Crow Indian Tribe v. United States
965 F.3d 662 (9th Cir. 2020) 26, 28

Crowe & Dunlevy, P.C. v. Stidham
640 F.3d 1140 (10th Cir. 2011) 22

Dep't of the Army v. Blue Fox, Inc.
525 U.S. 255 (1999) 10

East Bay Sanctuary Covenant v. Biden
993 F.3d 640 (9th Cir. 2021) 17

Gill v. Whitford
138 S. Ct. 1916 (2018) 25

Great Atl. & Pac. Tea Co. v. Cottrell
424 U.S. 366 (1976) 21

Grupo Mexicano de Desarrollo, SA v. All. Bond Fund
527 U.S. 308 (1999) 13

Harmon v. Thornburgh
878 F.2d 484 (D.C. Cir. 1989) 17

Hoopa Valley Tribe v. FERC
913 F.3d 1099 (D.C. Cir. 2019) 4

Idaho v. Coeur d'Alene Tribe
794 F.3d 1039 (9th Cir. 2015) 22

Invenergy Renewables LLC v. United States
476 F. Supp. 3d 1323 (Ct. Int'l Trade 2020) 19

Lair v. Bullock
697 F.3d 1200 (9th Cir. 2012) 8

Michelin Tire Corp. v. Wages
423 U.S. 276 (1976) 20

Montes v. United States
37 F.3d 1347 (9th Cir. 1994) 25, 26, 27

N. Mariana Islands v. United States
686 F. Supp. 2d 7 (D.D.C. 2009) 20

N. Plains Res. Council v. U.S. Army Corps of Eng'rs
No. 4:19-cv-44, Dkt. 131-1:¶14 (D. Mont. Apr. 27, 2020) 22

N.Y. State Dep't of Envtl. Conservation v. FERC
884 F.3d 450 (2d Cir. 2018) 4, 17

Nat'l Cable & Telecomm'cns Ass'n v. Brand X Internet Servs.
545 U.S. 967 (2005) 16

Nat'l Parks Conservation Ass'n v. Salazar
660 F. Supp. 2d 3 (D.D.C. 2009) 12

Pac. Rivers Council v. Shepard
No. 03:11-CV-00442-HU, 2011 WL 7562961 (D. Or. Sept. 29, 2011) 12

Patel v. Del Taco, Inc.
446 F.3d 996 (9th Cir. 2006) 26, 27

Phillip Morris USA Inc. v Scott
561 U.S. 1301 (2010) (Scalia, J., in chambers) 22

Pit River Tribe v. U.S. Forest Serv.
615 F.3d 1069 (9th Cir. 2010) 27, 28

Pollinator Stewardship Council v. U.S. EPA
806 F.3d 520 (9th Cir. 2015) 10, 13, 14

PUD No. 1 of Jefferson County v. Washington Department of Ecology
511 U.S. 700 (1994) 7, 16

Regan v. Time, Inc.
468 U.S. 641 (1984) 17

Rural Cellular Ass'n v. FCC
588 F.3d 1095 (D.C. Cir. 2009) 12

Silvers v. Sony Pictures Entm't, Inc.
402 F.3d 881 (9th Cir. 2005) (en banc) 10

Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala
80 F.3d 379 (9th Cir. 1996) 27, 28

Texas v. EEOC
933 F.3d 433 (5th Cir. 2019) 20

Texas v. U.S. EPA
829 F.3d 405 (5th Cir. 2016) 23

Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.
988 F.3d 1170 (9th Cir. 2021) 20

Wages & White Lion Invs., L.L.C. v. U.S. FDA
16 F.4th 1130 (5th Cir. 2021) 23

Whole Woman's Health v. Jackson
No. 21-463, ___ S. Ct. ___, 2021 WL 5855551 (Dec. 10, 2021) 14

FEDERAL STATUTES

5 U.S.C. §§ 553(b), (c), 551(5) 20

5 U.S.C. § 706(2) .... passim

28 U.S.C. § 1291 25

33 U.S.C. § 1251(b) 3

Clean Water Act .... passim

Administrative Procedure Act .... passim

Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U.S.C. § 1341) 3

Judiciary Act, 1789 (1 Stat. 73) 13

Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91, 108 (Apr. 3, 1970) 3

OTHER AUTHORITIES

40 C.F.R. § 121.1 5

40 C.F.R. § 121.2 5

40 C.F.R. § 121.3 5

40 C.F.R. § 121.4 5

40 C.F.R. §§ 121.5-9 6

40 C.F.R. § 121.7 6

40 C.F.R. §§ 121.8–9 6

40 C.F.R. §§ 121.11–121.16 .... 16, 17

40 C.F.R. §§ 121.11–16 6

44 Fed. Reg. 32,854, 32,856 (June 7, 1979) 18

85 Fed. Reg. 42,210 (July 13, 2020) 4

85 Fed. Reg. at 42,237 5

85 Fed. Reg. 42,256 6

86 Fed. Reg. 29,541 (June 2, 2021) 7

EO 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) 7

Fact Sheet: List of Agency Actions for Review, White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-listofagency-actions-for-review/ 7

Joint EPA Army Memorandum on 401 Implementation (Aug. 19, 2021), *available at* https://www.epa.gov/cwa-401/2020-rule-implementati on-material 24

INTRODUCTION

This stay application asks this Court to stop remarkable judicial overreach. In June 2021, EPA formally announced its intent to reconsider the 2020 Clean Water Act ("CWA") Section 401 Certification Rule (the "Rule"), a landmark rule promulgated by the prior Administration. EPA then filed a motion for remand *without vacatur* because the pending rulemaking could address many of Plaintiffs' arguments against the Rule. The district court agreed to remand the Rule, but took the extraordinary step of vacating the Rule in its entirety, even though the court had not found the Rule unlawful or even received a single merits brief. But the Administrative Procedure Act ("APA") only empowers courts to "set aside" agency actions after finding them unlawful, and that has not occurred here. This Court should immediately stay that ruling pending appeal.

Intervenors will prevail on the merits for multiple reasons. The district court lacked authority to vacate the Rule without first determining it was legally deficient, and, in any event, its reasoning for vacatur fails on its own terms. Considerations of irreparable harms and the equities also call out for a stay. Absent a stay, Intervenors will suffer

irreparable harm from losing their rights to be protected by the Rule absent agency repeal through notice-and-comment rulemaking or a court's finding the Rule violates the APA. And there's more: other States will infringe the Intervenor States' sovereignty by burdening their commercial interests, and Intervenors will be forced to pay unrecoverable costs as they attempt to comply with the whipsawing regulatory framework for certification requests. In contrast, a stay will not impose any meaningful harm on Plaintiffs as Plaintiffs can litigate the Rule's legality on the merits, following the APA's processes.[1]

BACKGROUND

A. Clean Water Act

In 1970, Congress required that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." Water Quality Improvement Act of 1970,

[1] Pursuant to Circuit Rule 27-1(2), Intervenors state that Plaintiffs and EPA oppose any stay of the district court's vacatur order. Pursuant to Federal Rule of Appellate Procedure 8(2), Intervenors state that they sought a stay in the district court, which the court denied. A33–A46.

Pub. L. 91-224, 84 Stat. 91, 108 (Apr. 3, 1970). Then, in 1972, Congress enacted the CWA, a "total restructuring" and "complete rewriting" of the nation's water-pollution-control laws, *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 317 (1981), narrowing the certification requirement from proof that any "*activity* . . . will not violate applicable *water quality standards*," 84 Stat. at 108 (emphases added), to whether a "*discharge* will comply with" the CWA. Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U.S.C. § 1341) (emphases added). Congress also created a prominent role for States and Tribes in implementing this new program. 33 U.S.C. § 1251(b). In particular, federal agencies cannot permit activities that may result in a discharge into waters of the United States unless any State or authorized Tribe where the discharge would originate certifies that the discharge complies with applicable water quality requirements or waives the requirement. 33 U.S.C. § 1341.

B. Certain States Abused Their Section 401 Certification Authority

Despite the statutory change in 1972, EPA failed to revise its 1971 regulations governing the certification process. As a result, EPA's regulations were incongruent with the new statutory language.

Some States exploited this regulatory ambiguity to indefinitely extend the time for acting on a certification request or to deny permits based on non-water quality concerns, effectively vetoing projects. For example, the State of Washington denied certification based on purported concerns about the interstate rail system and the ability to accommodate additional vessels in ports, despite expressly concluding the project would not result in significant adverse effects on water quality, aquatic life, or designated uses. *See* ECF No.172-1. Similar examples of State and Tribal overreach abound in the administrative record. *See* ECF No.56-2:¶¶13–14. Indeed, courts repeatedly recognized that States' gamesmanship was violating the CWA. *See, e.g.*, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104–05 (D.C. Cir. 2019); *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018); *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

C. EPA Adopts The Section 401 Certification Rule

Pointing to these abuses, a coalition of states led by Louisiana petitioned for an update to the 1971 regulations to conform them to the 1972 CWA amendments, and to provide clarity and transparency. 85 Fed. Reg. 42,210 (July 13, 2020). EPA's response was in accord: "The

Agency's longstanding failure to update its regulations created the confusion and regulatory uncertainty that were ultimately the cause of th[e] controversial section 401 certification actions" that underlay Louisiana's petition. *Id.* at 42,227.

The Rule fixes these problems. It begins by defining fourteen key terms, 40 C.F.R. § 121.1; *see also* 85 Fed. Reg. at 42,237, and it reaffirms EPA's longstanding interpretation of when CWA Section 401 requires a water quality certification. 40 C.F.R. § 121.2; 85 Fed. Reg. at 42,237. It also sets out the permissible scope of certification, as developed through the rulemaking process. 40 C.F.R. § 121.3. The Rule ensures meaningful coordination between project proponents and State and Tribal certifying authorities before the certification process even begins, 40 C.F.R. § 121.4, and it provides uniform procedures for establishing the time period for States and Tribes to act on a certification request, clear rules for when that period begins and ends, and a procedure for communicating to all parties when the period begins and ends, 40 C.F.R. §§ 121.5-9. Furthermore, the Rule requires any action on a certification request—a grant, grant with conditions, or denial of certification—to be in writing and contain certain information that explains the State's or Tribe's

action, or else certification is waived. 40 C.F.R. § 121.7; 85 Fed. Reg. 42,256. The Rule also describes the effect of certain actions and explains how waiver of the certification requirement can occur proactively or by operation of law. 40 C.F.R. §§ 121.8–9. Finally, it provides a procedure for neighboring jurisdictions to participate in the certification process and describes how certification conditions should be enforced. 40 C.F.R. §§ 121.11–16.

D. This Lawsuit And The Order Vacating The Rule

Plaintiffs are three groups who filed complaints in the U.S. District Court for the Northern District of California: a group of environmental organizations (collectively "Plaintiff Groups"), twenty States and the District of Columbia (collectively "Plaintiff States"), and conservation associations and Indian Tribes (collectively "Plaintiff Tribes"). ECF Nos.75, 96, 98. Undersigned intervened to defend the Rule. ECF Nos.23, 27, 41, 62; Docket No.3:20-cv-04869-WHA, ECF Nos.75, 84, 113.

In January 2021, President Biden directed agencies to "take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with" his Administration's objectives,

EO 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021), including the Rule.[2] Thereafter, EPA announced its intent to reconsider the Rule, 86 Fed. Reg. 29,541 (June 2, 2021), and moved for remand *without* vacatur, ECF No.143:2, 13. Plaintiffs then argued for remand *with* vacatur in their oppositions, while failing to discuss meaningfully most aspects of the Rule. ECF Nos.145–47.

On October 21, 2021, the district court vacated and remanded the Rule to EPA, A15–A32, and entered final judgment, ECF No.176. The court concluded nothing in the APA "expressly preclude[d]" its issuing the equitable remedy of vacatur "without a decision on the merits[.]" It then applied the two-step test for "considering vacatur of agency actions found to be erroneous," announced in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). A22, A26–A31. Regarding the Rule's purported deficiencies—although EPA did "not admit fault"—the court concluded the Rule was "antithetical" to *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), and "harbor[ed] significant doubts" about the Rule, A27–A28.

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

Turning to the consequences of vacatur, the court reasoned that because the Rule "has only been in effect for thirteen months," and "has been under attack since before day one," there was no justifiable reliance on the Rule. *Id.* at 15. Intervenors moved the district court for a stay pending appeal, ECF No.179, which the district court denied on December 7, A33–A46.

ARGUMENT

I. This Court Should Stay The District Court's Vacatur Decision Pending Appeal

In deciding whether to grant a stay, a court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). This Court uses a "sliding scale" approach, balancing the elements "so that a stronger showing of one element may offset a weaker showing of another." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020).

Applying these factors, the vacatur order is an extraordinary overreach that this Court should stay immediately.

A. Intervenors Are Likely—Indeed, Certain—To Succeed On The Merits Of Their Appeal

Intervenors will succeed on the merits of their appeal for two independent reasons: (1) the district court had no authority to vacate the rule without receiving full merits briefing and deciding the rule's legality on the merits; and (2) the district court misapplied the *Allied-Signal* analysis, even if it were applicable in this procedural posture.

1. The APA Requires A Complete Administrative Record And Full Briefing On The Merits Before A Reviewing Court May Set Aside Agency Action

a. With the APA, Congress provided federal district courts with jurisdiction to review agencies' final actions, but only authorized courts to set aside such actions when they are "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Congress further provided that in "making [those] determinations, the court shall review the whole record or those parts of it cited by a party." *Id.*

The APA does not permit courts to vacate a rule without first concluding that it is unlawful. *See id.*; *see also Allied-Signal*, 988 F.2d at 150–51 (applying test only after determining the agency acted without "reasoned decision-making"); *Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) ("not supported by substantial evidence"). The plain import of that explicit requirement, under the *expressio unius* canon, is that Congress did not intend for courts to set aside agency action absent such a finding. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc). Indeed, because the APA waives sovereign immunity, the *expressio unius* canon applies with particular force, *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (citation omitted), thereby limiting a court's vacatur authority to instances where agency action is unlawful, 5 U.S.C. § 706(2).

Ignoring these explicit limitations affords plaintiffs complete relief without ever proving their case, while also circumventing the APA's notice-and-comment requirements for repeal of a rule. It invites litigants to seek process-free elimination of agency rules whenever the Presidency changes parties. Advocacy groups aligned with the policy agenda of the new administration urge pre-adjudication vacatur with the hope that a

single federal judge will find authority in "equity" to give them instantaneous relief without the burdens of administrative due process. As happened here, a new Administration can achieve its aims of eliminating the rule from the books by expressing "significant doubt" or "deep concern" about the challenged rule and throwing up spurious jurisdictional roadblocks to appellate review of patently unlawful district-court action.[3] The APA cannot tolerate such abuse and evasion.

b. The district court's decision to vacate the Rule here thus violates the plain text of the APA. The vacatur order does *not* find the Rule unlawful, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2), instead only asserting "significant doubt . . . that EPA correctly promulgated the rule." In so holding, the Order relies largely on EPA's decision to reconsider the Rule. A27–A29. Yet EPA never conceded that the Rule is unlawful or that it would rescind the entire Rule on remand, merely stating that it "will undertake a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule." ECF No.143:2; *see id.* at 7,

[3] *See* ECF No.185:4–7.

8; ECF No.155:2–3. Indeed, because EPA is *presently* in the middle of a rulemaking process, ECF Nos.153:3, 155:3, it could not concede the Rule's legality or commit to rescinding the entire Rule without violating the APA. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); ECF No.155:2–3. In any event, a concession would be legally insufficient to justify vacatur of the Rule because Intervenors are parties to the litigation and defend fully every aspect of it.

Because the district court never "determin[ed]" the Rule was "unlawful," whether on "the whole record" or otherwise, 5 U.S.C. § 706(2), it had no authority to vacate. *Doing so improperly provided Plaintiffs complete relief—repeal of their disfavored rule—without ever having to prove their case or go through notice-and-comment rulemaking*. *See Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009); *Pac. Rivers Council v. Shepard*, No. 03:11-CV-00442-HU, 2011 WL 7562961, at *4 (D. Or. Sept. 29, 2011) ("the court would have no legal basis to vacate and remand [the rule] without determining the merits").

c. The district court's justifications for its actions do not withstand scrutiny. The district court inferred that this Court's endorsement of remand without vacatur *in cases where agency action was found*

erroneous meant that remand with vacatur is appropriate in cases where the action has not been found erroneous. That makes no sense. A21. If anything, cases endorsing post-adjudication remand without vacatur undermine the district court's logic here. Those cases reflect the respect given to Executive Branch agencies, noting that courts will "leave an *invalid rule* in place only when equity demands." *Pollinator*, 806 F.3d at 532 (citation omitted). Vacating lawful rules disregards that respect.

The court then resorted to "equity": "[B]ecause vacatur is an equitable remedy, and because the APA does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of vacatur without a decision on the merits." A22 (citation omitted). The court never explained, beyond broad assertions of its equitable jurisdiction, from whence its authority to vacate a rule derives if the Rule was never determined to be unlawful. A21–A22, A37–A39. A district court's equitable discretion is limited to "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)," which "did not include the power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano*

de Desarrollo, SA v. All. Bond Fund, 527 U.S. 308, 318, 332 (1999). The Supreme Court reemphasized that limitation just last week, making clear that it applies no matter the issue. *Whole Woman's Health v. Jackson*, No. 21-463, ___ S. Ct. ___, 2021 WL 5855551, at *8 (Dec. 10, 2021). That the law in this circuit is "unsettled" as between a handful of district courts is a strong indicia that no relevant equitable remedy is part of historic practice. The district court's vacatur was thus ultra vires.

2. The District Court's Application Of The *Allied-Signal* Factors Was Erroneous

Only after a finding that an agency determination is unlawful under 5 U.S.C. § 706(2) does a court address the two-factor test under the *Allied-Signal* decision for whether it should vacate a rule or permit a lesser remedy while remand proceedings continue before the agency. *See Allied-Signal*, 988 F.2d at 150–51; *Pollinator*, 806 F.3d at 532. Under the first factor, the court asks how "serious[ ]" the agency's errors are in order to determine whether vacatur of the rule is necessary. *Allied-Signal*, 988 F.2d at 150. Second, a court must consider "the disruptive consequences" of the vacatur. *Id.* at 150–51. Even assuming these factors have any relevance without a finding of unlawfulness, the district court erred in applying them here.

Plaintiffs presented an insufficient record and argument as to the first *Allied-Signal* factor. The Plaintiff States and Plaintiff Groups relied almost entirely on their erroneous contention that EPA admitted the Rule's illegality in various statements. *See* ECF No.146:20–21; ECF No.147:4–10. The Plaintiff Tribes, in turn, merely argued that EPA "failed to provide sufficient justification for departing from a half century of practice and policy related to the interpretation and implementation of Section 401" without explanation for how the Rule would be more protective of water quality. ECF No.145:12–13. When the Plaintiffs did attempt to make a few substantive arguments, they failed to support the broad remedy of full vacatur, merely raising discrete concerns with individual sections of the Rule. ECF No.146:4–14, 20–21. Plaintiffs addressed at most a fraction of the Rule's provisions based on litigation statements by the EPA (not the Rule itself), only alluded to "other detrimental provisions" of the Rule, and offered no severability analysis whatsoever. ECF No.146:7, 20–21; *see Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351–52 (D.C. Cir. 2019).

Ignoring these problems, the district court focused on the Rule's scope-of-certification provision as "antithetical" to the Supreme Court's

decision in *PUD No. 1*, contending that EPA did not "reasonably explain[ ] the change." A27. While chastising EPA for "depart[ing] from what the Supreme Court dubbed the most reasonable interpretation of the statute," *id.*, the district court ignored that the Supreme Court held only that EPA's then-applicable construction of Section 401 was "a reasonable interpretation" or "most reasonably read" that way. *PUD No. 1*, 511 U.S. at 712. That does not mean it was the *only* reasonable interpretation, such that the agency could not adopt another reading as part of its delegated authority, *see Nat'l Cable & Telecomm'cns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Simply put, EPA's change does not "compel[ ] the conclusion that the current rule is unreasonable," A27, and EPA's more-recent interpretation of Section 401 is both reasonable and owed deference. The district court's reliance on post-enactment litigation statements by EPA to for its contrary conclusion, A28, further underscores the court's errors. *See Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 993 (9th Cir. 2012).

The district court's complete vacatur of the entire Rule was also without any coherent justification. Plaintiffs did not even challenge many portions of the Rule in the vacatur briefing, *see, e.g.*, 40 C.F.R.

§§ 121.11–121.16, and several portions of the Rule merely codify what federal courts have held the CWA requires, *see N.Y. State Dep't of Envtl. Conservation*, 884 F.3d at 455; *Alcoa Power Generating Inc.*, 643 F.3d at 972. There is ample reason to conclude EPA would have adopted those other provisions, which are all severable from the scope-of-certification rule, regardless of whether scope-of-certification was "foundation[al]," A25, for other parts of the Rule, *see Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984); *Carlson*, 938 F.3d at 351–52.

The district court relied on *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 681 (9th Cir. 2021), for the principle that courts "ordinarily do not attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule." But that portion of *East Bay* quoted *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), which made that point only after explaining that "[w]hen a court finds that an agency regulation is invalid in substantial part, *and that the invalid portion cannot be severed from the rest of the rule*, its typical response is to vacate the rule and remand to the agency," *id.* at 494 (footnote omitted; emphasis added). Thus, the district court's failure to conduct a severability analysis was error, inconsistent with Supreme

Court precedent, and will generate a circuit split if affirmed. Indeed, the upshot to the district court's vacatur is that—in reliance on its own divinations based on EPA's post-action statements—the Court apparently reinstated a rule EPA long-ago suggested was inconsistent with the 1972 amendments to the Clean Water Act. *See* NPDES; Revision of Regulations, 44 Fed. Reg. 32,854, 32,856 (June 7, 1979).

The district court also erred in its consideration of the second *Allied-Signal* factor by ignoring the substantial and predictable disruptions the immediate vacatur of a (not-unlawful) Rule has caused. As further explained below, *see infra* pp.21–23, vacating the Rule causes significant disruption to pending Section 401 reviews, allowing States to use outdated rules to exert control over activities in other States and to protect their own industries, *see, e.g.*, ECF No.27-7:1–4, increasing the cost of some interstate projects and fully defeating others, with attendant harms to other States' economies and ability to develop their natural resources, *see* ECF Nos.56-1, 56-2, and upending the progress agencies have made to improve and make transparent certification procedures.

B. Intervenors Will Suffer Irreparable Harm Absent A Stay, While Neither Plaintiffs Nor the Public Will Suffer Harm If This Court Grants A Stay

1. Intervenors have suffered and will continue to suffer grave, irreparable harm in three ways, absent a stay.

First, vacatur deprived Intervenors of their statutory and due-process rights to have the protection of a Rule that they successfully secured through notice-and-comment rulemaking, for the benefit of themselves and their members, not repealed without the agency following notice-and-comment rulemaking or a court holding that the Rule is unlawful. Intervenors fought for the Rule and then intervened in this case to defend it because of numerous abuses and delays that had occurred under the prior regime over many decades. *See supra* pp.3–4. Through the district court's vacatur, Intervenors have now lost the Rule and the protections that the Rule provides to their members.

Thus, even if vacatur produced no immediate sovereign or economic harm (and it most certainly has, *see infra* pp.20–24), the deprivation of Intervenors' statutory rights under the APA, which will be irreparable unless vacatur is stayed, is sufficient irreparable harm. *Invenergy Renewables LLC v. United States*, 476 F. Supp. 3d 1323, 1353 (Ct. Int'l

Trade 2020); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009); *see also Texas v. EEOC*, 933 F.3d 433, 446–47 (5th Cir. 2019). The court's decision circumvented "the most fundamental of the APA's procedural requirements," *Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1180 (9th Cir. 2021)—providing public notice and comment before repealing a rule, 5 U.S.C. §§ 553(b), (c), 551(5); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982). In other words, a single district judge has rolled back EPA rules to the 1971 regulations that do not reflect the 1972 amendments to the CWA, *supra* pp.2–3, without notice and comment or finding of illegality.

Second, vacatur harms State Intervenors' constitutional rights and sovereign interests. Such harms—leaving "individual States free to burden commerce . . . among themselves"—were "[o]ne of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). Indeed, particular "dissatisfaction" came from "the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their

neighbors, [through] whose ports, their commerce was carr[i]ed on." *Id.* (quoting Records of the Federal Convention of 1787 (M. Fanand ed. 1966)). So now a State "may not use the threat of economic isolation" to control its sister states. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976). Certain States doing just that was one of the reasons Intervenors petitioned for the Rule, *see, e.g.*, ECF No.172-2:¶¶4–7; *see also* ECF Nos.27-7, 56-1, 56-2, and such foundational constitutional harms will assuredly return in light of vacatur.

Third, Intervenors will suffer irreparable economic harm if this Court does not stay the district court's vacatur. The whipsawing caused by reinstatement of the prior rule will be substantially disruptive for both regulators and regulated entities. ECF No.172-2:¶8; A13–A14. Vacatur of the Rule casts substantial uncertainty and raises questions with no clear answers, such as whether pending certification requests need to be resubmitted, causing substantial delay in completing pending Section 401 reviews. ECF No.172-3:¶11; ECF No.56-2:¶¶21, 23, 24. For example, while the U.S. Army Corps of Engineers has now lifted its "pause" on finalizing permit decisions in light of the district court's decision, the Corps has noted that it *still* needs to "identify an

appropriate path" to comply with the new regulatory framework thrust upon industry actors by a single district court's vacatur in the thousands of pending requests for certifications. ECF No.186-1:2; *see N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-44, Dkt. 131-1:¶14 (D. Mont. Apr. 27, 2020) ("the Corps receives 3,000 standard individual permit applications annually"). This uncertainty and attendant risk of delay can continue to deter large capital projects that benefit multiple States economically and are necessary for the development of their natural resources. *Id.* ¶¶ 7-9; A8–A9. It also imposes costs on states that must devote resources addressing uncertainty from the regulated community. A13–A14.

This uncertainty imposes irreparable economic harm. *See Phillip Morris USA Inc. v Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) ("If expenditures cannot be recouped, the resulting loss may be irreparable."); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) ("[I]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). Indeed, other Circuits have noted that "complying with a

regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. U.S. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (citation omitted); *Wages & White Lion Invs., L.L.C. v. U.S. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). Intervenors' members have numerous certification requests pending for projects that involve billions of dollars in capital investment at the time of their intervention in these actions, *see, e.g.*, ECF No.56-2: ¶¶14, 22, 24, with many more forthcoming, ECF No.172-3: ¶10.

The district court's contention that Intervenors can simply challenge any abuses to particular projects in future litigation rings hollow. A44–A45. The regulations that the district court unilaterally reimposed permitted many of these abuses. So while the district court relied on a months-old settlement in a different certification lawsuit to establish that federal-court challenges are available, *see* A43, the court failed to acknowledge the unrecoverable costs of compliance with portions of the newly reimposed regulations that the never-declared-unlawful Rule protected against.

2. Granting a stay pending appeal will not substantially injure Plaintiffs and would serve the public interest. As an initial matter,

Plaintiffs have no equitable interest or entitlement to an unlawful vacatur, *see supra* pp.9–18, so staying that decision would not impose any legal harm. Moreover, Plaintiffs can seek redress for any prejudice they claim they would suffer if the Rule were left in place and can participate in the usual notice-and-comment procedures before EPA, to secure any protections they want, as EPA and the U.S. Army Corps of Engineers have indicated their willingness to address concerns with the Rule raised by the Plaintiffs on remand.[4] The public interest also supports a stay. The Rule fills a gaping regulatory void, setting basic rules for the Section 401 process, including a rule for defining when the clock starts on a State's reasonable time period to act on a certification request, and clearly defining the scope of authority granted by Congress in Section 401. Each of these regulatory improvements aids the public interest, and returning to the prior dysfunction fostered by EPA's decades-long failure to set basic rules for the Section 401 process would harm industry and government actors.

[4] Joint EPA Army Memorandum on 401 Implementation (Aug. 19, 2021), *available at* https://www.epa.gov/cwa-401/2020-rule-implementation-materials.

3. At minimum, this Court should stay the district court's vacatur order outside of the Ninth Circuit. Both Article III and principles of equity generally limit a court's ability to fashion relief to that "necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Gill v. Whitford*, 138 S. Ct. 1916, 1929–30 (2018). Applying those principles here, allowing the district court to vacate the Rule nationwide sweeps far beyond relief to the Plaintiffs and this Court should, at the least, limit the vast reach of the district court's vacatur to this Circuit.

II. This Court Has Appellate Jurisdiction

Notwithstanding arguments by EPA and Plaintiffs below, ECF Nos.185:4–7, 186:4–6; *see also* A46, this Court has appellate jurisdiction over this case. Circuit Courts maintain appellate jurisdiction "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This Court gives the finality requirement "a practical rather than a technical construction," looking to "what effect the court intended it to have, rather than the label placed upon it," *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994), so "finality" exists whenever a decision "is a full adjudication of the issues" and "clearly evidences the judge's

intentions that it be the court's final act in the matter," *Patel v. Del Taco, Inc.*, 446 F.3d 996, 1000 (9th Cir. 2006). Entry of final judgment is indicative that a district court intended its order to be final, *Montes*, 37 F.3d at 1350; *Beveridge v. City of Spokane*, No. 20-35848, 2021 WL 3082003, at *1 (9th Cir. July 21, 2021), and permits parties to appeal from prior, even interlocutory orders, *Am. Ironworks v. N. Am. Constr.*, 248 F.3d 892, 897 (9th Cir. 2001).

This Court considers orders remanding to an agency to be final if "(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004). But this rule only applies to an appeal by private parties "whose positions on the merits would be considered during the agency proceedings on remand," *Crow Indian Tribe v. United States*, 965 F.3d 662, 675 (9th Cir. 2020), and this Court will still "exercise [its] jurisdiction over a remand order" in absence of those three elements if "a holding of nonappealability would effectively deprive the litigants of an

opportunity to obtain review." *Alsea*, 358 F.3d at 1184–85 (citation omitted). Indeed, "*Alsea* did not announce a hard-and-fast rule prohibiting a non-agency litigant from appealing a remand order," *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075 (9th Cir. 2010), and this Court continues to give the finality determination in such instances "a practical construction," *Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996).

Here, the district court's vacatur order and final judgment provide this Court with appellate jurisdiction under any practical consideration of finality. The district court's order remanding the Rule to EPA with vacatur effectively ends the entire dispute. Indeed, Plaintiffs throughout this litigation sought "an order vacating the Final Rule or those portions determined to be unlawful," ECF No.1:23, and the court's order grants that relief, A31. *See Patel*, 446 F.3d at 1000. The district court's subsequent final judgment, "ensur[ing] appealability," clarifying that no issues remained, and closing the case, ECF No.176:1, removed any doubt about finality, *Montes*, 37 F.3d at 1350.

That the order involved a remand to EPA does nothing to change this conclusion. The core issue raised by Intervenors on appeal is

whether the district court even had the authority or jurisdiction to vacate the Rule without first determining its unlawfulness, *see supra* Part I.A, an issue that will not "be considered during the agency proceedings on remand," *Crow Indian Tribe*, 965 F.3d at 675, as EPA considers the merits of the Rule. Indeed, absent review now, Intervenors will not get any resolution on this important question, providing this Court appellate jurisdiction under "a practical construction" of the finality rule, *Skagit Cty.*, 80 F.3d at 384. Thus, regardless of whether the district court's vacatur order meets the *Alsea* criteria—not a "hard-and-fast rule" itself, *Pit River Tribe*, 615 F.3d at 1075—this Court has appellate jurisdiction.

CONCLUSION

This Court should stay the district court's Order vacating the Section 401 Rule pending appeal.

Dated: December 15, 2021

Respectfully submitted,

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

DIERDRE G. DUNCAN
ERICA N. PETERSON
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1932
dduncan@huntonak.com
epeterson@huntonak.com

CLARE ELLIS
HUNTON ANDREWS KURTH LLP
50 California Street
Suite 1700
San Francisco, CA 94111
(415) 975-3708
(415) 975-3701 (fax)
cellis@huntonak.com

Attorneys for Intervenor-Defendants-Appellants American Petroleum Institute and Interstate Natural Gas Association of America

/s/ Misha Tseytlin
MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

CHARLES SENSIBA
TROUTMAN PEPPER HAMILTON SANDERS LLP
401 9th Street NW
Suite 1000
Washington, DC 20004-2146
(202) 274-2850
(202) 274-2994 (fax)
charles.sensiba@troutman.com

ELIZABETH HOLT ANDREWS
TROUTMAN PEPPER HAMILTON SANDERS LLP
Three Embarcadero Center
Suite 800
San Francisco, CA 94111-4057
(415) 477-5700
(415) 477-5710 (fax)
elizabeth.andrews@troutman.com

Attorneys for Intervenor Defendant-Appellant National Hydropower Association

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

Attorneys for Intervenor Defendant-Appellant State of Louisiana

/s/ James Kaste
James Kaste
Deputy Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
(307) 777-7895 (phone)
(307) 777-3542 (fax)
james.kaste@wyo.gov

Additional Counsel:

LESLIE RUTLEDGE
Attorney General of Arkansas

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

KEN PAXTON
Attorney General of Texas

PATRICK MORRISEY
Attorney General of West Virginia

* Pursuant to Circuit Rule 25-5(e), I hereby attest that concurrence in the filing of the document has been obtained from each of the other Signatories. /s/ George P. Sibley, III

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 5,577 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Century Schoolbook typeface.

Dated: December 15, 2021

/s/ George P. Sibley, III
GEORGE P. SIBLEY, III

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 15, 2021. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: December 15, 2021

/s/ George P. Sibley, III

GEORGE P. SIBLEY, III

ADDENDUM

TABLE OF CONTENTS

Supplemental Declaration of Joan Dreskin A1

Declaration of Robert Christopher Sadlier.. A11

Order on Motion for Remand Without Vacatur (ECF No.173) A15

Order Denying Motion for Stay Pending Appeal (ECF No.191) A33

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

IN RE: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED; COLUMBIA RIVERKEEPER; SIERRA CLUB; SUQUAMISH TRIBE; PYRAMID LAKE PAIUTE TRIBE; ORUTSARARMIUT NATIVE COUNCIL; STATE OF CALIFORNIA; STATE WATER RESOURCES CONTROL BOARD; STATE OF OREGON; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF MARYLAND; STATE OF RHODE ISLAND; STATE OF COLORADO; DISTRICT OF COLUMBIA; STATE OF NORTH CAROLINA; COMMONWEALTH OF VIRGINIA; STATE OF NEW MEXICO; STATE OF VERMONT; STATE OF MINNESOTA; STATE OF CONNECTICUT; STATE OF WASHINGTON; STATE OF MICHIGAN; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEVADA; STATE OF WISCONSIN; STATE OF MAINE; *and* STATE OF ILLINOIS,
PLAINTIFFS-APPELLEES,

v.

ANDREW R. WHEELER *and* U.S. ENVIRONMENTAL PROTECTION AGENCY,
DEFENDANTS,

and

AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *and* NATIONAL HYDROPOWER ASSOCIATION,
INTERVENOR-DEFENDANTS-APPELLANTS

AND

STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; *and* STATE OF TEXAS,
INTERVENORS-APPELLANTS.

On Appeals from the U.S. District Court
for the Northern District of California
Case Nos. 3:20-cv-04636-WHA, -04869-WHA, -06137-WHA
The Honorable William H. Alsup, Senior District Judge

SUPPLEMENTAL DECLARATION OF JOAN DRESKIN FOR THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLANTS' MOTION FOR STAY PENDING APPEAL

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

2. I offer this declaration in support of the Motion by Intervenor Defendants to Stay Pending Appeal the district court's order vacating the Section 401 Rule. *Final Rule, CWA Section 401 Certification Rule,* EPA, 85 Fed. Reg. 42,210 (July 13, 2020) (the "401 Rule").

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

4. U.S. natural gas production is expected to increase to 130 billion cubic feet per day by 2035, spurred by growing markets, if available supplies are developed, and it is estimated that investment in new oil and gas infrastructure will total $791 billion from 2018 through 2035, averaging $44 billion per year. Natural

gas also will serve as a backstop to help firm up variable renewables, like wind and solar, which are expected to grow. This translates to the need for thousands of miles of new and replacement pipe to meet market demand or to modernize existing pipeline facilities.

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

6. Due to the public need to transport natural gas long distances, projects developed by INGAA members unavoidably cross wetlands and other waters of the United States regulated by the Clean Water Act (CWA). Such crossings require authorization from the U.S. Army Corps of Engineers (Corps) under CWA Section 404. And for such crossings, CWA section 401 requires the project applicant to provide the federal agency with the certification of the state that the discharges in the state comply with applicable water quality standards. If the state fails or refuses to act on the request for certification within a reasonable time not to

exceed one year, the applicant's duty to provide the certification is waived. The federal agency (such as FERC or the U.S. Army Corps of Engineers (Corps)) is precluded from authorizing the activity resulting in the discharge unless the certification is provided or waived. 33 U.S.C. § 1341.

7. INGAA members rely on, and make regular use of both individual and general permits, including Nationwide Permits (NWPs), Regional General permits, and Programmatic General Permits, issued by the Corps under CWA section 404, which authorize activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities. NWPs are general permits that allow for the timely authorization of activities that have only minimal and temporary environmental effects, but that are essential to the reliable, safe and affordable supply of energy to U.S. consumers. Regional General Permits are issued for a specific geographic area by an individual Corps district and have specific terms and conditions, all of which must be met for project-specific actions to be verified. Programmatic General Permits are based on an existing state, local, or other federal program and designed to eliminate duplication of effort between Corps districts and State regulatory programs that provide similar protection to aquatic resources. In some states, a State Programmatic General Permit (SPGP) replaces some or all of the Corps NWPs, which results in greater efficiency in the overall permitting process.

8. INGAA members use general permits, including NWPs, Regional permits, and SPGPs, for both large and small pipeline projects located across the country that will have minimal impacts on the environment. For example, INGAA members use NWP 12 for large pipeline expansions, where applicable, and also for smaller projects, such as pipeline replacement projects driven by highway replacements, ingress and egress to project workspace, and valve replacements. NWP 3 and NWP 12 are also used extensively for maintenance, inspection, and repair activities to comply with pipeline integrity requirements mandated by the Pipeline & Hazardous Materials Safety Administration (PHMSA) pursuant to the Pipeline Safety Act. INGAA members often rely on NWP 3 and NWP 12 authorizations to inspect, maintain, and repair existing pipelines to ensure the continued safety and reliability of the pipelines.

9. Collectively, INGAA members use general permits thousands of times annually for their construction, maintenance, and repair activities.

10. INGAA's members schedule and design their projects and maintenance and repair activities to meet the terms and conditions of the NWPs, including NWP 12. NWPs provide an efficient permitting mechanism that helps streamline the review and approval process for pipeline projects without precluding or compromising the consideration of any necessary project-specific conditions. Construction and maintenance of natural gas pipelines typically occur

on tight schedules designed to ensure the safety, security, and reliability of the natural gas pipeline network and to meet the growing demands of natural gas customers. Obtaining coverage under a NWP takes considerably less time than an individual CWA section 404 permit, while still ensuring appropriate consideration of all applicable avoidance, minimization and mitigation measures through adherence to the applicable conditions listed therein.

11. The conditions associated with the NWPs are designed to ensure that authorized crossings have only minimal environmental effects. NWPs are subject to 32 general conditions that protect a range of different environmental resources, including spawning areas, migratory bird breeding areas, shellfish beds, water supply intakes, wild and scenic rivers, endangered species, migratory birds, bald and golden eagles, historic properties, and designated critical resource waters. In each case, these conditions prohibit activities that would have more than minimal impacts on these resources. Regional conditions further ensure that authorized crossings have only minimal environmental effects on state- or region-specific resources of concern, including special status wetlands, special status streams and rivers, and streams known to harbor protected species.

12. In reliance on the availability of NWP 3 and NWP 12, the majority of INGAA members have plans to submit or have already submitted Pre-Construction Notifications seeking Corps verification to construct interstate natural gas pipelines

and complete necessary repair, maintenance and modernization work using NWP 3 and/or NWP 12.

13. The Corps re-issued certain NWPs in March 2021, and many States have issued CWA Section 401 water quality certifications (or waived certification) for those nationwide permits. These certifications or waivers were issued while the 401 Rule was still effective. In States that have issued certifications or have waived, INGAA members are relying on NWPs to complete vital projects, and plan to rely on NWPs in the immediate future.

14. After the district court's decision to vacate the 401 Rule, INGAA members have reported that the Corps suspended permitting authorizations for activities that rely on water quality certifications based on the 401 Rule, specifically citing the district court's decision. This included authorizations under both individual permits and NWPs, including NWP 12.

15. For example, on November 4, 2021, the Corps' Sacramento District posted the following message on its website: "Due to the decision of the United States District Court for the Northern District of California on October 21, 2021 to remand EPA's 2020 401 WQC rule with vacatur, the Corps of Engineers is not finalizing permit decisions that rely on a 401 WQC or waiver under EPA's 2020 rule at this time. The Corps is working to provide more refined guidance that provides a way forward that allows us to finalize permit decisions."

16. The Corps' Buffalo District posted the same message on its website on November 9, 2021.

17. The Corps' suspension was not limited to its Sacramento and Buffalo Districts. Other Corps Districts, including Mobile, Vicksburg (MS), Tulsa, Nashville, Seattle, Los Angeles, Pittsburgh, Huntington, Baltimore, and New Orleans Districts verbally told members that they would not finalize any permit decisions that rely on a certification or waiver under the 2020 401 Rule due to the district court's decision.

18. Around November 19, 2021, Corps headquarters issued additional verbal guidance to Corps District Engineers. Pursuant to that guidance, which has not been published, District Engineers may issue NWP verifications as to NWPs issued in March 2021 and for which States issued blanket certifications or waivers pursuant to the 2020 401 Rule. But where a State has issued an individual certification or waiver for projects that either intend to proceed under an NWP or an individual permit, the State has the option to revisit its certification decision up to the one year statutory deadline.

19. As a result, critical projects nationwide that intended to proceed under general or individual permits already have been delayed, imposing substantial added costs to INGAA's members. And the even though the Corps has lifted its

permitting suspension, the re-opener for States creates the potential for conflicting directives from other agencies.

20. Of further concern to INGAA members are pipeline integrity projects that were planned to commence within the next several months. These pipeline integrity projects are necessary to reduce the likelihood of pipeline leaks and ruptures by inspecting, repairing and/or replacing pipelines located in densely populated areas, including pipelines near homes, schools, churches, and businesses. In many cases, these actions follow inspection schedules mandated by the PHMSA. INGAA's members have created inspection and remediation schedules based on the PHMSA requirements and company risk assessments. If INGAA members cannot rely on NWPs or individual permits where Section 401 certificates have been issued, some of these safety improvements will not be accomplished pursuant to the regulatory timeframes, or PHMSA will need to extensively grant waivers, imposing an additional administrative burden on its staff.

21. Delays such as these will increase the risk of reliability issues, while also failing to meet the needs of customers who have a need for natural gas that may be unfulfilled in the interim.

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

Executed on December 14, 2021.

Joan Dreskin
Senior Vice President and General Counsel
Interstate Natural Gas Association of America
20 F Street, NW
Suite 450
Washington, DC 20001

Nos. 21-16958, -16960, 16961

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

IN RE: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED; COLUMBIA RIVERKEEPER; SIERRA CLUB; SUQUAMISH TRIBE; PYRAMID LAKE PAIUTE TRIBE; ORUTSARARMIUT NATIVE COUNCIL; STATE OF CALIFORNIA; STATE WATER RESOURCES CONTROL BOARD; STATE OF OREGON; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF MARYLAND; STATE OF RHODE ISLAND; STATE OF COLORADO; DISTRICT OF COLUMBIA; STATE OF NORTH CAROLINA; COMMONWEALTH OF VIRGINIA; STATE OF NEW MEXICO; STATE OF VERMONT; STATE OF MINNESOTA; STATE OF CONNECTICUT; STATE OF WASHINGTON; STATE OF MICHIGAN; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEVADA; STATE OF WISCONSIN; STATE OF MAINE; *and* STATE OF ILLINOIS,
PLAINTIFFS-APPELLEES,

v.

ANDREW R. WHEELER *and* U.S. ENVIRONMENTAL PROTECTION AGENCY,
DEFENDANTS,

and

AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *and* NATIONAL HYDROPOWER ASSOCIATION,
INTERVENORS-DEFENDANTS-APPELLANTS

AND

STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; *and* STATE OF TEXAS,
INTERVENORS-APPELLANTS.

On Appeals from the U.S. District Court
for the Northern District of California
Case Nos. 3:20-cv-04636-WHA, -04869-WHA, -06137-WHA
The Honorable William H. Alsup, Judge

DECLARATION OF ROBERT CHRISTOPHER SADLIER

I, Robert Christopher Sadlier, hereby declare as follows:

1. I am the Deputy Director of the Water Quality Division for the Texas Commission on Environmental Quality (TCEQ). I have been employed by the TCEQ since 2011, and have served in this capacity since 2021. As part of my duties, I am responsible for overseeing the implementation of the Clean Water Act (CWA) in Texas related to administration of the state's National Pollutant Discharge Elimination System permitting program and Section 401 water quality certifications.

2. Based on my position, I have personal knowledge and experience to understand many of the steps the State must undertake in response to the vacatur of the revised CWA 401 rule.

3. The water quality of Texas is protected through the policy of the State of Texas, which is to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state; to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy. *Texas Water Code § 26.003.*

4. According to the Texas Water Code, the TCEQ is "the agency with primary responsibility for implementation of water quality management functions, including enforcement actions, within the state. *Texas Water Code§ 26.0136.* Additionally, all waters in Texas receive protection of their water quality through the Texas Surface Water Quality Standards in 30 Texas Administrative Code (TAC) Chapter 307. Specifically, the TCEQ is responsible, in cooperation with other state agencies, for maintaining water quality in Texas' lakes, rivers, and streams so that the state's Surface Water Quality Standards are complied with.

5. For CWA § 402 permitting, Texas was delegated authority for the Texas Pollutant Discharge Elimination System (TPDES) in

1998. Texas had an existing program prior to delegation and we continue to protect waters in the state through our state regulations. TCEQ also develops Texas' Water Quality Standards criteria, monitors and assesses Texas' water resources, manages the Total Maximum Daily Load program for the State of Texas, and incorporates federal requirements to ensure the State's permitting program complies with the Clean Water Act.

6. The TCEQ is responsible for conducting Clean Water Act Section 401 certification reviews to ensure that Texas is involved in decisions made by the federal government that affect the quality of the water resources of the state. The TCEQ is the lead state agency that administers the Section 401 certification program in Texas, except for activities related to oil and gas exploration, development, and production, which is the responsibility of the Railroad Commission of Texas. The primary focus of TCEQ's 401 certification program is reviewing U.S. Army Corps of Engineers (USACE) Section 404 permit applications for the discharge of dredged or fill material into waters of the United States, including wetlands. The purpose of the certification reviews is to determine whether a proposed discharge will comply with the Texas Surface Water Quality Standards, which are found in 30 TAC Chapter 307. TCEQ state certifications are governed by 30 TAC Chapter 279.

7. Under the CWA's certification program, Texas must review each discharge to a water and certify for all CWA permits that the discharge will comply with the State's surface water quality standards. 33 U.S.C. § 134l(a)(l).

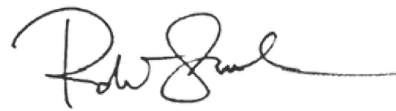
8. For example, Texas is like many of the states in that CWA § 404 Dredge and Fill permitting is conducted by the USACE. Anyone seeking to discharge dredge or fill material into a water subject to the Rule is required to obtain a permit under Section 404 of the CWA from USACE. A prerequisite to a 404 permit is a Section 401 water quality certification.

9. As a result of the vacatur of the revised CWA 401 rule there has been confusion in the regulated community in Texas. There has been concern that 401 certifications provided under the 2020 rule are

no longer valid. As a result, TCEQ is having to devote significant resources addressing this issue for individual 401 certifications and Nationwide Permits issued under the 2020 rule, including responding to numerous inquiries from the regulated community.

10. TCEQ does have concerns that a third party will try to re-open a case under the revised CWA 401 rule.

I declare under penalty of perjury that the foregoing is correct. Executed on this 14th day of December 2021, at Austin, Texas.



1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7
8 NORTHERN DISTRICT OF CALIFORNIA
9
10
11
12
13
14
15
16

In re CLEAN WATER ACT RULEMAKING.	No. C 20-04636 WHA No. C 20-04869 WHA No. C 20-06137 WHA
This Document Relates to: ALL ACTIONS.	(Consolidated) **ORDER RE MOTION FOR REMAND WITHOUT VACATUR**

United States District Court
Northern District of California

17

INTRODUCTION

18 Plaintiff states, tribes, and non-profit conservation groups have challenged EPA's Clean
19 Water Act certification rule, and now EPA moves to remand the proceedings without vacatur.
20 For the reasons stated, the rule is remanded to the agency with vacatur.

21

STATEMENT

22 The Federal Water Pollution Control Act Amendments of 1972, commonly known as the
23 Clean Water Act, is the primary federal statute regulating water pollution. Congress enacted
24 the Clean Water Act in 1972 — over then-President Nixon's veto — but the roots of the Act
25 extend much farther back to 1899 and the Rivers and Harbors Act. That statute, often referred
26 to as the Refuse Act, primarily ensured free and open navigability of the waters of the United
27 States, but also prohibited the discharge of "refuse matter of any kind or description whatever
28 other than that flowing from streets and sewers and passing therefrom in a liquid state, into any

navigable water of the United States," and authorized the Secretary of the Army to permit such discharges under certain conditions. *See* 33 U.S.C. §§ 407 *et seq.* In 1948, following an increase an industrialization throughout the country, Congress passed the Federal Water Pollution Control Act (FWPCA). *See generally* Joel Gross & Kerri Stelcen, Clean Water Act 2–7 (2d ed. 2012).

In 1969, two events would help foster a new environmental awareness in the United States and prompt the promulgation of amendments to the FWPCA: A catastrophic oil spill of three million gallons of crude off the coast of Santa Barbara (creating a thirty-five-mile slick); and a fire on the surface of the Cuyahoga River in northeast Ohio. A 1968 Kent State University symposium on the state of the Cuyahoga River is worth briefly quoting:

> The surface is covered with brown oily film observed upstream as far as the Southerly Plant effluent. In addition, large quantities of black heavy oil floating in slicks, sometimes several inches thick, are observed frequently. Debris and trash are commonly caught up in these slicks forming an unsightly floating mess. Anaerobic action is common as the dissolved oxygen is seldom above a fraction of a part per million. The discharge of cooling water increases the temperature by 10 to 15° F. The velocity is negligible, and sludge accumulates on the bottom. Animal life does not exist.

The Cuyahoga River Watershed: Proceedings of a Symposium Held at Kent State University 104 (George D. Cooke, ed., 1969); Gross & Stelcen, *supra*, at 7; Christine Mai-Duc, The 1969 Santa Barbara oil spill that changed oil and gas exploration forever, L.A. Times, May 20, 2015, https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmlstory.html.

Three years after these events, Congress passed the Clean Water Act. Section 101 of the act expressed Congress' goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The congressional declaration in Section 101(b) recited:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the

United States District Court
Northern District of California

exercise of his authority under this chapter.

Section 101(d) charged EPA to administer the act while Section 101(e) explicitly enshrined public participation into the statutory scheme:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.

Under Section 401 of the Clean Water Act, a federal agency may not issue a permit or license to an applicant that seeks to conduct any activity that may result in any discharge into the navigable waters of the United States unless a state or authorized tribe where the discharge would originate issues a water quality certification or waives the requirement. EPA is responsible for the certification by non-authorized tribes or when a discharge would originate from lands under exclusive federal jurisdiction. Importantly, "No [federal] license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be." 33 U.S.C. § 1341; *see also* Overview of CWA Section 401 Certification, epa.gov/cwa-401/overview-cwa-section-401-certification (last visited Oct. 21, 2021). Several major federal licensing and permitting schemes are subject to Section 401, such as National Pollutant Discharge Elimination System (NPDES) permits under Section 402, permits for discharge of dredged or fill material into wetlands under Section 404, Federal Energy Regulatory Commission (FERC) licenses for hydropower facilities and natural gas pipelines, and Rivers and Harbors Act Section Nine and Section Ten permits.

While EPA has promulgated myriad rules to administer the Clean Water Act, iterations of the administrative rule implementing Section 401 had remained, until recently, singular. EPA originally promulgated 40 C.F.R. Part 121 to implement water quality certifications for Section 21(b) of the FWPCA as it existed in 1971 — a year before the Clean Water Act amendments to the FWPCA. *See* 36 Fed. Reg. 22,487 (Nov. 25, 1971), redesignated at 37 Fed. Reg. 21,441 (Oct. 11, 1972), further redesignated at 44 Fed. Reg. 32,899 (June 7, 1979). EPA would continue to use this rule for the Section 401 licensing scheme. In brief, 40 C.F.R. Part 121 as promulgated set out: (i) the minimum procedural content of a certification to facilitate

1 EPA's administrative processes; (ii) the procedures for determining the effects of a license
2 upon other, non-certifying states; (iii) the procedures the EPA Administrator employs to certify
3 an application for a project under exclusive federal jurisdiction; and (iv) the procedures for
4 EPA consultations on obtaining a license or permit. EPA employed this procedure for
5 certifications as-is for half a century.

6 * * *

7 On April 10, 2019, President Trump issued Executive Order 13,868, entitled *Promoting*
8 *Energy Infrastructure and Economic Growth*. 84 Fed. Reg. 15,495 (Apr. 10, 2019). The order
9 stated: "The United States is blessed with plentiful energy resources, including abundant
10 supplies of coal, oil, and natural gas," and, the "Federal Government must promote efficient
11 permitting processes and reduce regulatory uncertainties that currently make energy
12 infrastructure projects expensive and that discourage new investment." To that end, Executive
13 Order 13,868 asserted that "[o]utdated Federal guidance and regulations regarding section 401
14 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the
15 development of energy infrastructure," and instructed EPA to review and issue new guidance
16 regarding Section 401. *Id.* at 15,496.

17 Pursuant to the executive order, EPA revised its general Section 401 guidance in June
18 2019. Two months later, EPA published an economic analysis of existing Section 401
19 processes. That same month, in a publication dated August 22, 2019, EPA proposed an
20 updated Section 401 certification rule with extensive revisions. After a very active public
21 comment phase, EPA published the final rule in the Federal Register on July 13, 2020. The
22 rule went into effect September 11, 2020. *See* Economic Analysis for the Proposed Clean
23 Water Act Section 401 Rulemaking, NEPIS 810R19001A (Aug. 2019); Clean Water Act
24 Section 401 Guidance for Federal Agencies, States and Authorized Tribes,
25 www.epa.gov/sites/default/files/2019-06/documents/cwa_section_401_guidance.pdf (June 7,
26 2019); 84 Fed. Reg. 44,080 (Aug. 22, 2019); 85 Fed. Reg. 42,210 (July 13, 2020).

27 The new certification rule makes a variety of substantive changes to EPA's procedures
28 for implementing Section 401. To state just a few examples, the new rule: (i) narrows the

scope of certification to ensuring that a discharge from a point source into a water of the United States from a federally licensed or permitted activity will comply with "water quality requirements" — another defined term narrowed to mean applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act; (ii) authorizes EPA to establish the reasonable amount of time for a certifying authority to certify a request; and (iii) authorizes EPA to determine whether a certifying authority's denial has complied with the rule's procedural requirements, and to deem certifications waived if not. *See* 40 C.F.R. pt. 121.

Plaintiff states, tribes, and non-profit conservation groups, many of which had strenuously objected to these and other changes to the certification rule, began suing, many the same day EPA published the final rule. Three cases eventually arrived before the undersigned by August 2020. The new certification rule became effective in September, and by October, eight states and three industry groups intervened as defendants. Then, in November, administrative momentum for the revised certification rule stalled after the election of President Biden, who declared his administration's policy:

> 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.

Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). The administration specifically listed the certification rule as one agency action set to be reviewed, and EPA stated its intent to promulgate a new certification rule in a notice published on June 6, 2021. The earliest EPA will be able to promulgate a revised rule is Spring 2023 (Goodin Decl. ¶ 27). *See* 86 Fed. Reg. 29,541 (June 2, 2021); Fact Sheet: List of Agency Actions for Review, www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review (Jan. 20, 2021).

United States District Court
Northern District of California

EPA now moves to remand for further proceedings without vacatur. Due to plaintiffs' oppositions that requested remand *with* vacatur, intervenor defendants filed a motion to strike, which necessitated extra briefing on that matter. After oral argument held telephonically due to the COVID-19 pandemic, intervenor defendants were invited to file further briefing on the vacatur issue, which they did.

ANALYSIS

1. The Applicable Standards for Remand and Vacatur.

Ambiguities in statutes within an agency's jurisdiction to administer are, per *Chevron* and *Brand X*, delegations of authority to fill the statutory gap in a reasonable fashion. Under the Administrative Procedure Act (APA), a district court reviews a challenged federal agency action to determine whether it is arbitrary and capricious or otherwise not in accordance with law. Per the familiar taxonomy established by *SKF USA*, an agency typically takes one of five positions when its action is challenged in federal court: (i) it may defend the decision on previously articulated grounds; (ii) it may seek to defend the decision on grounds *not* previously articulated by the agency; (iii) it may seek remand to reconsider its decision because of intervening events outside the agency's control; (iv) it may seek remand even absent any intervening events, *without confessing error*, to reconsider its previous position; and (v) it may seek remand because it believes the original decision was incorrect on the merits and it wishes to change the result. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1027–28 (Fed. Cir. 2001); *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 980, 982 (2005); *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); *Cal. Cmtys. Against Toxics v. EPA* (*CCAT*), 688 F.3d 989, 992 (9th Cir. 2012) (approving *SKF USA* taxonomy); 5 U.S.C. § 706(2).

An agency thus need not defend a challenged action in a district court and may instead voluntarily request the court to remand the action to the agency for further proceedings. Nor does an agency even need to admit error to justify voluntary remand. "Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *CCAT*, 688 F.3d at 992.

United States District Court
Northern District of California

The deferential standard for reviewing an agency's request for voluntary remand can raise difficult issues when vacatur comes into play. When a district court rules that an agency action is defective due to errors of fact, law, or policy, the APA explicitly instructs that the court "shall . . . hold unlawful and set aside" the agency action. "This approach enables a reviewing court to correct error but, critically, also avoids judicial encroachment on agency discretion." 33 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 8381 (3d ed. 2021); 5 U.S.C. § 706(2). Nevertheless, our court of appeals has held that, when equity demands, a flawed rule need not be vacated. *See CCAT*, 688 F.3d at 992. Oftentimes, an agency may voluntarily request remand prior to a court's adjudication of the merits of the disputed action. The caselaw here is unsettled. Leaving an agency action in place while the agency reconsiders may deny the petitioners the opportunity to vindicate their claims in federal court and would leave them subject to a rule they have asserted is invalid. On the other hand, vacatur "of an action may allow an agency to abandon a legislative rule without going through the (extensive) trouble of developing a new one." Wright & Miller, *supra*, at § 8383. Our court of appeals has issued the broad guidance — albeit in opinions where the agency action had been found erroneous — that remand without vacatur is appropriate only in limited circumstances. *CCAT*, 688 F.3d at 994; *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015).

Contrasting policy implications have led to a split in authority regarding whether a court may order vacatur without first reaching a determination on the merits of the agency's action. *Compare Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011) (Judge John L. Kane), *with Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135–36 (D.D.C. 2010) (Judge Emmet G. Sullivan). Our court of appeals has not had the opportunity to address this question directly, but its holding that even a flawed rule need not be vacated supports the corollary proposition that a flaw need not be conclusively established to vacate a rule. Other district courts in our circuit have consistently acknowledged they have the authority to vacate agency actions upon remand prior to a final determination of the action's legality. *See, e.g.*, *Pascua Yaqui Tribe v. EPA*, ––– F. Supp. 3d –––, 2021 WL 3855977, at *4

(D. Ariz. Aug. 30, 2021) (Judge Rosemary Márquez); *All. for Wild Rockies v. Marten*, 2018 WL 2943251, at *2–3 (D. Mont. June 12, 2018) (Judge Dana L. Christensen); *N. Coast Rivers All. v. Dep't of the Interior*, 2016 WL 8673038, at *6 (E.D. Cal. Dec. 16, 2016) (Judge Lawrence J. O'Neill).

This order agrees with the foregoing opinions from district judges within our circuit that, when an agency requests voluntary remand, a district court may vacate an agency's action without first making a determination on the merits. Vacatur is a form of discretionary, equitable relief akin to an injunction. This order finds persuasive the reasoning in *Center for Native Ecosystems*, which explains that "because vacatur is an equitable remedy, and because the APA does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of vacatur without a decision on the merits." 795 F. Supp. 2d at 1241–42; *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542–43 (1987); *Coal. to Protect Puget Sound Habitat v. United States Army Corps of Engineers*, 843 Fed. App'x 77, 80 (9th Cir. 2021).

Our court of appeals has applied the familiar *Allied-Signal* test when considering vacatur of agency actions found to be erroneous, and this order finds the same factors applicable when considering voluntary remand prior to a conclusive decision on the merits. *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150–151 (D.C. Cir. 1993). Under *Allied-Signal*, the "decision whether to vacate depends on [1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Ibid.*; *see also CCAT*, 688 F.3d at 992 (adopting *Allied-Signal*). *Allied-Signal* can properly guide a vacatur analysis prior to a merits determination similar to the review of a motion for a preliminary injunction. In fact, the test in *Allied-Signal* explicitly arose from a preliminary injunction analysis. *See Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990).

The first prong of *Allied-Signal* — sometimes abridged in decisions where the court had made a merits determination — considers an agency action's deficiencies in order to evaluate

United States District Court
Northern District of California

the "extent of doubt whether the agency chose correctly." Conclusive findings of agency error are thus sufficient but not necessary for this factor to support vacatur. The first prong may be measured in different ways, including: the extent the agency action contravenes the purposes of the statute in question; whether the same rule could be adopted on remand; and whether the action was the result of reasoned decisionmaking. *Pollinator*, 806 F.3d at 532; *Or. Nat. Desert Ass'n v. Zinke*, 250 F. Supp. 3d 773, 774 (D. Or. 2017) (Judge Michael Mosman) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314–15 (1982)); *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 185 (D.D.C. 2008). Because a district court's review of an agency's action begins and ends with the reasoning the agency relied on in making that decision, the final rule and its preamble provide valuable material with which to evaluate whether the agency employed reasoned decisionmaking. *See CCAT*, 688 F.3d at 993. As for the second prong of *Allied-Signal*, our court of appeals has engaged in a broad analysis of the potential consequences of vacatur. *See id.* at 994; *Pollinator*, 806 F.3d at 532–33.

2. EPA AND INTERVENOR DEFENDANTS' OBJECTIONS TO VACATUR AND *ALLIED-SIGNAL*.

Both EPA and intervenor defendants assert that this order cannot and should not consider whether to vacate the certification rule. Their host of arguments fails to persuade.

First, intervenor defendants contend in a separate motion to strike that plaintiffs' arguments for vacatur in their opposition briefing contravenes Federal Rule of Civil Procedure 7(b), Civil Local Rule 7-1(a), and the undersigned's standing order (Dkt. No. 148 at 2). An August 2021 order ensured that the parties fully briefed this issue concurrently with EPA's motion for voluntary remand (Dkt. No. 151). Upon review, this order finds that plaintiffs properly addressed the issue of vacatur. EPA has moved for remand *without vacatur*. Yet as our court of appeals has explicitly stated, "We order remand without vacatur only in 'limited circumstances.'" *Pollinator*, 806 F.3d at 532 (quoting *CCAT*, 688 F.3d at 994). EPA, in fact, quoted *CCAT* in its opening brief, but neglected to address why the instant action is the exception meriting remand without vacatur or why the default standard of vacatur stated in *CCAT* should not apply here. EPA cannot avoid the default standard by strategically tailoring

United States District Court
Northern District of California

United States District Court
Northern District of California

its briefing and requested relief, and intervenor defendants made a strategic choice not to initially file any briefing on the subject. Intervenor defendants, regardless, were granted the opportunity to file supplemental briefing on the vacatur issue and *Allied-Signal* (Intervenors Br., Dkt. No. 172). So, they have had the last word. Plaintiffs will not be faulted for addressing the issues that this order must address to render a decision. *See also N. Coast Rivers All.*, 2016 WL 8673038, at *7.

Second, EPA and intervenor defendants argue that *Allied-Signal* is not the proper standard here because there has been no ruling on the merits of the certification rule (Reply Br. 6; Intervenors Br. 8–9). As explained, *Allied-Signal* does not require a merits decision (and, in fact, is based on the standard for a preliminary injunction). Neither EPA nor intervenor defendants, it should be noted, attempt to suggest a substitute for *Allied-Signal* for our purposes. Intervenor defendants attempt to distinguish *Pascua Yaqui Tribe* — a recent decision from our sister court that vacated upon remand another EPA rule related to the Clean Water Act — on the ground that the district court had before it the parties' fully-briefed summary judgment motions (Intervenors Br. 9). But, the court's opinion did not rule on the parties' summary judgment motions, which were dismissed without prejudice in the docket entry for the remand order. *Pascua Yaqui Tribe*, No. C 20-00266, Dkt. No. 99, Aug. 30, 2021. *Pascua Yaqui Tribe*, in fact, stated that it was not reaching the merits of the agency action: "[I]n the Ninth Circuit, remand with vacatur may be appropriate even in the absence of a merits adjudication. Accordingly, the Court will apply the ordinary test for whether remand should include vacatur." 2021 WL 3855977, at *4.

Third, intervenor defendants state that plaintiffs "fail to provide any severability analysis, *which would be mandatory* if [p]laintiffs want this Court to vacate the entire Rule" (Intervenors Br. 11, emphasis added). The decision intervenor defendants cite to support this statement, *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 351–52 (D.C. Cir. 2019), does not necessarily mandate a severability analysis, and this order is not aware of any mandatory authority that requires a severability analysis. Regardless, severance is not required here because, as explained below, this order finds serious deficiencies in an aspect of the certification rule that,

in EPA's words, "is the foundation of the final rule and [] informs all other provisions of the final rule." 85 Fed. Reg. at 42,256.

Fourth, in a footnote in its reply brief, EPA requests additional briefing regarding the scope of vacatur, citing *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (*see* Reply Br. 2 n. 2). EPA does not elaborate how a decision regarding standing to challenge the minimum essential coverage requirement of the Affordable Care Act has any bearing on our case here. Citing general statements of law does not warrant additional briefing, nor did EPA raise this request at our hearing after the intervenor defendants were permitted to provide supplemental briefing on the *Allied-Signal* analysis. This order has considered the proper scope of vacatur.

In sum, should remand be justified, this order will duly apply *Allied-Signal* as described to determine whether vacatur is the appropriate remedy in this dispute.

3. WHETHER REMAND OF THE CERTIFICATION RULE TO EPA IS WARRANTED.

This order now considers whether to remand the certification rule back to EPA for further proceedings. EPA says remand is appropriate because the request: (i) is made in good faith and reflects substantial and legitimate concerns with the rule; (ii) supports judicial economy; and (iii) would not cause undue prejudice to the parties (Br. 6–7).

Remand in this circuit, as EPA reminds us, is generally only refused when the agency's request is frivolous or made in bad faith. *See CCAT*, 688 F.3d at 992. The American Rivers plaintiffs argue EPA's request is frivolous because "the *process* EPA has laid out to address [its] concerns does not demonstrate a genuine commitment to a changed rule that will address all of those concerns" (American Rivers Opp. 16). This order notes some support for American Rivers' argument to deny EPA's remand request as frivolous due to the fact that the agency wholly omitted addressing vacatur until forced to by plaintiffs' opposition briefing, but will not deny remand on that basis alone. This order accordingly proceeds to consider the *SKF USA* taxonomy of positions an agency may take on a challenge to its action.

EPA asserts that its remand request here falls into the fourth category of actions under *SKF USA* — remand to reconsider a decision without confessing error (Br. 8). In this

situation, an agency "might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision." For an action with this type of posture, *SKF USA* advised that a district court has discretion not to remand, but "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *SKF USA*, 254 F.3d at 1029.

EPA, as explained below, has certainly expressed substantial concerns with the current formulation of the certification rule (Br. 2–5). Plaintiffs have not presented evidence or argument sufficient to justify departing from the default rule permitting remand. The certification rule will be remanded to EPA for further proceedings.

4. WHETHER VACATUR OF THE CERTIFICATION RULE UPON REMAND IS WARRANTED.

This order now considers whether the *Allied-Signal* test supports vacatur upon remand of the certification rule. Each factor is considered in turn.

A. THE CERTIFICATION RULE'S DEFICIENCIES.

The first *Allied-Signal* factor considers the seriousness of the rule's deficiencies, thus evaluating the extent of doubt whether the agency correctly promulgated the rule. *See Allied-Signal*, 988 F.2d at 150–51. At the hearing, plaintiff states asserted that the most glaring deficiency in the current certification rule is a newly-inserted subsection defining the scope of certification, which they say impinges upon the Clean Water Act's principles of cooperative federalism. *See* 40 C.F.R. § 121.3. We start our *Allied-Signal* analysis with these revisions.

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Supreme Court affirmed that Section 401(d) confers on states the power to "consider all state actions related to water quality in imposing conditions on [S]ection 401 certificates." 511 U.S. 700, 710 (1994). The majority recognized that Section 401(a) contemplates state certification that a "discharge" will comply with certain provisions of the Clean Water Act while subsection (d) "expands the State's authority to impose conditions on the certification of a project" because it "refers to the compliance of the applicant, not the discharge." *Id.* at 711. *PUD No. 1* concluded that Section 401(d) "is most reasonably read as authorizing additional conditions

United States District Court
Northern District of California

United States District Court
Northern District of California

and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 712.

The revised scope of certification that EPA promulgated takes an *antithetical* position to *PUD No. 1* without reasonably explaining the change. The rule's scope of certification is "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements," which the rule limits to Sections 301, 302, 303, 306, and 307 of the Clean Water Act. 40 C.F.R. § 121.3. EPA may, of course, take up different interpretations of Section 401, but a revised rule with unexplained inconsistencies suggests it is an unreasonable interpretation that is not entitled to deference under *Chevron*. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 995 (9th Cir. 2018). EPA does not adequately explain in the preamble how it could so radically depart from what the Supreme Court dubbed the most reasonable interpretation of the statute. *PUD No. 1*, 511 U.S. at 712. The certification rule's preamble tries to address the sharp departure from *PUD No. 1* but falls back to claiming that the case was wrongly decided, and eventually sides with Justice Thomas' dissenting opinion. *See* 85 Fed. Reg. at 42,231. EPA now undermines that argument itself by declaring its intent to "*restore the balance* of state, Tribal, and federal authorities consistent with the cooperative federalism principles central to CWA section 401" (Goodin Decl. ¶ 11, emphasis added). The agency's recognition of its inconsistent interpretation of the scope of the certification compels the conclusion that the current rule is unreasonable. Accordingly, this order harbors significant doubts that EPA correctly promulgated the certification rule due to the apparent arbitrary and capricious changes to the rule's scope. *See City of Arlington v. FCC*, 569 U.S. 290, 307 (2013); *PUD No. 1*, 511 U.S. at 723 (Stevens, J., concurring) ("Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require.").

Moreover, EPA's acknowledgment it intends to "restore" the principles of cooperative federalism indicates that the current scope of the certification rule is inconsistent with and contravenes the design and structure of the Clean Water Act, and thus does not warrant

deference. As noted in the Clean Water Act's congressional declaration of goals and policy: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b); *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 321 (2014). The rule's inconsistency with the purpose of the statute it interprets also supports vacatur.

Next, while EPA does not admit fault, it does signal it will not or could not adopt the same rule upon remand. The scope of certification is not the only problematic aspect of the rule. EPA's opening brief lists eleven aspects of the certification rule about which it has "substantial concerns." That list takes up two-and-a-half pages of its twelve-page brief, and includes:

- "the certification action process steps, including whether there is any utility in requiring specific components and information for certifications with conditions and denials; whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose"
- "enforcement of CWA Section 401, including the roles of federal agencies and certifying authorities in enforcing certification conditions"
- "modifications and 'reopeners,' including whether the statutory language in CWA Section 401 supports modification of certifications or 'reopeners,'"
- "application of the Certification Rule, including impacts of the Rule on processing certification requests, impacts of the Rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the Certification Rule's procedural requirements"

(Br. 3–5). These are not narrow issues. They address nearly every substantive change introduced in the current rule. Even without admitting error, the scope of potential revisions EPA is considering supports vacatur of the current rule because the agency has demonstrated that it will not or could not adopt the same rule upon remand.

In sum, in light of the lack of reasoned decisionmaking and apparent errors in the rule's scope of certification, the indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled it could not or will not adopt the same rule

United States District Court
Northern District of California

upon remand, significant doubt exists that EPA correctly promulgated the rule. The first *Allied-Signal* factor supports vacatur of the certification rule.

B. THE DISRUPTIVE CONSEQUENCES OF VACATUR.

The second *Allied-Signal* factor considers the disruptive consequences of vacatur. Intervenor defendants argue that "[r]einstating the prior rule would result in substantial disruption from general whipsawing of both regulators and regulated entities" and raise several hypothetical procedural issues (Intervenors Br. 16, 18). The rule has only been in effect for thirteen months. This is insufficient time for institutional reliance to build up around the current rule, which has been under attack since before day one. This order finds vacatur will not intrude on any justifiable reliance.

Moreover, the whipsawing intervenor defendants would ascribe to vacatur clearly arose from EPA's promulgation of a revised certification rule that dramatically broke with fifty years of precedent, and subsequent complete course reversal by the agency less than nine months later. EPA asserted in a June 2021 notice that it will not reinstate wholesale the previous certification rule from 1971 (Goodin Decl. ¶ 13). However, EPA's statements here that it will "restore" the principles of cooperative federalism and that it plans to address nearly every substantive change the current certification rule introduced suggest vacatur will prove less disruptive than leaving the current rule in place until Spring 2023.

Our court of appeals has measured the disruptive consequences of vacating an EPA rule by measuring the extent to which a faulty rule could result in possible environmental harm. To that end, our court of appeals has chosen not to vacate an EPA rule when setting aside listing of a snail species as endangered would have risked potential extinction of that species, and when vacating could have, in part, led to air pollution that would undermine the goals of the Clean Air Act. On the other hand, our court of appeals did vacate an EPA action that could have affected sensitive bee populations. *See Pollinator*, 806 F.3d at 532–33 (bees); *CCAT*, 688 F.3d at 994 (air); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (snails).

United States District Court
Northern District of California

Plaintiffs have established that significant environmental harms will likely transpire should remand occur without vacatur. This order finds particularly persuasive the State of Washington's example concerning three hydropower dams on the Skagit River. These dams will each require Section 401 certifications prior to EPA's promulgation of a replacement for the current certification rule. As noted in the State of Washington's brief, "because FERC licenses for dams will last between 30–50 years, the lack of adequate water quality conditions attached to these licenses will have adverse impacts for a *generation*" (States Opp. 7). As Loree' Randall, Washington's Section 401 Policy Lead, explains, the new certification rule curtails restrictions certifying authorities can impose on dams to limit increases in water temperature. The threatened Chinook salmon that reside in the Skagit River are vulnerable to these changes in water temperature, which puts at risk a primary food source for the endangered Southern Resident Orca population in Puget Sound, of which there are currently only seventy-three, the lowest number in over four decades (Randall Decl. ¶¶ 7, 10–11).

Intervenor defendants argue that overreach by certifying authorities under the old rule led to negative economic effects, pointing to several energy projects that failed or had additional restrictions placed upon them (Intervenors Br. 4). This order duly considers the economic effects of vacatur — and temporary reinstatement of the previous rule — but notes that our court of appeals has focused more on environmental consequences when considering whether to vacate EPA rules, and the Clean Water Act has the express goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Progress towards this goal carries inherent economic effects. This order finds the disruptive environmental effects should remand occur without vacatur described by plaintiffs outweighs the disruptive economic consequences of vacatur described by intervenor defendants. The economic harms intervenor defendants proffer also do not outweigh the significant doubts that EPA correctly promulgated the current certification rule. *See Pollinator*, 806 F.3d at 532; *CCAT*, 688 F.3d at 994; *Zinke*, 250 F. Supp. 3d at 775; *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic and Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1242–43 (N.D. Cal. 2015) (Judge Nathanael M. Cousins). This order finds the second *Allied-Signal* factor supports

United States District Court
Northern District of California

United States District Court
Northern District of California

vacatur because the disruptions caused by vacatur and the imposition of an interim rule do not outweigh the deficiencies of the current rule.

Finally, EPA and intervenor defendants have cited several cases that also reviewed the certification rule (Reply Br. 2). This order considers the analysis in each of these opinions, to the extent they seriously and substantively examined remand and vacatur, but ultimately finds *Pascua Yaqui Tribe*, an opinion on another EPA rule with the most thorough analysis, to be the most persuasive. 2021 WL 3855977. In that opinion, Judge Rosemary Márquez of our circuit vacated EPA's rule that narrowed the definition of "waters of the United States" upon remand to the agency. In two of the decisions EPA cited here, Judge Richard Seeborg of our district filed short orders remanding to EPA challenges to the rule at issue in *Pascua Yaqui Tribe*, finding the issue of vacatur moot (Dkt. No. 161). *See California v. Regan*, No. C 20-03005 RS, Dkt. No. 271 (N.D. Cal. Sept. 16, 2021); *WaterKeeper All., Inc. v. EPA*, No. C 18-03521 RS, Dkt. No. 125 (N.D. Cal. Sept. 16, 2021). In dicta, both brief orders stated the court would have been disinclined to impose vacatur. Both orders, however, based that conclusion on a previous order that denied a motion for a preliminary injunction on the ground that plaintiffs were unlikely to succeed on the merits proving the rule was legally erroneous. *See California v. Regan*, No. C 20-03005 RS, Dkt. No. 171 (N.D. Cal. June 19, 2020). These orders, accordingly, premised their disinclination to impose vacatur on an issue evaluated by the first *Allied-Signal* prong, which here supports vacatur.

In sum, the *Allied-Signal* factors support vacatur of the certification rule upon remand to EPA, which will result in a temporary return to the rule previously in force until Spring 2023, when EPA finalizes a new certification rule. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

CONCLUSION

As explained, the motion for remand is **GRANTED**. Upon remand the current certification rule, 40 C.F.R. Part 121, is **VACATED**.

1 Intervenor defendants' motion to strike (Dkt. No. 148) is **DENIED**. Being unnecessary for
2 the resolution of this motion, EPA's request for judicial notice (Dkt. No. 157) is **DENIED AS**
3 **MOOT**.
4 **IT IS SO ORDERED.**
5
6 Dated: October 21, 2021.
7
8
9 WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re CLEAN WATER ACT RULEMAKING.	No. C 20-04636 WHA No. C 20-04869 WHA No. C 20-06137 WHA
This Document Relates to: ALL ACTIONS.	(Consolidated) **ORDER DENYING MOTION FOR STAY PENDING APPEAL**

INTRODUCTION

Intervenor defendants move for a stay of the order vacating and remanding EPA's Clean Water Act Section 401 certification rule pending appeal. Intervenors' arguments on the merits and irreparable harm provide lukewarm support for a stay. On the other side, a stay would substantially injure plaintiffs and does not align with the public interest. The motion is **DENIED**.

STATEMENT

The previous order at issue here describes our facts (Dkt. No. 173). In brief, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, commonly referred to as the Clean Water Act, with the express goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Relevant here, under Section 401 of the act, a federal agency may not issue a permit or license to an applicant that

seeks to conduct any activity that may result in any discharge into the navigable waters of the United States unless the state where the discharge would originate issues a water quality certification or waives the requirement. Authorized tribes and EPA can also act as certifying entities. Notably: "No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator [of the EPA], as the case may be." 33 U.S.C. § 1341(a)(1). Section 401 certifications are required for certain permits issued by, for example, the Army Corps of Engineers and the Federal Energy Regulatory Commission (FERC).

EPA employed 40 C.F.R. Part 121 to administer Section 401 certifications, which the agency had promulgated a year prior to the Clean Water Act to regulate water quality certifications pursuant to Section 21(b) of the FWPCA. *See* 36 Fed. Reg. 22,487 (Nov. 25, 1971), redesignated at 37 Fed. Reg. 21,441 (Oct. 11, 1972), redesignated at 44 Fed. Reg. 32,899 (June 7, 1979). EPA utilized this regulation unchanged for half a century. This order will refer to this certification rule as the 1971 rule.

On September 11, 2020, EPA revised 40 C.F.R. Part 121 in accordance with President Trump's Executive Order 13,868, which asserted that the "Federal Government must promote efficient permitting processes and reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment." 84 Fed. Reg. 15,495 (Apr. 15, 2019); *see also* 85 Fed. Reg. 42,210 (July 13, 2020). The revised Section 401 certification rule — which this order will refer to as the 2020 rule — parted ways with the 1971 rule in dramatic fashion. This led to challenges to the rule by our plaintiff states, tribes, and non-profit conservation groups. Those actions eventually consolidated before the undersigned.

In October 2020, eight states and three industry groups intervened as defendants. But the election of President Biden in November shifted the course of this litigation. On January 20, 2021, Executive Order 13,990 revoked Executive Order 13,868. The Biden administration also specifically listed the 2020 rule as one agency action it planned to review. Five months later, on June 2, 2021, EPA noticed its intent to revise the 2020 rule. EPA expects to finalize the new certification rule by Spring 2023. 86 Fed. Reg. 7,037 (Jan. 25, 2021); 86 Fed. Reg. 29,541

United States District Court
Northern District of California

United States District Court
Northern District of California

(June 2, 2021); Fact Sheet: List of Agency Actions for Review, https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ (Jan. 20, 2021).

Less than a month after EPA announced it would revise the 2020 rule, the agency, in this action, moved for remand of the rule without vacatur (Dkt. No. 143). Plaintiffs, opposing the motion, argued that the 2020 rule should be vacated upon remand to the agency. Intervenors, who had chosen not to file any briefing on EPA's motion up to that point, filed a reply brief arguing for remand without vacatur and separately moved to strike plaintiffs' vacatur arguments (Dkt. Nos. 148, 155). After a hearing on the motions, intervenors were offered the opportunity to file supplemental briefing on the vacatur issue, which they did (Dkt. No. 172).

An October 2021 order vacated and remanded the 2020 rule (Vacatur Order, Dkt. No. 173). EPA has stated it will not appeal the vacatur order. Intervenors, however, now move for a stay of the vacatur order pending their own appeal. To expedite the hearing on this motion, defendants waived their reply briefing. This order follows oral argument held telephonically due to the COVID-19 pandemic.

ANALYSIS

Under the traditional test for a stay pending appeal, a district court considers four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 433–34 (2009); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1006–07 (9th Cir. 2020).

Our court of appeals has instructed that we weigh these factors using a flexible, sliding-scale approach, under which "a stronger showing of one element may offset a weaker showing of another." *Leiva-Perez v. Holder*, 640 F.3d 962, 964, 966 (9th Cir. 2011). The first two factors are the most critical. The mere possibility of success or irreparable injury are insufficient. A movant must show "at a minimum, that she has a substantial case for relief on the merits." *Id.* at 964, 967–68. Irreparable harm carries a higher standard: a movant must

United States District Court
Northern District of California

demonstrate irreparable harm is probable, not merely possible. We consider the final two factors — which tend to merge when the government is an opposing party — once a movant satisfies the first two. *Nken*, 556 U.S. at 435; *United States v. Mitchell*, 971 F.3d 993, 996 (9th Cir. 2020). If a petition raises at least a serious question going to the merits, the other factors can be satisfied by a showing that the balance of hardships tips sharply in the movant's favor. *Leiva-Perez*, 640 F.3d at 970.

This order will proceed through the stay factors in a moment, but offers this overview. On the one hand, allowing the 1971 rule to remain in effect will give certifying entities greater latitude to prescribe more conditions. This would harm those who wish to be free of further requirements, such as our intervenor defendants. On the other hand, should we allow the 2020 rule to remain in effect, those certifying entities that wish to impose more conditions on Section 401 certifications will lose the opportunity to do so. This would result in harm to them. We face a crossroads where one side or the other will suffer some harm, no matter what. But harm is one thing, irreparable harm another. Certifying entities that dislike more conditions can simply choose not to impose additional conditions. And, a party saddled with unwanted conditions can sue in district court if presented with a flawed certification process. These considerations mitigate some potential harms. Ultimately, when it comes to mitigating harm, prudence favors maintaining the course EPA has charted the past fifty years under the 1971 rule, the devil we know, rather than the devil we don't.

With these overarching points in mind, this order considers each factor in turn.

1. SUCCESS ON THE MERITS.

We start with whether intervenors can make a "strong showing" of success on the merits. In light of the irreparable harm considerations previewed above, this order notes intervenors need to make a commensurably stronger showing for the first factor. Intervenors assert they are likely to succeed on the merits of their appeal of the vacatur order based on two issues: (1) whether the Administrative Procedure Act (APA) requires a complete administrative record and full briefing on the merits before a reviewing court may set aside an agency action; and (2) whether the vacatur order correctly applied the *Allied-Signal* test (Br. 9–18). This order

questions whether intervenors have made a sufficient showing to justify a stay based on either issue.

A. *Vacatur Prior to Full Adjudication on the Merits.*

Intervenors argue nothing in the APA "authorizes a court to set aside federal agency action without making the predicate finding that the action was unlawful, and that decision must be based on a review of the agency's record" (Br. 10). Further, intervenors argue that the vacatur order "relied chiefly on the reasoning in *Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011)," which they assert is flawed in several ways (Br. 11–13).

To start, intervenors' statutory argument picks and chooses parts of the vacatur order to criticize, garbling the order's reasoning in the process. The vacatur order began with the APA's mandate that a district court "shall . . . set aside" unlawful agency actions (Vacatur Order 7, citing 5 U.S.C. § 706(2)). Despite this directive, our court of appeals has repeatedly held that, when equity demands, a flawed rule need not be vacated. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520 (9th Cir. 2015); *Cal. Cmtys. Against Toxics v. EPA* (*CCAT*), 688 F.3d 989 (9th Cir. 2012). Relying on these opinions, the order explained that our court of appeals' "holding that even a flawed rule need not be vacated supports the corollary proposition that a flaw need not be conclusively established to vacate a rule" (Vacatur Order 7). In other words, because federal courts have the equitable power to refrain from vacating an unlawful rule despite the express requirement a court set it aside in the APA, federal courts a priori retain the equitable power to vacate rules prior to a conclusive finding on the merits in procedural postures such as motions for voluntary remand. Nowhere in their briefing do intervenors grapple with these cases or this analysis. Moreover, as plaintiffs note: "Singular equitable relief is commonplace in APA cases." *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 681 (9th Cir. 2021) (quotation omitted).

Intervenors proceed to state general principles of law that could support their position. They assert that the APA's waiver of sovereign immunity "must be strictly construed," and recite the semantic canon *expressio unius est exclusio alterius* (Br. 10, citing *Dep't of the Army*

United States District Court
Northern District of California

v. Blue Fox, Inc., 525 U.S. 255, 261 (1999)). But how do these broad legal concepts apply to the analysis in the vacatur order, or undermine *CCAT* and *Pollinator*? Intervenors do not say. *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (stating the broad tenet that "a major departure from the long tradition of equity practice should not be lightly implied").

Intervenors go on to assert the vacatur order did not acknowledge cases like *Carpenters Industry Council v. Salazar*, 734 F. Supp. 2d 126 (D.D.C. 2010) — which held the APA precludes vacatur absent a conclusive judicial finding — or the policy concern that pre-merits vacatur would permit an agency to repeal a rule without public notice and comment (Br. 11). But the vacatur order expressly cited *Carpenters Industry Council* and the relevant section of the Wright & Miller treatise regarding the conflicting policy implications of vacatur (Vacatur Order 7). The order did not build its consideration of vacatur out of whole cloth. It cited precedent from our court of appeals recognizing analogous equitable powers as well as decisions by district court judges in our circuit supporting the vacatur order's position (Vacatur Order 7–8). Nor did the order ignore the policy concern that intervenors discuss. Rather, it found more pertinent the competing concern that, "[l]eaving an agency action in place while the agency reconsiders may deny the petitioners the opportunity to vindicate their claims in federal court and would leave them subject to a rule they have asserted is invalid" (*ibid*).

Intervenors then attempt to distinguish *Native Ecosystems*, which held district courts may vacate agency actions prior to a merits determination.

First, intervenors distinguish *Native Ecosystems* on the ground that, unlike here, the agency had confessed error (Br. 11). This factual difference makes the reasoning in *Native Ecosystems* regarding per-merits vacatur no less applicable. Moreover, this argument simply puts a different spin on intervenors' contention there must be some sort of conclusive statement regarding unlawfulness in order to set aside an agency action. The vacatur order examined and rejected that theory. Moreover, as explained below, step one of the *Allied-Signal* test does not require any definitive statement on the merits. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

Second, intervenors contend the law review article relied upon by *Native Ecosystems* addressed remand without vacatur, not pre-merits vacatur (Br. 11–12, citing Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291 (2003)). Professor Levin's article did indeed focus on remand without vacatur, but the equitable principles it considered are readily applicable to the issues here, as *Native Ecosystems* notes. *See Native Ecosystems*, 795 F. Supp. 2d at 1241 n. 8. Professor Levin's article, in fact, began with a discussion of our court of appeals' decision *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), which both *CCAT* and *Pollinator* expressly rely upon. Levin, *supra*, at 294.

Third, intervenors fault *Native Ecosystems* for not addressing "whether pre-adjudication vacatur has any analog in the precedent of the English High Court of Chancery" (Br. 12, citing *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund*, 527 U.S. 308, 318, 332 (1999)). The argument goes no further than stating *Grupo Mexicano*'s holding. Intervenors provide no analysis. Nor do they connect the dots back to the vacatur order. Intervenors do not sufficiently raise this argument for this order to evaluate its merit.

Fourth, intervenors argue that *Native Ecosystems* "did not confront the settled principle that equity cannot be invoked to evade limits imposed by law" (Br. 12, citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 397–98 (1946)). Once again, intervenors' point is lost given it fails to consider the vacatur order's analysis of *CCAT* or the order's citation to other corroborating caselaw.

As explained, intervenors assert many arguments regarding pre-merits vacatur. The vacatur order itself recognized that the law on this issue is unsettled and that difficult questions arise when vacatur comes into play in an agency's motion for voluntary remand (Vacatur Order 7). But intervenors neither substantively address the reasoning in the vacatur order, nor proffer new arguments beyond those considered and rejected in the order. Even EPA, which does not fully endorse the vacatur order's analysis, concludes that intervenors do not "fully grapple" with the complexities here (EPA Opp. 4 n. 3). This order doubts whether intervenors have made a sufficiently strong showing of their likelihood of success on appeal of this issue.

B. *THE ALLIED-SIGNAL ANALYSIS.*

The vacatur order applied the familiar *Allied-Signal* test when considering EPA's remand motion (Vacatur Order 8). Under *Allied-Signal*, the "decision whether to vacate depends on [1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 150–51 (quotation omitted). Intervenors argue the vacatur order erroneously applied *Allied-Signal*. We start with *Allied-Signal* step one.

First, intervenors recapitulate their primary equitable-powers argument, saying that review of the first *Allied-Signal* factor "can only logically occur after a court has concluded that a legal error has occurred" (Br. 13). But, as the vacatur order noted, in full context, the first factor considers "the extent of doubt whether the agency chose correctly." This analysis can be performed without a conclusive decision on the merits. Remember, *Allied-Signal* arose from a traditional preliminary injunction analysis (Vacatur Order 8–9). Intervenors do not address this reasoning.

Second, intervenors contend the vacatur order's failure to conduct a severability analysis constituted error. The vacatur order deemed severance unnecessary because it found "serious deficiencies in an aspect of the certification rule that, in EPA's words, 'is the foundation of the final rule and [] informs all other provisions of the final rule'" (Vacatur Order 10–11, citing 85 Fed. Reg. at 42,256). Intervenors assert here that severance should have occurred because "[s]everal of the procedural portions of the rule merely codif[ied] what federal courts have held the Clean Water Act requires," and that just because the "scope of certification provision may have been a 'foundation' for other parts of the rule does not mean those parts are not severable" (Br. 17). Intervenors demand a provision-by-provision review to salvage procedural portions of the rule that remained in force anyway. As our court of appeals reminds, "we ordinarily do not attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule." *East Bay Sanctuary*, 993 F.3d at 681 (quotation omitted).

United States District Court
Northern District of California

Third, intervenors assert the vacatur order's analysis of *PUD No. 1* was erroneous (Br. 15–16, citing *PUD No. 1of Jefferson Cty. v. Wash. Dep't of* Ecology, 511 U.S. 700 (1994)). The arguments intervenors proffer here are substantially similar to those considered by the order. As explained in the order, EPA can change its interpretation of Section 401 and revise the certification rule accordingly. But, for the 2020 rule, the agency embraced an interpretation of the scope of Section 401 *antithetical* to the 1971 rule — which was consistent with what *PUD No. 1* deemed the most reasonable interpretation of the statute. It matters that EPA did not merely assert a different interpretation but a contrary interpretation. As noted, unexplained inconsistencies in an agency's revisions to a rule indicate the new interpretation is unreasonable and not entitled to *Chevron* deference (Vacatur Order 12–13). EPA failed to sufficiently justify the inconsistent revisions in the 2020 rule. Without more, intervenors' argument here remains unconvincing.

Fourth, intervenors argue the vacatur order erred by considering EPA's declaration in support of its remand motion (*see* Br. 16, citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). EPA's declaration asserted that the agency harbored substantial doubts regarding nearly every aspect of the 2020 rule and that it would "restore" principles of cooperative federalism in its new rulemaking (Dkt. No. 143-1). The vacatur order does not run afoul of *Chenery* by noting EPA's opinion of the grounds upon which it based the 2020 rule. The order properly focused on the final rule and its preamble (Vacatur Order 13–14). Upon a motion for voluntary remand, moreover, evaluations of remand and vacatur do not occur in isolation from one another. *See, e.g.*, *Safer Chemicals, Healthy Families v. EPA*, 791 Fed. App'x 653, 656 (9th Cir. 2019); *Pollinator*, 806 F.3d at 532–33; *CCAT*, 688 F.3d at 993–94.

Turning to step two of *Allied-Signal*, intervenors contend the vacatur order failed to consider the level of disruption returning to the 1971 rule would cause. As explained in our framing discussion above and in the proceeding irreparable harm analysis, this speculative argument does not convince. Intervenors also insist the vacatur order erred when it concluded that insufficient time had elapsed since promulgation of the 2020 rule to justify any institutional reliance on it (Br. 18). Intervenors' reference to implementation documents for

United States District Court
Northern District of California

the 2020 rule do not demonstrate reliance. Intervenors also cite FERC's rulemaking that aligned its one-year deadline for certifications with the 2020 rule (Br. 18). But, as plaintiffs point out, FERC explicitly disavowed the notion that it premised its rulemaking on the 2020 rule. *See* 86 Fed. Reg. 16,298, 16,299 n. 9 (Mar. 29, 2021). The 2020 rule was in effect for thirteen months — and under attack since before day one — too brief and unsettled a time for justifiable reliance to build up.

This order doubts whether intervenors have made a sufficiently strong showing on their likelihood of success on the merits of their appeal of the vacatur order's *Allied-Signal* analysis.

In sum, intervenors have not made particularly strong showings of their likelihood of success on the merits. It bears emphasizing here that intervenors do not meaningfully critique the vacatur order. Rather, intervenors cherry-pick strands of analysis to contest in isolation. Nor did intervenors proffer any substantive arguments beyond those previously considered by the order. Nevertheless, this order declines to halt the analysis at this stage. As explained at the outset, atypical harm considerations warrants proceeding through the rest of the factors so that we can better balance the equities.

2. IRREPARABLE HARM.

This order next considers whether intervenors will suffer irreparable harm absent a stay. Intervenors argue that vacatur deprived them of statutory rights under the APA, that vacatur "reimposes harms of constitutional magnitude," and that vacatur has imposed irreparable economic harms (Br. 19–22). This order finds intervenors have made, at best, a marginal showing of irreparable harm.

First, intervenors argue the vacatur order irreparably harmed their "statutory right under the APA to participate in the administrative process" (Br. 21). How? EPA announced in June 2021, months before the vacatur order, that the agency would revise the 2020 rule. Neither the vacatur order, nor this litigation generally, has proscribed intervenors' full participation in that rulemaking process. Nor did the vacatur order dictate the final outcome of EPA's ongoing rulemaking. "The key word in this consideration is irreparable." *Al Otro Lado*, 952 F.3d at 1008 (quotation omitted). Moreover, the vacatur order did not substitute the 2020 rule with a

judicially manufactured replacement. It temporarily reinstated the 1971 rule that EPA employed for half a century.

Second, intervenors contend that "what the [vacatur order] discounted as mere 'negative economic effects' are of constitutional magnitude" (Br. 22). Constitutional violations are generally deemed irreparable harm. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Analogizing to the Articles of Confederation, intervenors explain that certain states unfairly exploited the 1971 rule, concluding: "There is every reason to believe those constitutional harms will return without the [2020] Rule" (Br. 21). To support this speculative assertion, intervenors highlight a certification issued by the State of Maryland that would have required the Conowingo dam and hydroelectric project to remove phosphorus and nitrogen from the Susquehanna River despite the project not actually discharging those two elements, or pay $172 million per year for fifty years (Br. 22; Dkt. No. 172-1). The problem with intervenors argument is that the project manager was able to challenge this alleged overreach in federal court. It did so. In fact, the parties recently reached a settlement. *See Exelon Generation Co., LLC v. Grumbles*, No. C 18-01224 APM, Dkt. No. 49 (D.D.C. Apr. 9, 2021) (Judge Amit P. Mehta). And remember, *PUD No. 1*, our primary guidance from the Supreme Court on Section 401, blessed a broad construction of the types of conditions certifying entities may impose pursuant to Section 401. *See PUD No. 1*, 511 U.S. at 711–12; *see also id.* at 723 (Stevens, J., concurring).

Third, intervenors say that their members face irreparable economic harm absent a stay. Monetary harm is not typically considered irreparable, although exceptions do exist for certain economic injures that are not recoverable as damages. *See Al Otro Lado*, 952 F.3d at 1008; *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). Intervenors focus on how, due to the vacatur order, the Army Corps of Engineers paused permitting under its purview, providing three examples of resultant harm (Dreskin Decl. ¶¶ 14–22). This order questions whether any of the economic harms intervenors describe rank as irreparable. Many of the economic harms intervenors assert, such as unspecified delays to projects, remain too speculative to rank as irreparable. Others do not directly harm intervenors themselves. *See Azar*, 911 F.3d at 581;

Doe #1 v. Trump, 957 F.3d 1050, 1060 (9th Cir. 2020). And some harms intervenors describe are more properly considered the economic costs of complying with the vacatur order, which do not qualify as irreparable, rather than economic injuries perpetrated by certifying entities, or by permitters like the Corps, which could conceivably be irreparable.

Intervening events, moreover, have significantly undercut the strength of intervenors' showing of irreparable economic harm. At the hearing, intervenors acknowledged the Corps had already restarted its permitting process during the pendency of the stay motion (*see also* Anastasio Decl. ¶¶ 4–5). This indicates that the scope of harm intervenors describe amounts to a predictable pause by permitters like the Corps to reassess the certification process in light of the vacatur order. As EPA states, until it "concludes its rulemaking process, there will be uncertainty regarding future permitting requirements" (EPA Opp. 8). This comes into play when we balance the hardships.

This order finds that intervenors have not clearly demonstrated serious irreparable harm absent a stay. At best, intervenors' showing of irreparable harm ranks as marginal. And, even giving intervenors the benefit of the doubt, "certainty of irreparable harm has never *entitled* one to a stay." *Leiva-Perez*, 640 F.3d at 965.

3. INJURY TO OTHER PARTIES, THE PUBLIC INTEREST, AND WEIGHING THE STAY FACTORS.

As discussed in this order's overture, injury to other parties and where the public interest lies merit consideration here. We thus consider the third and fourth stay factors despite tepid showings by intervenors on their likelihood of success on the merits and irreparable harm.

Intervenors contend that a stay supports the public interest because the 2020 rule "fills a gaping regulatory void" and prevents states from "impair[ing] the interests of other states" (Br. 23). This order, however, agrees with EPA's statement that the public interest "weighs in favor of returning to the familiar 1971 regulations while EPA completes" its rulemaking (EPA Opp. 9). Staying the course with a familiar rule avoids further regulatory uncertainty. Intervenors' assertion that plaintiffs "can challenge any particular application of the Rule that

United States District Court
Northern District of California

United States District Court
Northern District of California

causes the harm they claim they will suffer" (Br. 23), would also seem to apply equally well to intervenors themselves. *See, e.g.*, *Exelon*, No. C 18-01224 APM (D.D.C.).

More substantively, the public interest as to the Clean Water Act, at base, lies in preserving nature and avoiding irreparable harm to the environment. The Act has the express goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). And our court of appeals has recognized the public interest in preventing environmental harm. *See, e.g.*, *The Lands Council v. McNair*, 537 F.3d 981, 1004–05 (9th Cir. 2008), *overruled in part on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1101 (9th Cir. 2006).

Plaintiffs convincingly asserted for the vacatur order that irreparable environmental harm would result should the 2020 rule remain in effect. The order highlighted permitting issues related to three dams on the State of Washington's Skagit River (Vacatur Order 16). Other examples carry similar force. Plaintiffs also pointed to a sediment removal project upstream from the Marble Bluff Dam in Nevada. The project seeks to remove a sediment island on the Truckee River, and its certification is up for renewal prior to EPA's estimated promulgation of a revised rule. The sediment currently blocks threatened fish from swimming upstream to spawning areas and contains high levels of mercury. Removal could cause environmentally dangerous sediment to run off into nearby Pyramid Lake. The Pyramid Lake Paiute Tribe manages certifications for this project, but the 2020 rule would prevent it from placing restrictions on the mercury run-off (Dkt. No. 145-1 at ¶¶ 26–27). A stay would permit irreparable environmental harms like this to occur. The public interest lies in preventing these sorts of environmental injuries, especially given the marginal and speculative showing of economic harm on the other side of the scale.

Upon consideration of the applicable factors, this order finds intervenors have not justified a stay of the vacatur order. Intervenors fail to substantively probe the vacatur order's reasoning, or misstate it. Most of the harm intervenors describe remains speculative. If they did identify irreparable harm, their showing ranks as marginal. On the other hand, EPA and

plaintiffs have demonstrated that the equities tip sharply in favor of denying a stay due to the importance of preserving some certainty in the administrative process and plaintiffs' showing of substantial, irreparable environmental harm should a stay go into effect.

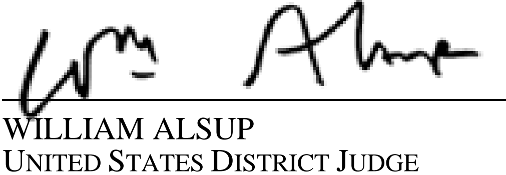
4. THE APPEALABILITY OF THE VACATUR ORDER.

One last point. The parties also brief the antecedent question of whether intervenors can even appeal the vacatur order in the first place. Both EPA and plaintiffs assert that the vacatur order is non-final and unappealable by intervenors within the meaning of Section 1291 of Title 28 of the United States Code (EPA Opp. 5–7; Plaintiffs Opp. 4). We need not linger on this issue. This order has already found that a stay should be denied under the traditional four-factor test. This question can be left up to our court of appeals.

CONCLUSION

For the reasons stated, the motion is **DENIED**. **IT IS SO ORDERED.**

Dated: December 7, 2021.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

No. 21-16958

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS, et al.,
Plaintiffs/Appellees,

v.

MICHAEL S. REGAN and U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendants/Appellees,

and

AMERICAN PETROLEUM INSTITUTE, et al.,
Intervenor-Defendants/Appellants.

Appeal from the U. S. District Court for the Northern District of California
No. 3:20-cv-04636-WHA (Hon. William Alsup)

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO INTERVENOR DEFENDANTS/APPELANTS' MOTION FOR STAY PENDING APPEAL

TODD KIM
Assistant Attorney General

ELISABETH H. CARTER
LESLIE M. HILL
ELLEN J. DURKEE
KEVIN W. MCARDLE
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0219
kevin.mcardle@usdoj.gov

Of Counsel:

JAMES CURTIN
ALEXIS WADE
ANDREA PRIEST
ALEXANDER MULLEE
Attorneys
Office of General Counsel
U.S. Client Agency

INTRODUCTION

Appellants in this and companion appeals request a stay pending appeal of the district court's October 21, 2021 order ("Remand Order") vacating the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (the "2020 Certification Rule" or "2020 Rule") and remanding the 2020 Rule to the Environmental Protection Agency ("EPA"). Appellants are three industry groups and eight states that intervened as defendants (collectively, "Intervenor-Defendants") in consolidated district court cases brought by twenty states, the District of Columbia, three Indian Tribes, and six conservation organizations (collectively, "Plaintiffs") to challenge the 2020 Rule.

A stay pending appeal is not warranted under the circumstances presented and therefore the Federal Defendants (collectively, "EPA") oppose the motion. Intervenor-Defendants cannot establish a strong likelihood of success on the merits because as to them the Remand Order is not a final, appealable decision under 28 U.S.C. § 1291. Moreover, Intervenor-Defendants have not shown that they will suffer irreparable harm absent a stay; their allegations are generalized, speculative, and conclusory. Nor have Intervenor-Defendants met their burden to demonstrate that a stay is in the public interest. As the district court concluded, the equities tip sharply *against* a stay. The Remand Order simply reinstated the regulatory status quo, in place since 1971, which protects the rights of States over their water

quality, pending EPA's ongoing rulemaking to revise regulations governing Clean Water Act ("CWA") Section 401 certification. Intervenor-Defendants will have an opportunity to participate in that rulemaking and, after a final rule issues, they may return to court to challenge any revisions with which they disagree and to raise the arguments they seek to advance prematurely in this appeal.

BACKGROUND

A. Statutory and regulatory background

The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Among the Act's policy declarations is "the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id*. § 1251(b).

Under CWA Section 401, a federal agency may not issue a permit or license for any activity that may result in a discharge into waters of the United States unless the state or authorized tribe where the discharge would originate issues or waives a Section 401 water quality certification. *Id*. § 1341(a). Some of the federal licenses and permits subject to Section 401 include: CWA discharge permits issued by EPA or the U.S. Army Corps of Engineers ("Corps"); hydropower licenses issued by the Federal Energy Regulatory Commission (FERC); and bridge permits issued by the U.S. Coast Guard. The certifying state

or tribal authority may verify that the federal permit or license complies with applicable water quality requirements and grant the certification, grant the certification with conditions necessary to assure compliance with applicable water quality requirements, deny certification, or waive certification. *Id*. If the state or authorized tribe grants the certification with conditions, those conditions become a part of the federal permit or license. But if certification is denied, then the federal agency may not issue the license or permit. A certifying authority may waive certification voluntarily, or by not acting within a reasonable time period.

The 2020 Certification Rule was published in July 2020 and became effective on September 11, 2020. 85 Fed. Reg. at 42,210; 40 C.F.R. Part 121. The 2020 Rule revised EPA's 1971 certification regulations. *See* 36 Fed. Reg. 8,545, 8,563 (May 7, 1971) (redesignated at 37 Fed. Reg. 21,441 (Oct. 11, 1972), further redesignated at 44 Fed. Reg. 32,899 (June 7, 1979), and subsequently codified at 40 C.F.R. Part 121 (2019)); *see also* 85 Fed. Reg. at 42,210.

In January 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. 20, 2021). The 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" a number of

enumerated national objectives, such as improving human health, protecting the environment, and ensuring access to clean water. *Id*. The 2020 Certification Rule was listed in a subsequent White House Statement as one of the agency actions to be reviewed pursuant to the Executive Order for potential suspension, revision or rescission. *See* 86 Fed. Reg. 29,541, 29,542 (June 2, 2021).

EPA completed its initial review of the 2020 Certification Rule and decided that it would reconsider and propose revisions to the 2020 Rule through a new rulemaking effort due to the Agency's "substantial concerns" with a number of the 2020 Rule's provisions "that relate to cooperative federalism principles and CWA Section 401's goal of ensuring that states are empowered to protect their water quality." 86 Fed. Reg. at 29,542. EPA is currently reconsidering numerous aspects of the 2020 Certification Rule. *See id*. at 29,542-44; *see also* ECF Nos. 143 at 3-5 and 143-1, ¶¶ 11-15.

After considering public input and information provided during pre-proposal outreach, EPA is now drafting new regulatory language and supporting documents. EPA expects to publish its proposed rule in spring 2022 and, after receiving and considering public comments, expects to publish its final rule in spring 2023. ECF 143-1 ¶¶ 20-27.

B. Proceedings below

After publication of the 2020 Certification Rule, twenty states and the District of Columbia, three Indian Tribes, and six conservation organizations filed three cases challenging the 2020 Rule in the U.S. District Court for the Northern District of California. Plaintiffs alleged that EPA violated the Administrative Procedure Act ("APA") because the 2020 Rule exceeds statutory jurisdiction, authority, or limitations, and is arbitrary, capricious or otherwise not in accordance with law. The three cases were consolidated. Eight states and three industry groups intervened as defendants.

Before the cases were briefed on the merits, EPA announced its intention to reconsider and revise the 2020 Certification Rule and moved to remand the 2020 Rule without vacatur. Plaintiffs opposed the motion, arguing that the district court should remand only if it vacates the 2020 Rule. Alternatively, Plaintiffs argued that the district court should deny EPA's motion and review the 2020 Rule on the merits. Intervenor-Defendants did not object to remand without vacatur, but they opposed Plaintiffs' position that the 2020 Rule should be vacated if the court remanded the matter to EPA.

On October 21, 2021, the district court issued the Remand Order, which remands the 2020 Certification Rule to EPA with vacatur. The court held that remand is appropriate because an agency may seek remand without confessing

error in order to reconsider its previous position, and courts generally will refuse a voluntary remand request only if the request is frivolous or made in bad faith. Remand Order 6-7, 11-12. The court explained that neither exception applied, and that remand was appropriate because EPA had expressed substantial concerns regarding the validity of the 2020 Rule. *Id*. at 11-12. The court also held that vacatur of the 2020 Rule was appropriate based on its application of the two-part test established in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). *See* Remand Order 7-8, 10-11, 13.

On November 17, 2021, the district court issued an order captioned "Final Judgment," which states that for the reasons stated in the Remand Order and "to ensure appealability, final judgment is hereby entered in favor of plaintiffs and against defendants, intervenors, and intervenor defendants." ECF No. 176.

EPA did not notice an appeal from the Remand Order or judgment, and has decided not to appeal those orders.

Intervenor-Defendants, however, filed three separate notices of appeal from the Remand Order and judgment—which were docketed in this Court as Nos. 21-16958 (American Petroleum Institute and Interstate Natural Gas Association of America), 21-16960 (states), and 21-16961 (National Hydropower Association). Intervenor-Defendants also filed a joint motion for stay pending appeal in district court. EPA opposed the stay motion, arguing among other things that the Remand

Order is not appealable by Intervenor-Defendants and that Intervenor-Defendants had not demonstrated that they would suffer any irreparable harm during the pendency of the appeals.

After a hearing, the district court issued an order denying the motion for stay pending appeal ("Stay Order," ECF No. 191). Among other things, the court explained that most of the harms that Intervenor-Defendants described were speculative and that even if they had identified irreparable harm, "their showing ranks as marginal." Stay Order 13. The court also held that EPA and Plaintiffs had demonstrated that the equities tip sharply in favor of denying a stay due to the importance of preserving some certainty in the administrative process, and that Plaintiffs had shown "substantial, irreparable environmental harm should a stay go into effect." *Id*. at 13-14.

On December 15, 2021, Intervenor-Defendants/Appellants in No. 21-16958 filed a motion for stay pending appeal in that case. On December 16, 2021, Intervenor-Defendants/Appellants in Nos. 21-16960 and 21-16961 filed identical motions. For reasons elaborated below, this Court should deny the motions.

ARGUMENT

A stay pending appeal is an "extraordinary remedy." *United States v. Mitchell*, 971 F.3d 993, 999 (9th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)). In *Nken*, the Supreme Court set forth the four factors courts consider

in deciding whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." 556 U.S. at 434. "The party seeking the stay bears the burden of showing that these factors favor a stay." *Mitchell*, 971 F.3d at 996. Because Intervenor-Defendants have not shown that any of the four factors favors a stay, their motion should be denied.

I. Intervenor-Defendants cannot show a likelihood of success on the merits because the Remand Order is not a final appealable order as to them.

EPA generally agrees with the proposition that, in a voluntary remand context where the agency does not confess error, vacatur should be ordered only after the court has resolved the merits and carefully considered the appropriate scope of relief. *See* ECF No. 153 at 2 n.2. However, as the district court observed, district court decisions are split on whether a court may order vacatur without reaching a dispositive determination on the merits of the challenged agency action. *See* Remand Order 7-8. And, while the district court here did not make a dispositive merits ruling, it did identify "serious deficiencies in an aspect of the certification rule," *id*. at 10, and explained why it "harbor[ed] significant doubts that EPA correctly promulgated the certification rule due to the apparent

arbitrary and capricious changes to the rule's scope," *id*. at 13. Thus, Intervenor-Defendants' claim that they are "certain" to succeed on the merits of their arguments that the district court had no authority to vacate the 2020 Rule and misapplied the *Allied Signal* test (Motion 9) is hyperbolic.

Regardless, Intervenor-Defendants cannot make a "substantial case for relief on the merits" of their appeal, *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (citation omitted), much less a "strong showing that [they are] likely to succeed on the merits," *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (cleaned up), because the Remand Order is not appealable as to them. Intervenor-Defendants contend that the Court has appellate jurisdiction under 28 U.S.C. § 1291, which provides that courts of appeals "shall have jurisdiction over all final decisions of the district courts." Motion 25-28. They are wrong, however, because remand orders ordinarily are not appealable by non-government parties under 28 U.S.C. § 1291, and EPA has not appealed here. *See*, *e.g.*, *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174 (9th Cir. 2011); *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004).

A remand may be considered "final" for appellate jurisdiction purposes in limited circumstances where:

> (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would,

> as a practical matter, be foreclosed if an immediate appeal were unavailable.

Crow Indian Tribe v. United States, 965 F.3d 662, 676 (9th Cir. 2020) (cleaned up). Because this Court "appl[ies] a practical construction to the finality requirement … , these are considerations, rather than strict prerequisites." *Sierra Forest*, 646 F.3d at 1175. But the Court has not hesitated to dismiss attempted appeals where the third factor is not met—i.e., where review would be available after the remand. *E.g.*, *Alsea Valley*, 358 F.3d at 1184 (citing additional cases).

Application of these factors leads to the conclusion that ordinarily only the defendant agency whose action is challenged may appeal a remand order, *National Wildlife Federation v. National Marine Fisheries Serv.*, 886 F.3d 803, 816 (9th Cir. 2018), and that, in the remand context, appellant-intervenors "'do not succeed to the agency's right to appeal, which is unique to itself,'" *Alsea Valley,* 358 F.3d at 1185 (9th Cir. 2004) (quoting *Smoke v. Norton*, 252 F.3d 468, 472 n.1 (D.C. Cir. 2001) (Henderson, J., concurring)). If the defendant agency could not appeal a remand order, it would be required to apply the court's potentially erroneous directions on remand with no ability to seek judicial review of its own revised action. *Id*. at 1184; *Crow Indian Tribe*, 965 F.3d at 675. This is generally not true for other parties that seek to appeal a remand order in the absence of an appeal by a defendant federal agency. *See Alsea Valley*, 359 F.3d at 1185; *cf. Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1075-77 (9th Cir. 2010). Intervenor-

Defendants are free to seek judicial review of any final revised certification rule EPA issues.

Because EPA is not appealing the Remand Order, the ordinary rule that a remand order is not appealable applies to Intervenor-Defendants' appeals here. Moreover, none of the factors that support making an exception to the ordinary rule suggests that the Remand Order is final as to them.

First, the district court did not "conclusively resolve[ ] a separable legal issue." *Crow Indian Tribe*, 965 F.3d at 676. The matter came to the district court on EPA's motion for voluntary remand, in which the Agency did not admit error. The district court's discussion of problems with the 2020 Certification Rule in the context of the propriety of vacatur focused on Plaintiffs' allegations against EPA in the complaints, Plaintiffs' oppositions to EPA's motion for remand without vacatur, and EPA's substantial concerns regarding the 2020 Rule. The district court did not direct EPA to take any particular actions on remand. The Remand Order simply concluded that "[u]pon remand the current certification rule, 40 C.F.R. Part 121, is VACATED." Remand Order 17.

The second factor—whether the Remand Order requires EPA to "apply a potentially erroneous rule which may result in a wasted proceeding," *Alsea Valley*, 358 F.3d at 1184—also does not apply here. While the Remand Order means that EPA will resume applying the 1971 certification regulations, application of these

long-standing regulations while EPA undertakes its rulemaking process does not result in a wasted rulemaking process. Because the structure of the district court order preserves EPA's discretion to determine the content of a new rule, it does not have the effect of forcing EPA to adopt a potentially erroneous new rule on remand.

Regarding the third factor, the Ninth Circuit has held that "a remand [is] not a final order with respect to private parties whose positions on the merits would be considered during the agency proceedings on remand." *Crow Indian Tribe*, 965 F.3d at 675 (cleaned up). That holding applies here. Intervenor-Defendants will have the full opportunity to submit comments on remand during EPA's rulemaking—including the same arguments they make now regarding the validity of the approach taken in the 2020 Certification Rule—and they will have the opportunity to challenge any final rule resulting from the remand. Accordingly, an appeal does not lie under 28 U.S.C. § 1291.

Intervenor-Defendants suggest that they meet the third factor—or even if they do not, should be allowed to appeal anyway based on a practical construction of finality—because EPA will not consider on remand whether a district court has authority to remand and vacate a rule without first making a dispositive determination that the rule is unlawful. Motion 28-29. But Intervenor-Defendants point to no case that supports making an exception to the general remand rule for a

procedural ruling of this nature. For example, in *Crow Indian Tribe*—a case cited by Intervenor-Defendants for this point—the Court held that intervenors could appeal a remand order directing the agency to include a commitment to modeling recalibration in any new rule fashioned on remand. 965 F.3d at 676.[1] The Court held that the recalibration order was final as to the intervenors because it was a "definitive ruling" that preordained (at least in part) the outcome of proceedings on remand. *Id*. Here, in contrast, the Remand Order does not constrain EPA's discretion on remand or in any way dictate the outcome of the ongoing rulemaking process. And because Intervenor-Defendants' positions will "be taken into account in the remand proceeding which could result in a decision favorable to them," *Crow Indian Tribe*, 965 F.3d at 676, the Remand Order is not final as to them.

Also unpersuasive is Intervenor-Defendants' assertion that the district court's entry of a final judgment "to ensure appealability" (ECF No. 176) and its directive to the Clerk to close the case "removed any doubt" that they may appeal the Remand Order. Motion 27 (citing *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994)). This contention fails first because neither an order's label nor the closing of a case on the district court docket are determinative of the order's appealability under Section 1291. *See Montes*, 37 F.3d at 1350 (label is not

---

[1] In *Crow Indian Tribe*, the federal defendants also appealed the remand order, but had not included the calibration holding in the issues they raised on appeal. *Id*. at 675.

determinative); *Pit River Tribe*, 615 F.3d at 1076 (rejecting intervenor defendant's argument that a remand order accompanied by dismissal of the action is a final appealable order when the federal agency defendant has not appealed). Moreover, Intervenor-Defendants put misplaced reliance on *Montes* to suggest that if the district court intended for its Remand Order to be a final appealable decision then it must be treated as such. *Montes* was not an APA challenge to agency action and the order at issue in that case did not remand to an agency. Rather, the disputed question in *Montes* was whether an order dismissing a complaint was intended to be without prejudice and thus not a final judgment.

In any event, the phrase, "to ensure appealability," in the final judgment is not directed at any particular party and thus does not evidence an intent to ensure that Intervenor-Defendants can appeal on their own, in the absence of an appeal by EPA. In its Stay Order, the district court stated that it would not "linger" on this question of appellate jurisdiction because "a stay should be denied under the traditional four-factor test" and the appellate jurisdiction "question can be left up to our court of appeals." Stay Order 14.

In sum, because the Remand Order is not an appealable "final decision" within the meaning of 28 U.S.C. § 1291, Intervenor-Defendants' cannot make a "substantial case" that they will prevail on the merits in their appeal.[2]

II. Intervenor-Defendants have not established a likelihood of irreparable harm.

"An applicant for a stay pending appeal must show that a stay is necessary to avoid likely irreparable injury to the applicant while the appeal is pending." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020). Because Intervenor-Defendants have not shown that they are likely to suffer irreparable harm while the Court determines the merits of their appeal, their motion should be denied even assuming that the Court possesses appellate jurisdiction.

Intervenor-Defendants first argue they are irreparably harmed because the Remand Order deprives them of their alleged procedural right to have the 2020 Certification Rule "not repealed without the agency following notice-and-comment rulemaking or a court holding that the Rule is unlawful." Motion 19-20. But the

---

[2] Intervenor-Defendants do not identify any basis other than 28 U.S.C. § 1291 for appellate jurisdiction and none exists. Intervenor-Defendants cannot appeal under 28 U.S.C. § 1292(a)(1) because Plaintiffs did not move for an injunction, the district court did not say it was issuing one, and the Remand Order is plainly not injunctive in nature as to the Intervenor-Defendants. While the Remand Order has the effect of changing the law that might apply to some of Intervenor-Defendants' activities, that does not make the Order an injunction that is enforceable against them. *See Alsea Valley*, 358 F. 3d at 1198; *Pit River Tribe*, 615 F.3d at 1078.

deprivation of a procedural right "in vacuo" does not suffice to establish Article III standing, *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009), let alone constitute irreparable harm that could justify a stay pending appeal. "A chorus of federal courts … has found that procedural injury, standing alone, cannot constitute irreparable harm." *Eastern Band of Cherokee Indians v. U.S. Dep't of the Interior*, Civil Action No. 20-757 (JEB), 2020 WL 2079443, at *4 (D.D.C. April 30, 2020) (collecting cases). Moreover, if the Court possesses jurisdiction and Intervenor-Defendants were to prevail in their appeal of the vacatur, the Court could order the 2020 Certification Rule reinstated while EPA completes the remand, restoring Intervenor-Defendants' alleged procedural right not to have the 2020 Rule rescinded without notice-and-comment procedures. An injury is not "irreparable" when the claimant "may yet pursue and vindicate its interests in the full course of th[e] litigation." *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017).

Intervenor-Defendants next argue that the Remand Order harms the Defendant-Intervenor States' "constitutional rights and sovereign interests." Motion 21-22. They explain that they petitioned EPA to promulgate new rules because certain coastal states allegedly were abusing their authority under the 1971 certification regulations to the detriment of landlocked states like Montana, and that "such foundational constitutional harms will assuredly return in light of the vacatur." *Id*. This speculative argument also lacks merit.

The 1971 certification regulations were in effect for nearly 50 years. Yet Appellants identify only one instance during that period in which a state claims to have been prejudiced by another state's certification decision. *See* ECF Nos. 172-2 ¶¶ 4-7, 27-7. That hardly establishes a likelihood that similar instances will occur during the limited time required to resolve this appeal—particularly since Intervenor-Defendants also say that in "the significant majority of instances," states "dutifully approach their Section 401 certification obligations with a genuine interest in identifying and addressing discharges with potential adverse impacts on water quality." ECF 56-1, ¶ 7. The mere possibility that a state could exercise its certification authority in a way that harms another state before this appeal is resolved cannot justify a stay. "The minimum threshold showing for a stay pending appeal requires that irreparable injury is *likely* to occur during the period before the appeal is likely to be decided." *Al Otro Lado*, 952 F.3d at 1007.

Intervenor-Defendants next claim that the "whipsawing" allegedly caused by reinstatement of the 1971 certification regulations "will be substantially disruptive," and that vacatur of the 2020 Rule creates "uncertainty and raises questions with no clear answers, such as whether pending certification requests need to be resubmitted." Motion 21. This uncertainty, Intervenor-Defendants allege, "imposes irreparable economic harm." Motion 22. But Intervenor-

Defendants' allegations of uncertainty are overblown and their claims of corresponding delays and economic harm are unsupported.

As the district court explained, the 2020 Certification Rule "was in effect for thirteen months — and under attack since before day one — too brief and unsettled a time for justifiable reliance to build up." Stay Order 10. Nor did the court's vacatur of the 2020 Rule create a "regulatory void," Motion 24, or impose some new, untested certification process; it simply reinstated 1971 certification regulations that governed the process for nearly five decades. EPA has also clarified that it generally does not expect to revisit certifications the Agency issued while the 2020 Rule was in effect and that pending certification requests should be processed in accordance with the 1971 certification regulations.[3] In addition, the Corps has resumed decision-making on permit applications and has explained that, as part of the process, Corps districts will coordinate with certifying authorities on water quality certifications that are potentially impacted by the Remand Order.[4] Consequently, the "uncertainty" that forms the basis for Intervenor-Defendants' claims of economic harm has largely been addressed.

---

[3] *See* https://www.epa.gov/system/files/documents/2021-12/questions-and-answers-document-on-the-2020-cwa-section-401-certification-rule-vacatur-12-17-21-508.pdf (hereafter referred to as "EPA Questions and Answers").

[4] *See* https://www.usace.army.mil/Media/Announcements/Article/2875721/2-december-2021-water-quality-certifications-and-corps-permitting/.

To the extent any "uncertainty" remains, Intervenor-Defendants have not shown that it will result in any significant delays or economic injuries before their appeal is decided. The Remand Order has already been in effect for two months. Intervenor-Defendants thus had available to them the "best evidence of harms likely to occur because of the [Remand Order]: evidence of harms that *did* occur because of the [Remand Order]." *Al Otro Lado*, 952 F.3d at 1007. Yet just as in *Al Otro Lado*, instead of submitting specific evidence of actual delays and disruption of particular projects supposedly caused by the Remand Order, Intervenor-Defendants offer only conclusory assertions and vague speculation.

Intervenor-Defendants first cite a declaration that was executed on October 4, 2021, before the Remand Order was even issued. The cited paragraph speculates (in full) that if the 2020 Rule were vacated, "Montana could also suffer substantial disruption from general whipsawing of its regulators and regulated entities." ECF 172-2, ¶ 8. Intervenor-Defendants likewise point to a declaration submitted in September 2020 in support of their motion to intervene, which speculates that if the 2020 Rule were vacated, unidentified projects "could face" delays and unidentified activities "may be delayed or otherwise encumbered." ECF 56-2, ¶¶ 23-24. Such conclusory and generalized allegations of *possible* delays and disruption do not suffice. *See Al Otro Lado*, 952 F.3d at 1007.

Intervenor-Defendants next cite a declaration from a Texas official averring that the Remand Order has led to "confusion in the regulated community" and "concern that 401 certifications provided under the 2020 rule are no longer valid." Motion A13. But that concern has been addressed: EPA has clarified that it generally does not expect to revisit certifications the Agency issued while the 2020 Rule was in effect. *See supra* p. 18 n.3 (EPA Questions and Answers). Although the declarant also asserts that Texas officials have had to respond "to numerous inquiries from the regulated community," Motion A14, that generalized assertion does not establish any significant administrative burden that could rise to the level of irreparable harm. *See Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (declaration of government official averring that injunction's requirements would "be more time consuming and keep [agency officials] from their other assigned duties" did not establish significant harm to the government).

Finally, Intervenor-Defendants cite a declaration they submitted in district court discussing ongoing FERC licensing proceedings. The licenses sought in those proceedings apparently require Section 401 certifications, and some commenced while the 2020 Certification Rule was in effect. ECF 172-3, ¶¶ 9-11. The declarant avers that before the 2020 Rule was issued, it was "not uncommon for the licensing process to be significantly delayed." *Id.* ¶ 12. But the declarant

provides no evidence that any ongoing proceeding has experienced or likely will experience significant delay or disruption because of the Remand Order. *See id*.

Moreover, even assuming that the Remand Order might delay some ongoing licensing proceeding, Intervenor-Defendants have not shown that the associated costs would rise to the level of irreparable harm. "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough." *Al Otro Lado*, 952 F.3d at 1008 (cleaned up); *see also Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020) (allegation that healthcare providers and taxpayers would incur substantial costs absent a stay was insufficient to establish irreparable harm where claimant presented "no further cost quantification"); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm").

In sum, Intervenor-Defendants have provided only "conclusory factual assertions and speculative arguments that are unsupported in the record," both of which are insufficient to establish a likelihood of irreparable harm that could justify a stay pending appeal. *Doe #1*, 957 F.3d at 1059-60. Intervenor-Defendants' motion should be denied on that basis alone.

III. The balance of equities and public interest do not support a stay.

The balance of equities and public interest also weigh strongly against a stay, which would have the effect of reinstating the 2020 Certification Rule while this appeal is decided. EPA has identified substantial concerns with a number of foundational provisions of the 2020 Rule "that relate to cooperative federalism principles and CWA section 401's goal of ensuring that states are empowered to protect their water quality." 86 Fed. Reg. at 29,542; ECF No. 143-1. EPA has commenced a rulemaking process to fairly evaluate and address those concerns with the benefit of public notice and the opportunity for all interested parties, including Intervenor-Defendants, to submit comments. The public interest weighs in favor of maintaining the status quo under the familiar 1971 certification regulations—which protect the rights of States over their water quality—while EPA completes this ongoing rulemaking process.

Moreover, the district court found that "significant environmental harms will likely transpire should remand occur without vacatur," Remand Order 16; Stay Order 13-14, and Intervenor-Defendants have not shown that finding to be erroneous. Environmental harm "is often permanent or at least of long duration, i.e. irreparable," *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987), and there is a "well-established public interest in preserving nature and avoiding irreparable environmental injury," *Alliance for the Wild Rockies v.*

Cottrell, 632 F.3d 1127, 1138 (9th Cir. 2011) (cleaned up). Indeed, the public interest in avoiding environmental degradation is expressed in the CWA itself: the Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). A "court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 497 (2001) (internal quotation marks omitted). The public interest in avoiding the environmental harms identified by the district court thus far outweighs Intervenor-Defendants' speculative allegations of delay and unquantified monetary costs.

In sum, the balance of harms and the public interest militate strongly in favor of maintaining the current status quo under the 1971 certification regulations while EPA pursues an orderly rulemaking.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants' motion for stay pending appeal should be denied.

Respectfully submitted,

/s/ *Ellen J. Durkee*
TODD KIM
Assistant Attorney General

ELISABETH H. CARTER
LESLIE M. HILL
ELLEN J. DURKEE
KEVIN W. MCARDLE
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

JAMES CURTIN
ALEXIS WADE
ANDREA PRIEST
ALEXANDER MULLEE
Attorneys
Office of General Counsel
Environmental Protection Agency

January 11, 2022
90-5-1-4-21752

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This motion contains 5,194 words, excluding the parts of the motion exempted by Federal Circuit Rule 27(d), and accordingly complies with the length limit in Federal Rule of Appellate Procedure 27(d)(2)(A).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), per Federal Rule of Appellate Procedure 27(d)(1)(E).

This motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ *Ellen J. Durkee*

ELLEN J. DURKEE

Date: January 11, 2022

No. 21-16958

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS, et al.,
Plaintiffs/Appellees,

v.

MICHAEL S. REGAN and U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendants/Appellees,

and

AMERICAN PETROLEUM INSTITUTE, et al.,
Intervenor-Defendants/Appellants.

Appeals from the U. S. District Court for the Northern District of California
No. 3:20-cv-04636-WHA (Hon. William Alsup)

FEDERAL DEFENDANTS' MOTION TO DISMISS APPEAL FOR LACK OF APPELLATE JURISDICTION

TODD KIM
Assistant Attorney General

ELISABETH H. CARTER
LESLIE M. HILL
ELLEN J. DURKEE
KEVIN W. MCARDLE
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0219
kevin.mcardle@usdoj.gov

Of Counsel:

JAMES CURTIN
ALEXIS WADE
ANDREA PRIEST
ALEXANDER MULLEE
Attorneys
Office of General Counsel
U.S. Client Agency

INTRODUCTION

Appellants in this and two companion appeals seek review of the district court's October 21, 2021 order ("Remand Order") vacating the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (the "2020 Certification Rule" or "2020 Rule") and remanding the 2020 Rule to the Environmental Protection Agency ("EPA"). Appellants are three industry groups and eight states that intervened as defendants (collectively, "Intervenor-Defendants") in consolidated district court cases brought by twenty states, the District of Columbia, three Indian Tribes, and six conservation organizations (collectively, "Plaintiffs") to challenge the 2020 Rule.

Defendants-Appellees EPA and EPA Administrator Michael S. Regan (collectively, "EPA") move to dismiss the appeals because there is no appellate jurisdiction. As demonstrated below, jurisdiction is lacking because as to Intervenor-Defendants the Remand Order is not a final, appealable decision under 28 U.S.C. § 1291. The order remanded to EPA to revise the regulations governing Clean Water Act ("CWA") certifications. Intervenor-Defendants will have the opportunity to participate in that ongoing rulemaking and, after a final rule issues, they may return to court to challenge any revisions with which they disagree. The appeals accordingly should be dismissed for lack of appellate jurisdiction.

Intervenor-Defendants oppose this motion to dismiss. Plaintiffs-Appellees consent to dismissal of the appeal but reserve the right to respond to this motion.

BACKGROUND

A. Statutory and regulatory background

The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Among the Act's policy declarations is that it is "the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id*. § 1251(b).

Under CWA Section 401, a federal agency may not issue a permit or license for any activity that may result in a discharge into waters of the United States unless the state or authorized tribe where the discharge would originate issues or waives a Section 401 water quality certification. *Id*. § 1341(a). Some of the federal licenses and permits subject to Section 401 include: CWA discharge permits issued by EPA or the U.S. Army Corps of Engineers ("Corps"); hydropower licenses issued by the Federal Energy Regulatory Commission (FERC); and bridge permits issued by the U.S. Coast Guard. The certifying state or tribal authority may verify that the federal permit or license complies with applicable water quality requirements and grant the certification, grant the certification with conditions necessary to assure compliance with applicable water

quality requirements, deny certification, or waive certification. *Id*. If the state or authorized tribe grants the certification with conditions, those conditions become a part of the federal permit or license. But if certification is denied, then the federal agency may not issue the license or permit. A certifying authority may waive certification voluntarily, or by not acting within a reasonable time period.

The 2020 Certification Rule was published in July 2020 and became effective on September 11, 2020. 85 Fed. Reg. at 42,210; 40 C.F.R. Part 121. The 2020 Rule revised EPA's 1971 certification regulations. *See* 36 Fed. Reg. 8,545, 8,563 (May 7, 1971) (redesignated at 37 Fed. Reg. 21,441 (Oct. 11, 1972), further redesignated at 44 Fed. Reg. 32,899 (June 7, 1979), and subsequently codified at 40 C.F.R. Part 121 (2019)); *see also* 85 Fed. Reg. at 42,210.

In January 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. 20, 2021). The 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" a number of enumerated national objectives, such as improving human health, protecting the environment, and ensuring access to clean water. *Id*. The 2020 Certification Rule was listed in a subsequent White House Statement as one of the agency actions to

be reviewed pursuant to the Executive Order for potential suspension, revision or rescission. *See* 86 Fed. Reg. 29,541, 29,542 (June 2, 2021).

EPA completed its initial review of the 2020 Certification Rule and decided that it would reconsider and propose revisions to the 2020 Rule through a new rulemaking effort due to the Agency's "substantial concerns" with a number of the 2020 Rule's provisions "that relate to cooperative federalism principles and CWA Section 401's goal of ensuring that states are empowered to protect their water quality." 86 Fed. Reg. at 29,542. EPA is currently reconsidering numerous aspects of the 2020 Certification Rule. *See id*. at 29,542-44; *see also* ECF Nos. 143 at 3-5 and 143-1, ¶¶ 11-15.

After considering public input and information provided during pre-proposal outreach, EPA is now drafting new regulatory language and supporting documents. EPA expects to publish its proposed rule in spring 2022 and, after receiving and considering public comments, expects to publish its final rule in spring 2023. ECF 143-1 ¶¶ 20-27.

B. Proceedings below

After publication of the 2020 Certification Rule, twenty states and the District of Columbia, three Indian Tribes, and six conservation organizations filed three cases challenging the 2020 Rule in the U.S. District Court for the Northern District of California. Plaintiffs alleged that EPA violated the Administrative

Procedure Act ("APA") because the 2020 Rule exceeds statutory jurisdiction, authority, or limitations, and is arbitrary, capricious or otherwise not in accordance with law. The three cases were consolidated. Eight states and three industry groups intervened as defendants.

Before the cases were briefed on the merits, EPA announced its intention to reconsider and revise the 2020 Certification Rule and moved to remand the 2020 Rule without vacatur. Plaintiffs opposed the motion, arguing that the district court should remand only if it vacates the 2020 Rule. Alternatively, Plaintiffs argued that the district court should deny EPA's motion and review the 2020 Rule on the merits. Intervenor-Defendants did not object to remand without vacatur, but they opposed Plaintiffs' position that the 2020 Rule should be vacated if the court remanded the matter to EPA.

On October 21, 2021, the district court issued the Remand Order, which remands the 2020 Certification Rule to EPA with vacatur. The court held that remand is appropriate because an agency may seek remand without confessing error in order to reconsider its previous position, and courts generally will refuse a voluntary remand request only if the request is frivolous or made in bad faith. Remand Order 6-7, 11-12. The court explained that neither exception applied, and that remand was appropriate because EPA had expressed substantial concerns regarding the validity of the 2020 Rule. *Id*. at 11-12. The court also held that

vacatur of the 2020 Rule was appropriate based on its application of the two-part test established in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). *See* Remand Order 7-8, 10-11, 13.

On November 17, 2021, the district court issued an order captioned "Final Judgment," which states that for the reasons set forth in the Remand Order and "to ensure appealability, final judgment is hereby entered in favor of plaintiffs and against defendants, intervenors, and intervenor defendants." ECF No. 176.

EPA did not notice an appeal from the Remand Order or judgment, and has decided not to appeal those orders.

Intervenor-Defendants, however, filed three separate notices of appeal from the Remand Order and judgment—which were docketed in this Court as Nos. 21-16958 (American Petroleum Institute and Interstate Natural Gas Association of America), 21-16960 (states), and 21-16961 (National Hydropower Association). Intervenor-Defendants also filed a joint motion for stay pending appeal in district court. EPA opposed the stay motion, arguing among other things that the Remand Order is not appealable by Intervenor-Defendants and that Intervenor-Defendants had not demonstrated that they would suffer any irreparable harm during the pendency of the appeals.

After a hearing, the district court issued an order denying the motion for stay pending appeal ("Stay Order," ECF No. 191). Among other things, the court

explained that most of the harms that Intervenor-Defendants described were speculative and that even if they had identified irreparable harm, "their showing ranks as marginal." Stay Order 13. The court also held that EPA and Plaintiffs had demonstrated that the equities tip sharply in favor of denying a stay due to the importance of preserving some certainty in the administrative process, and that Plaintiffs had shown "substantial, irreparable environmental harm should a stay go into effect." *Id*. at 13-14.

On December 15, 2021, Intervenor-Defendants/Appellants in No. 21-16958 filed a motion for stay pending appeal in that case ("Stay Motion"). On December 16, 2021, Intervenor-Defendants/Appellants in Nos. 21-16960 and 21-16961 filed identical motions. EPA has opposed the motions, arguing in relevant part that Intervenor-Defendants are not entitled to a stay pending appeal because as to them the Remand Order is not a final, appealable order and, as a result, this Court lacks appellate jurisdiction. Intervenor-Defendants/Appellants' motions for stay pending appeal are pending before this Court.

On January 11, 2022, the Plaintiff Tribes and conservation groups filed motions to dismiss each of the three appeals for lack of jurisdiction.

ARGUMENT

Intervenor-Defendants' appeals of the Remand Order should be dismissed because this Court lacks appellate jurisdiction. Intervenor-Defendants contend that

the Court possesses jurisdiction under 28 U.S.C. § 1291, which provides that courts of appeals "shall have jurisdiction over all final decisions of the district courts." *See* Stay Motion 25-28. Intervenor-Defendants are wrong, however, because remand orders ordinarily are not appealable by non-government parties under 28 U.S.C. § 1291, and EPA has not appealed here. *See*, *e.g.*, *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174 (9th Cir. 2011); *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004).

A remand may be considered "final" for appellate jurisdiction purposes only in limited circumstances where:

> (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.

Crow Indian Tribe v. United States, 965 F.3d 662, 676 (9th Cir. 2020) (cleaned up). Because this Court "appl[ies] a practical construction to the finality requirement … , these are considerations, rather than strict prerequisites." *Sierra Forest*, 646 F.3d at 1175. But the Court has not hesitated to dismiss appeals where (as here) the third factor is not met—i.e., where review would be available after the remand. *E.g.*, *Alsea Valley*, 358 F.3d at 1184 (citing additional cases).

Application of these factors leads to the conclusion that ordinarily only the defendant-agency whose action is challenged may appeal a remand order, *National*

Wildlife Federation v. National Marine Fisheries Serv., 886 F.3d 803, 816 (9th Cir. 2018), and that, in the remand context, appellant-intervenors "'do not succeed to the agency's right to appeal, which is unique to itself,'" *Alsea Valley,* 358 F.3d at 1185 (9th Cir. 2004) (quoting *Smoke v. Norton*, 252 F.3d 468, 472 n.1 (D.C. Cir. 2001) (Henderson, J., concurring)). If the defendant agency could not appeal a remand order, it would be required to apply the court's potentially erroneous directions on remand with no ability to seek judicial review of its own revised action. *Id*. at 1184; *Crow Indian Tribe*, 965 F.3d at 675. This is generally not true for other parties that seek to appeal a remand order in the absence of an appeal by a defendant federal agency. *See Alsea Valley*, 359 F.3d at 1185; *cf. Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1075-77 (9th Cir. 2010). Intervenor-Defendants are free to seek judicial review of any final revised certification rule EPA issues.

Because EPA is not appealing the Remand Order, the ordinary rule that a remand order is not appealable applies to Intervenor-Defendants' appeals here. Moreover, none of the factors that support making an exception to the ordinary rule suggests that the Remand Order is final as to them.

First, the district court did not "conclusively resolve[ ] a separable legal issue." *Crow Indian Tribe*, 965 F.3d at 676. The matter came to the district court on EPA's motion for voluntary remand, in which the Agency did not admit error.

The district court's discussion of problems with the 2020 Certification Rule in the context of the propriety of vacatur focused on Plaintiffs' allegations against EPA in the complaints, Plaintiffs' oppositions to EPA's motion for remand without vacatur, and EPA's substantial concerns regarding the 2020 Rule. The district court did not direct EPA to take any particular actions on remand. The Remand Order simply concluded that "[u]pon remand the current certification rule, 40 C.F.R. Part 121, is VACATED." Remand Order 17.

The second factor—whether the Remand Order requires EPA to "apply a potentially erroneous rule which may result in a wasted proceeding," *Alsea Valley*, 358 F.3d at 1184—also does not apply. While the Remand Order means that EPA will resume applying the 1971 certification regulations, application of these long-standing regulations while EPA undertakes its rulemaking process does not result in a wasted rulemaking process. Because the structure of the district court order preserves EPA's discretion to determine the content of a new rule, it does not have the effect of forcing EPA to adopt a potentially erroneous new rule on remand.

Regarding the third factor, the Ninth Circuit has held that "a remand [is] not a final order with respect to private parties whose positions on the merits would be considered during the agency proceedings on remand." *Crow Indian Tribe*, 965 F.3d at 675 (cleaned up). That holding applies here. Intervenor-Defendants will have the full opportunity to submit comments on remand during EPA's

rulemaking—including the same arguments they make now regarding the validity of the approach taken in the 2020 Certification Rule—and they will have the opportunity to challenge any final rule resulting from the remand. Accordingly, an appeal does not lie under 28 U.S.C. § 1291.

Intervenor-Defendants suggest that they meet the third factor—or even if they do not, should be allowed to appeal anyway based on a practical construction of finality—because EPA will not consider on remand whether a district court has authority to remand and vacate a rule without first making a dispositive determination that the rule is unlawful. Stay Motion 28-29. But Intervenor-Defendants point to no case that supports making an exception to the general remand rule for a procedural ruling of this nature. For example, in *Crow Indian Tribe*—a case cited by Intervenor-Defendants for this point—the Court held that intervenors could appeal a remand order directing the agency to include a commitment to modeling recalibration in any new rule fashioned on remand. 965 F.3d at 676.[1] The Court held that the recalibration order was final as to the intervenors because it was a "definitive ruling" that preordained (at least in part) the outcome of proceedings on remand. *Id*. Here, in contrast, the Remand Order does not constrain EPA's discretion on remand or in any way dictate the outcome

---

[1] In *Crow Indian Tribe*, the federal defendants also appealed the remand order, but had not included the calibration holding in the issues they raised on appeal. *Id*. at 675.

of the ongoing rulemaking process. And because Intervenor-Defendants' positions will "be taken into account in the remand proceeding which could result in a decision favorable to them," *Crow Indian Tribe*, 965 F.3d at 676, the Remand Order is not final as to them.

Also unpersuasive is Intervenor-Defendants' assertion that the district court's entry of a final judgment "to ensure appealability" (ECF No. 176) and its directive to the Clerk to close the case "removed any doubt" that they may appeal the Remand Order. Stay Motion 27 (citing *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994)). This contention fails first because neither an order's label nor the closing of a case on the district court docket are determinative of the order's appealability under Section 1291. *See Montes*, 37 F.3d at 1350 (label is not determinative); *Pit River Tribe*, 615 F.3d at 1076 (rejecting intervenor defendant's argument that a remand order accompanied by dismissal of the action is a final appealable order when the federal agency defendant has not appealed). Moreover, Intervenor-Defendants put misplaced reliance on *Montes* to suggest that if the district court intended for its Remand Order to be a final appealable decision then it must be treated as such. *Montes* was not an APA challenge to agency action and the order at issue in that case did not remand to an agency. Rather, the disputed question in *Montes* was whether an order dismissing a complaint was intended to be without prejudice and thus not a final judgment.

In any event, the phrase, "to ensure appealability," in the final judgment is not directed at any particular party and thus does not evidence an intent to ensure that Intervenor-Defendants can appeal on their own, in the absence of an appeal by EPA. In its Stay Order, the district court stated that it would not "linger" on this question of appellate jurisdiction because "a stay should be denied under the traditional four-factor test" and the appellate jurisdiction "question can be left up to our court of appeals." Stay Order 14.

In sum, because the Remand Order is not final and appealable by Intervenor-Defendants pursuant to 28 U.S.C. § 1291, the Court lacks appellate jurisdiction.[2]

CONCLUSION

For the foregoing reasons, Intervenor-Defendants' appeals should be dismissed for lack of appellate jurisdiction.

---

[2] Intervenor-Defendants do not identify any basis other than 28 U.S.C. § 1291 for appellate jurisdiction, and none exists. Intervenor-Defendants cannot appeal under 28 U.S.C. § 1292(a)(1) because Plaintiffs did not move for an injunction, the district court did not say it was issuing one, and the Remand Order is plainly not injunctive in nature as to the Intervenor-Defendants. While the Remand Order has the effect of changing the law that might apply to some of Intervenor-Defendants' activities, that does not make the Order an injunction that is enforceable against them. *See Alsea Valley*, 358 F. 3d at 1198; *Pit River Tribe*, 615 F.3d at 1078.

Respectfully submitted,

/s/ *Ellen J. Durkee*
TODD KIM
Assistant Attorney General

ELISABETH H. CARTER
LESLIE M. HILL
ELLEN J. DURKEE
KEVIN W. MCARDLE
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

JAMES CURTIN
ALEXIS WADE
ANDREA PRIEST
ALEXANDER MULLEE
Attorneys
Office of General Counsel
Environmental Protection Agency

January 19, 2022
90-5-1-4-21752

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This motion contains 3,018 words, excluding the parts of the motion exempted by Federal Circuit Rule 27(d), and accordingly complies with the length limit in Federal Rule of Appellate Procedure 27(d)(2)(A).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), per Federal Rule of Appellate Procedure 27(d)(1)(E).

This motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ *Ellen J. Durkee*
ELLEN J. DURKEE
Date: January 19, 2022

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 24 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS; et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellees,

NATIONAL HYDROPOWER ASSOCIATION,

Intervenor-Defendant,

STATE OF ARKANSAS; et al.,

Intervenors,

and

AMERICAN PETROLEUM INSTITUTE; INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,

Intervenor-Defendants-Appellants.

No. 21-16958

D.C. Nos. 3:20-cv-04636-WHA
3:20-cv-04869-WHA
3:20-cv-06137-WHA
Northern District of California, San Francisco

ORDER

LCC/MOATT

In re: CLEAN WATER ACT RULEMAKING ------------------------------ AMERICAN RIVERS; et al., Plaintiffs-Appellees, v. ANDREW R. WHEELER; U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendants-Appellees, AMERICAN PETROLEUM INSTITUTE; INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, Intervenor-Defendants, STATE OF ARKANSAS; et al., Intervenors, and NATIONAL HYDROPOWER ASSOCIATION, Intervenor-Defendant-Appellant.	No. 21-16960 D.C. Nos. 3:20-cv-04636-WHA 3:20-cv-04869-WHA 3:20-cv-06137-WHA
In re: CLEAN WATER ACT RULEMAKING	No. 21-16961

------------------------------	D.C. Nos. 3:20-cv-04636-WHA 3:20-cv-04869-WHA 3:20-cv-06137-WHA
AMERICAN RIVERS; et al., Plaintiffs-Appellees, STATE OF ARKANSAS; et al., Intervenors-Appellants, v. ANDREW R. WHEELER; U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendants-Appellees, AMERICAN PETROLEUM INSTITUTE; et al., Intervenor-Defendants. and STATE OF ARKANSAS; et al., Intervenors-Appellants,	

Before: CANBY, BERZON, and BENNETT, Circuit Judges.

The unopposed motion to consolidate these appeals (Docket Entry No. 32 in 21-16958) is granted. Appeal Nos. 21-16958, 21-16960, and 21-16961 are consolidated.

The motions for a stay of the challenged district court order pending these appeals (Docket Entry No. 20 in 21-16958; Docket Entry No. 14 in 21-16960; Docket Entry No. 26 in 21-16961) are denied. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020). Appellants do not demonstrate a sufficient likelihood of irreparable harm to warrant the requested relief.

The motions to dismiss these appeals for lack of jurisdiction (Docket Entry Nos. 27 and 33 in 21-16958) are denied without prejudice to renewing the arguments in the answering brief(s). *See Nat'l Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss).

The opening brief(s) and excerpts of record are due April 6, 2022. The answering brief(s) are due May 6, 2022. The optional reply brief(s) are due within 21 days after service of the last-served answering brief. All parties on a side are encouraged to join in a single brief to the extent practicable. *See* 9th Cir. R. 32-2 circuit advisory committee note.