No. 21A539

# 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.

ON APPLICATION FOR STAY, OR, IN THE ALTERNATIVE, ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**APPENDIX TO RESPONSE TO APPLICATION FOR A STAY**
**VOLUME I OF III**

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT


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## APPENDIX

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

| | |
|---|---|
| In re<br><br>Clean Water Act Rulemaking<br><br>This Document Relates to:<br><br>ALL ACTIONS | Case No. 3:20-cv-04636-WHA (consolidated)<br><br>**EPA'S RESPONSE TO INTERVENOR DEFENDANTS' MOTION FOR STAY PENDING APPEAL**<br><br>Telephonic Hearing<br>Date: December 2, 2021<br>Time: 8:00 a.m. PDT |

Pursuant to Civil L.R. 7-3(a) and this Court's Order of November 17, 2021 (Dkt. No. 177), Defendants, the United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), by and through their counsel, submit the following response to Defendant-Intervenors'[1] motion for stay pending appeal (Dkt. No. 179) ("Motion").

Defendant-Intervenors seek to stay pending appeal this Court's order vacating the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (the "Certification Rule" or the "Rule") and remanding the Rule back to EPA. Dkt. No. 173 ("Remand Order"). A stay pending appeal is not warranted in this case. Defendant-Intervenors cannot establish a likelihood of success on the merits of their appeal because the Remand Order is not a "final decision" within the meaning of 28 U.S.C. § 1291 and is therefore not appealable, nor is the Order appealable under 28 U.S.C. § 1292(a)(1). Moreover, Defendant-Intervenors fail to establish that they will suffer any irreparable harm or that the public interest favors a stay. Indeed, Defendant-Intervenors barely defend the Certification Rule. The Remand Order simply returned to the familiar regulatory status quo, in place since 1971, pending EPA's ongoing rulemaking to reconsider and propose revisions to the Certification Rule. Defendant-Intervenors will have an opportunity to participate in that rulemaking and may return to court to raise many of the same issues raised in this Court after the ongoing rulemaking is final.

## I. BACKGROUND

### A. Regulatory Background

EPA issued its previous regulations relating to water quality certifications in 1971, pursuant to section 21(b) of the Federal Water Pollution Control Act of 1948, as amended, Pub. L. No. 91-224, 84 Stat. 91, 108-10 (1970). 36 Fed. Reg. 8563 (May 8, 1971) (subsequently codified at 40 C.F.R. pt. 121); *see also* 85 Fed. Reg. at 42,211. The Certification Rule revised the 1971 regulations. 85 Fed. Reg. 42,210. The Rule was published on July 13, 2020 and became

[1] Defendant-Intervenors include the States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming (collectively the "Defendant-Intervenor States"); and American Petroleum Institute, Interstate Natural Gas Association of America, and National Hydropower Association ("Industry Defendant-Intervenors").

effective on September 11, 2020. *Id.* On January 20, 2021, President Biden issued Executive Order 13,990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*. 86 Fed. Reg. 7037 (Jan. 25, 2021). Executive Order 13,990 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*. at 7037. Pursuant to the Executive Order, EPA initiated a rulemaking to reconsider and propose revisions to the Certification Rule. Declaration of John Goodin (Dkt. No. 143-1, "Goodin Decl.") ¶¶ 8-10.

EPA completed its initial review of the Certification Rule and has undertaken a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule. *Notice*, 86 Fed. Reg. 29,541 (June 2, 2021). EPA is reconsidering numerous aspects of the Certification Rule. 86 Fed. Reg. at 29,542-44; *see also* EPA Motion for Remand Without Vacatur (Dkt. No. 143) at 3-5 ("Mot. for Remand"); Goodin Decl. ¶ 15. EPA conducted initial stakeholder outreach by taking written input through a public docket. 86 Fed. Reg. at 29,541. After considering public input and information provided during stakeholder meetings, EPA is now drafting new regulatory language and supporting documents, then it will submit the draft rule to the Office of Management and Budget ("OMB"). Goodin Decl. ¶¶ 20-22. EPA expects its proposed rule detailing revisions to the Certification Rule will be published in the Federal Register in spring 2022, which will initiate a public comment period. *Id.* ¶ 23. Following the public comment period on the proposed rule, EPA plans to review comments and other input, develop the final rule, and submit it to OMB for interagency review. *Id.* ¶¶ 24-26. EPA expects to sign a final rule in spring 2023. *Id.* ¶ 27.

**B. Litigation Background**

Plaintiffs allege that EPA violated the Administrative Procedure Act because the Certification Rule is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Dkt. No. 75 ¶¶ 95, 99-101, 108, 115-18, 124-15, 132, 137 (citing 5 U.S.C. §§ 706(2)(A),

706(2)(C)); Dkt. No. 96 ¶¶ 7.5, 7.12, 7.19, 7.25 (same); Dkt. No. 98 ¶¶ 79-81, 85, 89 (same). On July 1, 2021, EPA moved the Court to remand the Certification Rule without vacatur. Dkt. No. 143. On September 30, 2021, the Court held a hearing on EPA's Motion to Remand, took the motions under submission, and ordered Defendant-Intervenors to "file a brief, not to exceed 25 pages, on the *Allied Signal* Factors." Dkt. No. 170.[2] Defendant-Intervenors filed a Supplemental Brief on *Allied-Signal* Factors on October 4, 2021. Dkt. No. 172. On October 21, 2021, the Court vacated the Certification Rule and remanded the Rule to EPA. Dkt. No. 173 ("Remand Order"). On November17, 2021, the Court issued a Final Judgment stating that "[f]or the reasons stated in the order granting remand with vacatur, Dkt. No. 173, and to ensure appealability, final judgment is hereby entered in favor of plaintiffs and against defendants, intervenors, and intervenor defendants." Dkt. No. 176.

## II. LEGAL STANDARD

"The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). In *Nken v. Holder*, the Supreme Court set forth the four factors governing issuance of 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 proceedings; and (4) where the public interest lies . . . ." 556 U.S. 418, 434 (2009); *accord Sierra Club v. Trump*, 929 F.3d 670, 708 (9th Cir. 2019).

"The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434-35. In the Ninth Circuit, an applicant for a stay must show that there is "a substantial case for relief on the merits," although it need not demonstrate that it is more likely than not that it will win on the merits. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (citation omitted); *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). The applicant must also show "that there is a probability of irreparable injury if the stay is not granted." *Lair*, 697 F.3d at 1214. A "possibility"

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[2] *Allied Signal* factors refers to an analytical framework set forth in *Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

of irreparable injury is not sufficient to satisfy the second factor. *Nken*, 556 U.S. at 434-35. "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Id*. at 435. "'[H]arm to the opposing party and weighing the public interest . . . merge when the Government' is one of the parties." *Sierra Club v. Trump*, 929 F.3d at 708 (quoting *Nken*, 556 U.S. at 434); *see Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (same); *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (same).

## III. ARGUMENT

### A. Defendant-Intervenors Cannot Show That They Have a Likelihood of Success on the Merits of Their Appeal.

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* EPA's Reply in Support of Mot. for Remand (Dkt. No. at 153) at 2 n.2. Here, however, it is unclear to what extent these general legal principles are applicable to the Remand Order or how, if at all, they would affect the Defendant-Intervenors' likelihood of success on appeal.[3]

In any event, the Defendant-Intervenors cannot make a "substantial case for relief on the merits" of the appeal, *Lair*, 697 F.3d at 1204 (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. As we demonstrate below, the Remand Order is unappealable: (a) under 28 U.S.C. § 1291 because remand orders are ordinarily not appealable by non-government parties; and (b) under 28 U.S.C.

[3] EPA also notes that Defendant-Intervenors' likelihood of success on the merits would also depend on the application of these broad legal principles to complexities of this case with which their Motion does not fully grapple. For example, while the Court held that "a district court may vacate an agency's action without first making a determination on the merits," the Court did find "serious deficiencies in an aspect of the certification rule" and state that it "harbors significant doubts that EPA correctly promulgated the certification rule due to the apparent arbitrary and capricious changes to the rule's scope." Remand Order at 8, 10-11, 13.

§ 1292(a)(1) because the Remand Order is not injunctive in nature as to the Defendant-Intervenors.

**1. The Remand Order Is Not a "Final Decision" Within the Meaning of 28 U.S.C. § 1291 and Is Therefore Not Appealable.**

Ordinarily, a remand order will not be considered a "final decision" for purposes of 28 U.S.C. § 1291. *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174 (9th Cir. 2011). However, 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 the Ninth Circuit "appl[ies] a practical construction to the finality requirement . . . , these are considerations, rather than strict prerequisites." *Sierra Forest Legacy*, 646 F.3d at 1175. Application of these factors leads to the conclusion that ordinarily only the agency involved may appeal a remand order, *Nat'l Wildlife Fed'n v. Nat'l 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 All. v. Dep't of Comm.*, 358 F.3d 1181, 1185 (9th Cir. 2004) (cleaned up). An agency's right to appeal a remand order is based on application of the third factor—that judicial review would be unavailable if an immediate appeal is not allowed—because, if the agency could not appeal a remand order, it would be required to apply the court's potentially erroneous directions on remand but would be unable to appeal its own revised action. *Id*. at 1184. The same is not true for private parties.

In this case, none of the factors suggests that the Remand Order is final as to the Defendant-Intervenors. First, the Court did not "conclusively resolve[ ] a separable legal issue." *Crow Indian Tribe*, 965 F.3d at 676. The matter came to the Court on EPA's motion for voluntary remand, in which the Agency did not admit error. The Court's discussion of problems with the Certification Rule in the context of the propriety of vacatur focused on Plaintiffs' allegations in

the complaints, Plaintiffs' oppositions to EPA's motion for remand without vacatur, and EPA's expressed concerns regarding the Rule, without directing EPA to take any particular actions on remand. The Remand Order stated only "[u]pon remand the current certification rule, 40 C.F.R. Part 121, is VACATED." Remand Order at 17. The structure of the Court's order means that the second prong, whether the Remand Order requires EPA to "apply a potentially erroneous rule" on remand, *Crow Indian Tribe*, 965 F.3d at 676, is also inapplicable here. Regarding the third prong, 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).[4] In this case, the Defendant-Intervenors will have an opportunity to provide their comments on remand during EPA's rulemaking and will have the opportunity to challenge any final rule EPA may ultimately promulgate. Accordingly, an appeal does not lie under 28 U.S.C. § 1291 and Defendant-Intervenors cannot prevail on the merits.

**2. The Remand Order Is Not Appealable Under 28 U.S.C. § 1292(a)(1).**

Defendant-Intervenors cannot appeal the Remand Order under 28 U.S.C. § 1292(a)(1) either. Section 1292(a)(1) authorizes appeals from "interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." As an initial matter, the Court's Order does not directly issue an injunction; Plaintiffs did not move for one, and the Court did not say it was issuing one.

While some orders are appealable if the "substantial effect" is that of an injunction, *see United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081 (9th Cir. 2004), the Remand Order is plainly not injunctive in nature as to Defendant-Intervenors. *See Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1187 (9th Cir. 2004) (summary judgment decision setting aside a final rule and

[4] In *Crow Indian Tribe*, the court held that the intervenors there were able to appeal a remand order "because the district court has issued a definitive ruling, contrary to the Intervenors' position," and "[a]n appeal is the only way the Intervenors' objections can be considered." 965 F.3d at 676. In this case, by contrast, the Remand Order does not definitively determine legal issues to be applied on remand by EPA, so that Defendant-Intervenors are free to raise their concerns on remand and to challenge any new final rule on CWA section 401 water quality certification that EPA may issue.

remanding it to the agency "does not have the 'practical effect' of an injunction for purposes of subsection 1292(a)(1)"); *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1078 (9th Cir. 2010) (holding that a "remand order at issue here cannot be construed as an order granting or denying an injunction; therefore, we lack appellate jurisdiction pursuant to section 1292(a)(1)"); *Sierra Club v. Dep't of Agric.*, 716 F.3d 653, 659-60 (D.C. Cir. 2013) (holding that an order was not appealable by intervenors because injunction was entered against the agency and injunction did not have any purpose beyond remanding). The Remand Order is not directed toward the Defendant-Intervenors and does not mandate or prohibit any action by them. While it has the effect of changing the law that might apply to some of their activities, that does not make the Order an injunction that is enforceable against the Defendant-Intervenors.

As a result, the Court's Order is not a "final decision" within the meaning of 28 U.S.C. § 1291 and is not appealable. Defendant-Intervenors therefore cannot make a "substantial case" on the merits in their appeal.

**B. Defendant-Intervenors Have Not Shown Irreparable Injuries Sufficient to Justify a Stay Pending Appeal.**

Defendant-Intervenors complain that they will be irreparably harmed by "substantial disruption from general whipsawing of both regulators and regulated entities" and that questions about what "rules apply and whether pending certification requests need to be resubmitted . . . will cause substantial delay in completing pending Section 401 reviews." Mot. at 19. Defendant-Intervenors suggest that they will be irreparably harmed by alleged delays with pending certification requests for projects that involve "billions of dollars in capital investment." *Id.* But courts routinely decline to recognize the economic costs of complying with an order as an irreparable injury warranting a stay. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020); *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1047 (D. Mont. 2020) (denying a stay pending appeal when, among other things, "Intervenors' alleged harm stems from the requirement that Intervenors and their members follow the law and obtain permits for their projects. These types of ordinary compliance costs likewise do not 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 (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

Even if mere economic injury were sufficient, "simply showing some possibility of irreparable injury" is insufficient. *Nken*, 556 U.S. at 434 (citation and internal quotation marks omitted). Here, Defendant-Intervenors' argument and supporting declarations do no more than suggest that unspecified delays to projects might add unspecified and unsubstantiated costs. *See* Mot. at 19-20; Declaration of Joan Dreskin ¶ 19-20 (Dkt. No. 179-1). Moreover, the timing of Defendant-Intervenors' motion for a stay—filed almost a month after the Court vacated the Certification Rule—weighs against Defendants-Intervenors' protestations of injury from project delays. If billions of dollars were truly at stake, it seems implausible that a party would wait to seek a stay.

In any event, any uncertainty identified by Defendant-Intervenors will exist regardless of which interim rule is in place during the pendency of EPA's new rulemaking—the Certification Rule or the 1971 regulation. Until EPA concludes its rulemaking process, there will be uncertainty regarding future permitting requirements. Moreover, the Court has already recognized that "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." Remand Order at 15. For these reasons, Defendant-Intervenors have not established that they face "a probability of irreparable injury," *Lair*, 697 F.3d at 1214, absent a stay here.

**C. The Public Interest and the Balance of Hardships Weigh Against Staying the Court's Remand Order.**

The public interest and balance of harms also weigh against staying the Order. *See Nken*, 556 U.S. at 435 (holding that "harm to the opposing party and weighing the public interest[,] . . . merge when the Government is the opposing party"). Defendant-Intervenors argue reinstating the Certification Rule is in the public interest because they believe it "more clearly defines the scope of authority granted by Congress in Section 401" and precludes states from making "policy decisions squarely reserved to the federal government." Mot. at 23. EPA disagrees that reinstating the Certification Rule is in the public interest. The Agency has identified

"substantial concerns with a number of provisions of the 401 Certification Rule that relate to cooperative federalism principles and CWA section 401's goal of ensuring that states are empowered to protect their water quality." 86 Fed. Reg. at 29,542. EPA has committed to a new rulemaking process to fairly evaluate and address concerns related to cooperative federalism principles with the benefit of full public notice and opportunity to comment, including by both Defendant-Intervenors and Plaintiffs. The public interest weighs in favor of returning to the familiar 1971 regulations while EPA completes that process.

Defendant-Intervenors also argue that the public interests they identify outweigh the environmental harms from the Certification Rule alleged by Plaintiffs, because Plaintiffs can challenge "any particular application of the Rule" that causes them harm. Mot. at 23. That contention is meritless on this record. In vacating the Certification Rule, the Court already found that "Plaintiffs have established that significant environmental harms will likely transpire should remand occur without vacatur." Remand Order at 16. That finding weighs against a stay pending Defendant-Intervenors' appeal.

In sum, the strong public interest in addressing Plaintiffs' concerns about environmental injury and all parties' concerns about cooperative federalism through a new rulemaking process, and in avoiding even more regulatory uncertainty during the pendency of that rulemaking, easily outweighs Industry Defendant-Intervenors' pecuniary preference and Defendant-Intervenor States' regulatory preference for the Certification Rule. Maintaining the current status quo and allowing EPA to pursue an orderly rulemaking best serves the public interest.

## IV. CONCLUSION

Defendant-Intervenors have not met the prerequisites for the issuance of a stay pending appeal because they have not shown a substantial likelihood of success on the merits (because this matter is not appealable as to them), they have not demonstrated that they will suffer irreparable injury if the stay pending appeal is not granted, and because the public interest and the balance of harms weigh against the stay. Therefore, the Court should deny the Defendant-Intervenors' motion for a stay pending appeal.

//

Respectfully submitted this 30th day of November, 2021.

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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

In re: Clean Water Act Rulemaking

Lead Case No. 3:20-CV-04636-WHA

Related Case Nos.
3:20-CV-04869-WHA
3:20-CV-06137-WHA

**INTERVENOR DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR REMAND WITHOUT VACATUR TO THE EXTENT PLAINTIFFS REQUEST REMAND WITH VACATUR**

Hearing Date: September 9, 2021
Time: 8:00 AM
Courtroom: 12, 19th Floor
Judge: The Hon. William H. Alsup

The States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming (collectively the "State Defendants"), American Petroleum Institute ("API"), Interstate Natural Gas Association of America ("INGAA"), and National Hydropower Association ("NHA") (collectively "intervenor defendants") respectfully submit this motion to strike plaintiffs' oppositions (Dkts. 145, 146, and 147) to the motion for remand without vacatur filed by defendant Environmental Protection Agency ("EPA"), to the extent plaintiffs request remand with vacatur in the above-captioned case.

## I. INTRODUCTION

Intervenor defendants intervened into this action to defend the Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (the "Rule"), issued by EPA. Intervenor defendants do not oppose EPA's motion to remand the Rule to the agency *without vacatur*, because that relief would allow the Rule to remain in place while EPA conducts notice-and-comment rulemaking to determine whether to modify or replace the Rule. Had EPA sought to remand the Rule *with vacatur*, intervenor defendants would have opposed and sought to defend the Rule on the merits.

Plaintiffs oppose EPA's motion and have asked the Court to deny it. But they have also asked the Court to remand the Rule *with* vacatur, without receiving full briefing on the merits from EPA or intervenor defendants. Plaintiffs' vacatur request is procedurally improper and is deeply prejudicial to intervenor defendants, whose very reason for entering this case was to ensure the Rule was not vacated judicially. If plaintiffs want this Court to vacate the Rule, they must file a separate motion seeking that relief in compliance with this Court's rules and standing orders, which intervenor defendants would oppose. *See* Fed. R. Civ. P. 7(b); Civil L.R. 7-1(a); Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup at 3, ¶ 11.

Accordingly, intervenor defendants respectfully request that this Court strike plaintiffs' opposition briefs to the extent that those briefs request vacatur of the Rule. In the alternative, if this Court intends to consider plaintiffs' unmoved-for request for vacatur of any aspect of the Rule, it should permit intervenor defendants an opportunity to file opposition briefs, with

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supportive declarations.

## II. BACKGROUND

Plaintiffs filed three complaints in this now consolidated action: Idaho Rivers United, American Rivers, California Trout, and American Whitewater on July 13, 2020, Dkt. 1 (amended complaint filed September 29, 2020, Dkt. 75); twenty states and the District of Columbia on October 30, Dkt. 96; and Columbia Riverkeeper, Sierra Club, Suquamish Tribe, Pyramid Lake Paiute Tribe, Orutsaramiut Native Council on November 2, Dkt. 98. Plaintiffs' complaints sought an order vacating the Rule as unlawful and enjoining the EPA from enforcing it. Dkt. 75. Intervenor defendants moved to intervene to defend the Rule on August 28, 2020, Dkt. 27 (State Defendants); and September 4, Dkts. 56 (API and INGAA), and 75 (Case No. 3:20-cv-04869-WHA) (NHA). This Court granted the motions to intervene on September 17, 2020, Dkt. 62 (State Defendants); and October 9, Dkts. 78 (API and INGAA), and 113 (Case No. 3:20-cv-04869-WHA) (NHA).

On June 18, 2021, EPA notified this Court of its intent to file a Motion to Remand *Without Vacatur*. Dkt. 141. On June 21, 2021, this Court set a briefing schedule for EPA's upcoming Motion, requiring the motion by July 1, intervenor defendants' briefs by July 15, any briefs in opposition by July 26, and EPA's reply brief by August 12. Dkt. 142. On July 1, EPA filed its Motion, seeking remand without vacatur of the Rule to the agency. Dkt. 143. Because intervenor defendants do not oppose the relief EPA seeks, they decided not to burden this Court with further briefing. On July 26, 2021, plaintiffs responded with three separate briefs in Opposition To Defendants' Motion For Remand *Without Vacatur*. Dkts. 145–47. As part of plaintiffs' claimed opposition, they requested, in one brief as their primary argument, Dkt. 147 at 2–15, and in the other two in the alternative, Dkts. 145 at 11–16, 146 at 18–23, that this Court vacate the Rule. Because this Court's briefing schedule required intervenor defendants to file their briefs before plaintiffs, intervenor defendants are unable to respond to plaintiffs' new affirmative requests for relief under this Court's briefing schedule.

## III. ARGUMENT

A. Parties seeking relief in the Northern District of California must do so via motion or

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stipulation. Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion."); Civil L.R. 7-1(a) (listing types of permissible motions and stipulations); *see also* Civil L.R. 7-2(a) (providing that all motions should "be filed, served and noticed in writing" unless "otherwise ordered or permitted by the assigned Judge"). This Court is particularly attuned to the problems caused by parties trying to obtain relief through the back door, to the point that it devoted a paragraph of its own standing order to the problem as well. Supplemental Order to Order Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup at 3, ¶ 11 (providing that the "title of a submission must be sufficient to alert the Court to the relief sought; for example, please do not bury a request for continuance in the body of the memorandum").

This policy is consistent throughout district courts in California. A party may not evade and nullify these requirements by "piggy-back[ing]" its requested relief through briefing opposing a motion filed by another party. *Thomasson v. GC Servs. L.P.*, No. 05cv0940-LAB (CAB), 2007 U.S. Dist. LEXIS 54693, *21 (S.D. Cal. July 13, 2007), *rev'd, in part, on other grounds*, 321 F. App'x 557 (9th Cir. 2008). Parties, in short, may not seek "affirmative relief through [their] Opposition [briefings]." *Smith v. Premiere Valet Servs.*, No. 2:19-cv-09888-CJC-MAA, 2020 U.S. Dist. LEXIS 228465, at *42 (C.D. Cal. Aug. 4, 2020); *see e.g.*, *Interworks Unlimited, Inc. v. Digital Gadgets, LLC*, No. CV 17-04983 TJX (KSx), 2019 U.S. Dist. LEXIS 167149, at *3–4 (C.D. Cal. June 11, 2019); *Max Sound Corp. v. Google LLC*, No. 5:14-cv-04412-EJD, 2018 U.S Dist. LEXIS 59335, *7–8 (N.D. Cal. Apr. 6, 2018) (rejecting stay request asserted by plaintiff in opposition papers to defendant's motion, as procedurally improper under Civil Local Rule 7-1(a)); *Largan Precision Co., Ltd. v. Fujinon Corp.*, No. C 10-1318 SBA (JL), 2011 U.S. Dist. LEXIS, at *14 (N.D. Cal. Mar. 31, 2011) ("[I]t is improper for [plaintiff], in opposition to a discovery motion, to request an Order from this Court seeking affirmative, substantive remedies."); *Winward v. Pfizer, Inc.*, Nos. C 07-0878 SBA & C 07-0879 SBA, 2007 U.S. Dist. LEXIS 82885, at *6–7 (N.D. Cal. Oct. 22, 2007) (ignoring a non-moving party's transfer request on the ground that there was "no motion before the Court actually requesting a transfer of venue"). Failure to follow this Court's rules in this respect is a basis for denying any such relief. *Smith*, 2020 U.S. Dist. LEXIS 228465, at *42–43; *Duong v. Groundhog Enters., Inc.*, No. 2:19-

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cv-01333-DMG-MAA, 2020 U.S. Dist. LEXIS 76611, *37 (C.D. Cal. Feb. 28, 2020).

B. Plaintiffs' requests for vacatur of the Rule inappropriately seek affirmative relief without complying with this Court's rules and should therefore be struck. EPA properly filed a motion seeking remand without vacatur, in compliance with this Court's rules. In their oppositions, plaintiffs do not merely oppose EPA's request, but instead ask for new, drastic relief: vacatur of the Rule. Dkts. 145 at 11–16, 146 at 18–23, 147 at 2–15. Plaintiffs did not file a motion seeking this affirmative relief and did not give to intervenor defendants the mandatory notice that they would be seeking this relief. Civil L.R. 7.1(a) & 7.2(a). This violated this Court's rules, including under all of the authorities cited immediately above.

Plaintiffs' decision to violate this Court's rules is particularly prejudicial to intervenor defendants. In seeking vacatur of the Rule, plaintiffs make numerous arguments throughout their oppositions that go to the legality of the Rule and the claimed need for vacatur, Dkts. 145 at 11–16, 146 at 18–23, 147 at 2–15, which intervenor defendants oppose. Had plaintiffs complied with this Court's rules and filed a motion seeking vacatur relief, intervenor defendants would have opposed, and presented substantial authority against all of plaintiffs' assertions. Plaintiffs may not avoid such adversarial litigation by "piggy-back[ing]" their requested relief—*which would give plaintiffs everything they have sought in this litigation without having to prove up their case*—through opposition briefing. *Thomasson*, 2007 U.S. Dist. LEXIS 54693, *21.

Accordingly, intervenor defendants respectfully request that this Court strike plaintiffs' opposition briefs to the extent that those briefs request vacatur of the Rule. At the minimum, if this Court intends to consider vacating the Rule in *any* respect, it should permit intervenor defendants an opportunity to file briefs, with supportive declarations, in opposition to plaintiffs' unmoved-for request for vacatur of the Rule.

## IV. CONCLUSION

For the foregoing reasons, intervenor defendants respectfully request that this Court grant their motion to strike plaintiffs' opposition to defendant's motion for remand without vacatur, to the extent plaintiffs request remand with vacatur.

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Respectfully submitted,

Dated: August 4, 2021

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

| | |
|---|---|
| In re<br><br>Clean Water Act Rulemaking | Case No. 3:20-cv-04636-WHA<br>No. 3:20-cv-04869-WHA<br>No. 3:20-cv-06137-WHA<br><br>(consolidated)<br><br>**AMERICAN RIVERS' OPPOSITION TO EPA'S MOTION FOR REMAND WITHOUT VACATUR**<br><br>Courtroom: 12, 19th Floor<br>Date: August 26, 2021<br>Time: 12:00 P.M. (via telephone) |

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## INTRODUCTION

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

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

[1] Here and throughout, American Rivers uses internal pagination and not ECF pagination.

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

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

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

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, contrary to the statute's plain meaning, and the Supreme Court's explanation in *PUD No. 1*, the 2020 Rule narrows the scope of state and tribal review under Section 401(a), and the range of conditions they may impose under Section 401(d), to the potential environmental impacts from any point source discharges associated with the project. 40 C.F.R. § 121.3. Tellingly, in the preamble to the 2020 Rule, EPA acknowledges its interpretation goes against the Supreme Court's construction in *PUD No. 1*. 85 Fed. Reg. 42,231 (instead adopting the logic of Justice Thomas's dissent).[2] And EPA now admits in its notice that "the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality," and asks "whether the agency should revise its interpretation of scope to include potential impacts to water quality not only from the 'discharge' but also from the 'activity as a whole' consistent with Supreme Court case law." 86 Fed. Reg. at 29,543. While American Rivers appreciates EPA's abstract concern, as long as the rule remains in effect, American Rivers and its members continue to be demonstrably harmed. *See* Dkt. No. 75 (First Amended Complaint) ¶¶ 18–39 (describing the harm application of the 2020 Rule will cause the plaintiff organizations and their members).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

error is revealed").[5] Its unwillingness to provide more leaves all involved unable to discern whether, and to what degree, EPA has truly committed to a change in approach.

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

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

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

[5] Although refusing to formally confess error is not dispositive, *N. Coast Rivers Alliance*, 2016 WL 11372492, at *2, it is a factor courts take into account. *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (noting that the agency refused to confess error, in denying "last second" remand motion).

[6] Involuntary dismissal with prejudice is appropriate only when the following factors favor it: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits." *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002). EPA has not shown, nor can it, that any of these

identify a single case—and American Rivers is not aware of any—where a court dismissed a case with prejudice after determining that remand was appropriate. Nor has EPA demonstrated that less drastic alternatives are unavailable.[7]

EPA's proposed order of dismissal with prejudice would leave American Rivers and the other plaintiffs in this litigation injured by the unlawful 2020 Rule with no recourse if EPA delays its reconsideration, or indeed if EPA never completes its reconsideration of the 2020 Rule at all. It is unclear whether EPA's proposed order would even allow American Rivers to bring as-applied challenges to interim decisions made by federal agencies under the 2020 Rule. EPA's proposed order would render EPA unaccountable to judicial process, and would leave American Rivers' existing injuries unremedied and its future injuries without redress.

American Rivers has a right to judicial review of the 2020 Rule and for relief from the rule following a judgment on the merits. 5 U.S.C. §§ 702, 704, 706(2). Granting EPA's motion for remand without vacatur—whether effectuated through dismissal with prejudice or otherwise—would infringe this right.[8] More fundamentally, EPA seeks an end-run around federal jurisdiction. With its motion, EPA invites the Court to abdicate its "virtually unflagging obligation . . . to exercise the jurisdiction given [it]." *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976). The Court should decline EPA's invitation.

**Conclusion.**

For these reasons, the Court should either grant in part and deny in part EPA's motion for remand and order that the 2020 Rule be remanded with vacatur, or deny EPA's motion for

factors warrant the drastic and extraordinary measure of dismissal with prejudice.

[7] EPA has not attempted to show that even a less drastic measure, such as an involuntary stay, is warranted. *See Nat. Res. Def. Council v. Norton*, No. 1:05-cv-01207-OWW-LJO, 2007 WL 14283, at *13–16 (E.D. Cal. Jan. 3, 2007) (denying agency's request for remand and a stay, because "Plaintiffs are entitled to have their complaint decided on the merits, particularly given the fact that Defendants continue to rely on the challenged [agency rules] as if they were lawfully enacted"); *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936) (a litigant seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.").

[8] Ordering remand with vacatur, as discussed *supra* § I, would effectively grant American Rivers the relief it seeks and render its first amended complaint jurisdictionally moot, and therefore would not infringe its right of judicial review.

remand. If the Court decides to grant EPA's motion for remand without vacatur, it should not dismiss this case with prejudice, but retain jurisdiction.

Date: July 26, 2021.

Respectfully submitted,

*/s/ Andrew Hawley*
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Opposition to EPA's Motion for Remand Without Vacatur was electronically filed with the Clerk of the Court on July 26, 2021, using the Court's electronic filing system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's system.

*/s/ Andrew Hawley*
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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**In re:**

**CLEAN WATER ACT RULEMAKING**

**This document relates to:**

**ALL ACTIONS**

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

(Consolidated)

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

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

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## MEMORANDUM AND POINTS OF AUTHORITIES

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

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

## BACKGROUND

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

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

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

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

[1] Press Release, EPA, EPA Administrator Wheeler New York Post Op-Ed: Here's How Team Trump Will Bust Cuomo's Gas Blockade (Aug. 16, 2019), https://www.epa.gov/newsreleases/epa-administrator-wheeler-new-york-post-op-ed-heres-how-team-trump-will-bust-cuomos-0.
[2] Press Release, EPA, EPA Issues Final Rule that Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act (June 1, 2020), https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0.

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

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

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

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

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

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

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

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSION

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

DATED: July 26, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| **In re:**<br><br>**CLEAN WATER ACT RULEMAKING**<br><br>**This document relates to:**<br><br>**ALL ACTIONS** | Case No. 3:20-cv-04636-WHA<br>Case No. 3:20-cv-04869-WHA<br>Case No. 3:20-cv-06137-WHA<br><br>(Consolidated)<br><br>**Declaration of Kameron Morgan**<br><br>Hearing: Aug. 26, 2021 at 12 p.m. |

I, Kameron Morgan, declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge or information supplied to me by others.

1. I am the Water Quality Manager for the Pyramid Lake Paiute Tribe ("PLPT" or "the Tribe"). My position is within the Natural Resources Department of the Tribe. PLPT is a federally recognized Indian Tribe, whose aboriginal homeland is within and around the Pyramid Lake Indian Reservation, located approximately 35 miles Northeast of Reno, Nevada. By far the most important cultural and physical aspect of the Reservation is the fact that Pyramid Lake––one of only a handful of natural desert terminus lakes—is located entirely within the Reservation boundary. Pyramid Lake and the natural stone tufa formations that surround it are the foundation of the Tribe's origin story.
2. I have been employed by PLPT since 2013. During my time working for PLPT, I have developed expertise in the Clean Water Act ("CWA") and attended and presented at numerous workshops on the statute and related matters. As part of my duties as the Water Quality Manager for PLPT, I work closely with other members of the PLPT Natural Resources Department, as well as PLPT's outside consultants and legal counsel.
3. The purpose of this testimony is to highlight PLPT's concerns about imminent harms that may befall PLPT and contribute to a degradation of the waters of the lower Truckee River

and Pyramid Lake within the Reservation boundary should the 2020 Clean Water Act Section 401 Certification Rule ("Certification Rule") remain in force through the spring of 2023. Before I describe the Tribe's concerns about imminent harm I will explain PLPT's Section 401 certification process and why the provision is so important to the Tribe.

**PLPT's Section 401 Certification Process**

4. PLPT was approved for treatment as a state under the Clean Water Act on January 30, 2007. As a result of this designation, PLPT gained its authority to review, grant, condition, or deny certification for federally licensed projects that impact waters within its jurisdiction under Section 401.
5. I have spent seven years of my time with PLPT working on CWA Section 401 matters. As Water Quality Manager, I have an important role in shepherding projects through the Tribe's Section 401 certification process from start to finish. This role gives me perspective on the varied ways the Certification Rule impedes PLPT's certification review.
6. In my role as Water Quality Manager for PLPT, I confer with project proponents to determine whether or not their federally licensed projects will require Section 401 certification. Should a project proponent submit an application for Section 401 certification, I am the first person within the PLPT tasked with reviewing the documentation. I typically provide preliminary feedback detailing additional information the applicant will need to include in the application in order for the Tribe to deem the submission complete.
7. At a subsequent meeting with PLPT's Interdisciplinary Team ("IDT"), I will place on the agenda a discussion of the 401 certification application. The IDT consists of a board, including a Chairwoman and co-chair and representatives from Pyramid Lake Fisheries Department, the Tribal Historical Preservation Office, the PLPT Natural Resources Department, and the PLPT Cattlemen's Association. After a discussion of the 401 certification application, the IDT will vote to grant or deny certification to the applicant. The IDT may also decide what conditions, if any, to place upon a license as a condition of the Tribe's certification.

**The Importance of Section 401 to PLPT**

8. The IDT takes its decisions on Section 401 applications very seriously. Section 401 is immensely important to PLPT because the provision helps to safeguard the Tribe's sovereign authority over its natural and cultural resources. This authority is not simply important in the abstract. The power to grant, condition, or deny certification for proposed projects allows PLPT to protect its waters, its lands, its ecosystems, and its members.
9. Of particular concern to PLPT is the protection of Pyramid Lake. The lake is an irreplaceable cultural and spiritual resource for the Tribe.
10. Pyramid Lake has a rich, but fragile ecosystem. The lake is home to the Lahontan Cutthroat Trout, a threatened species listed under the Endangered Species Act. The lake is also the only habitat in the world for the federally-endangered cui-ui fish, a species of great cultural importance to the Tribe and its people. In their native Numu language, the Pyramid Lake Paiute people are called *Kooyooee Ticutta*, or cui-ui eaters.
11. The Lake is also an important component of the Pyramid Lake Indian Reservation's economy and PLPT's revenues. Many jobs on the Reservation are tied to such industries as fishing and recreation, and thus, depend upon the continued protection of the lake's water quality.
12. Pyramid Lake is especially vulnerable to nationwide regulatory changes like the Certification Rule because it is a terminal watershed. The Truckee River flows from Lake Tahoe on the California side, down the Eastern slope of the Sierra Nevada mountains into Nevada, then through the City of Reno, and ultimately into the Pyramid Lake Reservation where it terminates in Pyramid Lake, which has no outlet. Other than intermittent precipitation and minor intermittent streams, the Truckee River is the sole source of water for the lake. For this reason, the ability to regulate pollution from federally-licensed projects under Section 401 is doubly important to the Tribe. If the Section 401 authority of Nevada and California is diluted, upstream pollution discharged into the Truckee River from a project would make its way into Pyramid Lake. For instance, if California or Nevada are unable to place conditions on a certification for federally-licensed infrastructure threatening the water quality of the

Truckee River, then the water quality of Pyramid Lake may become impaired as a result. For this reason, the Tribe is concerned about the effects of the Certification Rule both inside and outside of the Pyramid Lake Reservation.

**Likely Harms Caused by the Certification Rule's Definition of Certification Request/Receipt**

13. Some aspects of the Certification Rule are likely to cause problems for all Section 401 certification reviews that PLPT undertakes over the next two years. I will focus on one example here.

14. As PLPT's employee who has primary responsibility over the collection of information from project proponents before they submit their applications for Section 401 certification, I have serious concerns about 40 CFR §§ 121.1(m) and 121.5, which define when a certification request is considered received, and when the statutory clock for a certification decision begins ticking.

15. The list of information that a project applicant is required to submit to certifying authorities under 40 CFR § 121.5 is important, but in many cases will be insufficient by itself to allow the Tribe's IDT to make an informed decision about whether to grant or deny a Section 401 certification for a federally licensed project.

16. For example, 40 CFR § 121.5(b)(6) requires applicants to "[i]nclude a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received." But a mere list of the identities of these agencies including all approvals and denials already received is often insufficient. In order to make an informed decision on an application, the Tribe also benefits from information on whether such agencies have already been consulted, and on the substance of those consultations. And, where a project has received approval or denial for a license or permit from another agency, it is important that the Tribe understands the basis of these agency decisions.

17. PLPT suffers ongoing harm as a result of 40 CFR § 121.5 because of the way the provision affects the Tribe's timeline for reviewing Certification Applications. It is important that PLPT has authority to determine whether an application is complete before the statutory

deadline for a Section 401 certification decision is imposed on the Tribe. If the statutory clock for a decision begins ticking before PLPT has all the information it needs, then the IDT's consideration may be rushed into granting or denying an application for certification. Furthermore, the provision forces the Tribe to divert resources during the certification review process away from deliberation and towards information gathering. And even after diverting these resources, PLPT still may be unable to gather all of the information it needs from the project applicant, if the applicant does not hand over the information before the statutory deadline.

**The Certification Rule will hinder Section 401 review of Construction General Permit Projects**

18. PLPT is concerned about the Certification Rule's effects on its Section 401 Review Program for Construction General Permits. Construction General Permits are required by the Tribe anytime a project proposes to disturb 1 acre or more of lands within the Pyramid Lake Indian Reservation. It has been the Tribe's practice to subject these permits to Section 401 review. Such projects and the Section 401 reviews are routine, recurring several times every year.
19. PLPT is concerned that it will no longer be able to review aspects of these projects under Section 401. Historically, many Construction General Permit projects subject to Section 401 review may have resulted in non-point source discharges to the Truckee River. The Tribe is concerned that its assertion of authority over non-point source discharges within the Reservation under Section 401 of the Clean Water Act between now and the spring of 2023 could result in legal disputes.
20. The consequences of being unable to review and regulate non-point source pollution from Construction General Permit projects over the next two years could be grave for the Tribe's water quality. The mobilization of sediment during construction activities along the Truckee River and Pyramid Lake is one of the important sources of contaminants addressed in Section 401 permitting. Not only is the Tribe concerned about the potentially toxic contaminants affixed to the sediment particles such as mercury, but the sediment itself is a potential contaminant if it deposits in the Truckee River delta and impairs the spawning of the Lahontan Cutthroat Trout and cui-ui.

**The Certification Rule will hinder Section 401 review of the CEMEX Paiute Pit**

21. PLPT also expects that the Certification Rule will hinder the Tribe's review and regulation of two specific projects for which Section 401 certification will be required between now and the spring of 2023.

22. The first project that will be subject to Section 401 review by PLPT is the CEMEX Paiute Pit, an aggregate (i.e. sand and gravel) mine that is located in the Reservation town of Wadsworth, Nevada directly adjacent to the Truckee River. Because of the high groundwater table in the mine's location, the operation proposes to pump groundwater from the mining location into an overland ditch that eventually that drains to the Truckee River.

23. PLPT hopes to place a number of conditions on the Section 401 certification of the CEMEX Paiute Pit's NPDES permit that would have been typical prior to the promulgation of the Certification Rule. These conditions aim to protect the Pyramid Lake Indian Reservation's water quality, endangered and threatened fish, the environment, and Tribal members. However, PLPT is concerned that it may not be able to impose some of these conditions on the NPDES permit because of the way the Certification Rule narrows the scope of the Tribe's review.

24. The CEMEX Paiute Pit proposes to discharge waters into the Truckee River that are likely to exceed the Tribe's Truckee River water quality standards for total dissolved solids, temperature, and nutrients and therefore threaten fragile ecosystems within Pyramid Lake itself. To the extent that these discharges of pollutants originate from a source that might not meet the legal definition of "point source" discharges under the Certification Rule, the Tribe is concerned that a legal dispute could arise regarding the Tribe's authority to regulate those discharges. PLPT is concerned that such a legal dispute could arise if it were to impose conditions of Section 401 certification aimed at addressing the water quality standard exceedances of these proposed discharges—for instance a condition requiring that CEMEX creates a riparian buffer between the mining area's pit walls and the Truckee River.

25. PLPT hopes to set additional conditions upon the certification of this NPDES permit to ensure that the CEMEX Paiute Pit does not harm the environment and residents of the

Pyramid Lake Indian Reservation in other ways as well. For instance, PLPT hopes to require that CEMEX engage in monitoring air quality for dust, and to install a safety perimeter around the site. Such conditions would have been routine for the Tribe to impose prior to the creation of the Certification Rule. Now, the Tribe is worried that it will become the subject of costly legal disputes because of the Rule's limits on the scope of review for effects of point source discharges only on water quality.

**The Certification Rule will hinder Section 401 review of Bureau of Reclamation Sediment Removal Project**

26. A second Section 401 review process that may be impacted by the Certification Rule between now and the spring of 2023 relates to a project proposed by the Bureau of Reclamation to remove a sediment island from the Truckee River that has formed immediately above (upstream of) the federally-owned and operated Marble Bluff Dam. The sediment island is putting endangered and threatened species of fish in Pyramid Lake at risk by blocking their passage to upstream spawning areas in the Truckee River. The sediment behind the dam has been found by the Bureau of Reclamation to have high levels of mercury.
27. The sediment removal project received a section 401 certification from PLPT in years prior, and that certification is now up for renewal. The Tribe would like to impose a series of conditions on a new grant of certification for the project in order to ensure that mercury-contaminated sediment does not run off into spawning areas for threatened fish. However, PLPT is concerned that these conditions could result in costly legal disputes because of the narrow scope of review permitted under the Certification Rule. Specifically, the Tribe is concerned that there may be a dispute over whether mercury contaminated runoff from the sediment removal project is considered pollution from a point source.

**Conclusion**

28. The Certification Rule has created many uncertainties for PLPT as it attempts to conduct its Section 401 certification processes. Over the next two years these uncertainties are likely to lead to unnecessary expenditures of administrative resources on matters such as legal deliberations over the validity of conditions on certification that, before the passage of the

new regulation, would have been uncontroversial. More importantly, the rule may undermine the Tribe's ability to protect its waters, its lands, its ecosystems, and its members.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Signed on this 23rd day of July, 2021.

Kameron Morgan
Natural Resources Department
Pyramid Lake Paiute Tribe
Nixon, Nevada