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

In re Clean Water Act Rulemaking This Document Relates to: ALL ACTIONS	Case No. 3:20-cv-04636-WHA (consolidated) **EPA'S MOTION FOR REMAND WITHOUT VACATUR** Courtroom: 12, 19th Floor Date: August 26, 2021 Time: 8:00 a.m. PDT

Notice of Motion and Motion

PLEASE TAKE NOTICE that, on August 26, 2021, at 8:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable William Alsup, Courtroom 12, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, or by telephone or webinar, Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), will and do respectfully move for remand without vacatur. The motion is based on this notice and the accompanying memorandum of points and authorities; any declarations, exhibits, and request for judicial notice filed in support of the motion; together with such oral and/or documentary evidence as may be presented at the hearing on this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Civil L.R. 7-2 and this Court's Order of June 21, 2021 (Dkt. No. 142), Defendants, the United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), by and through their counsel, respectfully request that the Court remand, without vacatur, EPA's Section 401 Certification Rule that revised the implementing regulations for state certification of federal licenses and permits that may result in any discharge into waters of the United States pursuant to section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341. Remand is appropriate here because EPA has announced its intention to reconsider and revise the Certification Rule. *Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,541 (June 2, 2021) ("Notice"). EPA has "determined that it will reconsider and propose revisions to the rule through a new rulemaking effort." Declaration of John Goodin ¶ 9 ("Goodin Decl."). "EPA seeks to revise the rule in a manner that promotes efficiency and certainty in the certification process, that is well-informed by stakeholder input on the rule's substantive and procedural components, and that is consistent with the cooperative federalism principles central to section 401." *Id.* ¶ 13.

Defendants have conferred with the parties regarding this motion. Plaintiffs plan to oppose this motion. Defendant-Intervenors do not object to the motion based on counsel for Defendants' description, but reserve the right to file a response if they think one is necessary, after seeing the motion. Dkt. No. 141.

BACKGROUND

On July 13, 2020, EPA's final rule, *Clean Water Act Section 401 Certification Rule*, was published. 85 Fed. Reg. 42,210 (the "Certification Rule" or the "Rule"). The Certification Rule became effective on September 11, 2020. On January 20, 2021, President Biden issued Executive Order 13,990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*. 86 Fed. Reg. 7037 (Jan. 25, 2021). Executive Order 13,990 stated that it is the policy of the new administration:

> to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

Id. at 7037. Executive Order 13,990 directs federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id*. The Certification Rule was specifically listed in a subsequent White House Statement as one of the agency actions to be reviewed pursuant to the Executive Order for potential suspension, revision or rescission.[1]

Plaintiffs allege that EPA violated the Administrative Procedure Act because the Certification Rule is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Dkt. No. 75 ("Am. Rivers Compl.") ¶¶ 95, 99-101, 108, 115-18, 124-15, 132, 137 (citing 5 U.S.C. §§ 706(2)(A), 706(2)(C)); Dkt. No. 96 ("States' Compl.") ¶¶ 7.5, 7.12, 7.19, 7.25 (same); Dkt. No. 98 ("Suquamish Compl.") ¶¶ 79-81, 85, 89 (same).

EPA has completed its initial review of the Certification Rule and determined that it will undertake a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule. *Notice*, 86 Fed. Reg. 29,541 (June 2, 2021). As explained in the Notice and Goodin Declaration, EPA is reconsidering numerous topics in the Certification Rule. 86 Fed. Reg. at 29,542-44; Goodin Decl. ¶ 15. The specific topics that EPA has committed to reconsidering as part of that process include:

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[1] Fact Sheet: List of Agency Actions for Review, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-ofagency-actions-for-review/ (last accessed on May 20, 2021).

- the utility of the pre-filing meeting process to date, including whether the pre-filing meeting request component of the Rule has improved or increased early stakeholder engagement, whether the minimum 30 day timeframe should be shortened in certain instances (*e.g.*, where a certifying authority declines to hold a pre-filing meeting), and how certifying authorities have approached pre-filing meeting requests and meetings to date;
- the sufficiency of the elements described in 40 C.F.R. § 121.5(b) and (c), and whether stakeholders have experienced any process improvements or deficiencies by having a single defined list of required certification request components applicable to all certification actions;
- the process for determining and modifying the "reasonable period of time," including whether additional factors should be considered by federal agencies when setting the "reasonable period of time," whether other stakeholders besides federal agencies have a role in defining and extending the reasonable period of time, and any implementation challenges or improvements identified through application of the Rule's requirements for the "reasonable period of time";
- the Rule's interpretation of the scope of certification and certification conditions, and the definition of "water quality requirements" as it relates to the statutory phrase "other appropriate requirements of State law," including whether the Agency should revise its interpretation of scope to include potential impacts to water quality not only from the "discharge" but also from the "activity as a whole" consistent with Supreme Court case law, whether the Agency should revise its interpretation of "other appropriate requirements of State law," and whether the Agency should revise its interpretation of scope of certification based on implementation challenges or improvements identified through the application of the newly defined scope of certification;

- the certification action process steps, including whether there is any utility in requiring specific components and information for certifications with conditions and denials; whether it is appropriate for federal agencies to review certifying authority actions for consistency with procedural requirements or any other purpose, and if so, whether there should be greater certifying authority engagement in the federal agency review process including an opportunity to respond to and cure any deficiencies; whether federal agencies should be able to deem a certification or conditions as "waived," and whether, and under what circumstances, federal agencies may reject state conditions;
- enforcement of CWA Section 401, including the roles of federal agencies and certifying authorities in enforcing certification conditions; whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law; whether the CWA citizen suit provision applies to Section 401; and the Rule's interpretation of a certifying authority's inspection opportunities;
- modifications and "reopeners," including whether the statutory language in CWA Section 401 supports modification of certifications or "reopeners," the utility of modifications (*e.g.*, specific circumstances that may warrant modifications or "reopeners"), and whether there are alternate solutions to the issues that could be addressed by certification modifications or "reopeners" that can be accomplished through the federal licensing or permitting process;
- the neighboring jurisdiction process, including whether the Agency should elaborate in regulatory text or preamble on considerations informing its analysis under CWA Section 401(a)(2), whether the Agency's decision to make a determination under CWA Section 401(a)(2) is wholly discretionary, and whether the Agency should provide further guidance on the Section 401(a)(2) process that occurs after EPA makes a "may affect" determination;

- application of the Certification Rule, including impacts of the Rule on processing certification requests, impacts of the Rule on certification decisions, and whether any major projects are anticipated in the next few years that could benefit from or be encumbered by the Certification Rule's procedural requirements;
- existing state CWA Section 401 procedures, including whether the Agency should consider the extent to which any revised rule might conflict with existing state CWA Section 401 procedures and place a burden on those states to revise rules in the future; and
- facilitating implementation of any rule revisions, including whether, given the relationship between federal provisions and state processes for water quality certification, EPA should consider specific implementation timeframes or effective dates to allow for adoption and integration of water quality provisions at the state level, and whether concomitant regulatory changes should be proposed and finalized simultaneously by relevant federal agencies (*e.g.*, the United States Army Corps of Engineers and the Federal Energy Regulatory Commission) so that implementation of revised water quality certification provisions would be more effectively coordinated and would avoid circumstances where regulations could be interpreted as inconsistent with one another.

86 Fed. Reg. at 29,542-44; Goodin Decl. ¶ 15. EPA is conducting initial stakeholder outreach by taking written input through a public docket that will be open until August 2, 2021, i.e., 60 days after publication of the Notice in the Federal Register. 86 Fed. Reg. at 29,541. After considering public input and information provided during stakeholder meetings, EPA will draft new regulatory language and supporting documents and submit the draft rule to the Office of Management and Budget ("OMB"). Goodin Decl. ¶¶ 20-22. EPA expects the proposed rule detailing revisions to the Certification Rule will be published in the Federal Register in Spring 2022, which will initiate a public comment period. *Id.* ¶ 23. Following the public comment period on the proposed rule, EPA plans to review comments and other input, develop the final

rule, and submit it to OMB for interagency review. *Id.* ¶¶ 24-26. EPA expects to sign a final rule in spring 2023. *Id.* ¶ 27.

STANDARD OF REVIEW FOR VOLUNTARY REMAND

"[A]n agency may reconsider its own regulations, 'since the power to decide in the first instance carries with it the power to reconsider.'" *State v. Bureau of Land Mgmt.*, No. 18-CV-00521-HSG, 2020 WL 1492708, at *8 n.9 (N.D. Cal. Mar. 27, 2020) (quoting *Nat'l Res. Def. Council, Inc. v. United States Dep't of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002) (quoting *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)); *accord Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) (stating that "it is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions").

"A federal agency may request remand in order to reconsider its initial action." *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). The Ninth Circuit has recognized that "[g]enerally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *Id*. (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("*SKF USA*"). An "agency may request a remand (without confessing error) in order to reconsider its previous position . . . " *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. C-09-4029 EMC, 2011 WL 3607790, at *3 (N.D. Cal. Aug. 16, 2011); *see also N. Coast Rivers All. v. United States Dep't of the Interior*, No. 11-CV-00307-LJO-MJS, 2016 WL 8673038, at *3 (E.D. Cal. Dec. 16, 2016) (noting that courts in the Ninth Circuit "generally look to the Federal Circuit's decision in *SKF USA* for guidance when reviewing requests for voluntary remand" and quoting *SKF USA*, 254 F.3d at 1027-28).

ARGUMENT

When determining whether to grant a motion for voluntary remand, courts consider whether: (1) the request for voluntary remand is made in good faith and "reflects substantial and legitimate concerns," *Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 2011 WL 3607790, at *4 (citing *SKF*, 254 F.3d at 1029); (2) remand supports "judicial economy," *Nat. Res. Def. Council*

v. United States Dep't of Interior, 275 F. Supp. 2d at 1141; and (3) voluntary remand would not cause "undue prejudice" to the parties, *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015). Here, the balance of all three factors weighs in favor of remand.

First, voluntary remand is appropriate because EPA has identified "substantial and legitimate concerns" with the Certification Rule and has publicly announced its intention to reconsider and revise the Rule. *SKF*, 254 F.3d at 1029 ("[I]f the agency's concern [with the challenged action] is substantial and legitimate, a remand is usually appropriate."); *N. Coast Rivers All.*, 2016 WL 8673038, at *3 (same); *Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 2011 WL 3607790, at *4 (same). Specifically, EPA has identified "substantial concerns with a number of provisions of the 401 Certification Rule that relate to cooperative federalism principles and CWA section 401's goal of ensuring that states are empowered to protect their water quality." 86 Fed. Reg. at 29,542. EPA also has serious concerns about whether the Certification Rule "constrains what states and Tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the 401 review process begins." *Id.* at 29,543. Likewise, EPA "is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests and limits the factors that federal agencies may use to determine the reasonable period of time." *Id*. EPA is also "concerned that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality." *Id*. And EPA "is concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of non-substantive and easily fixed procedural concerns identified by the federal agency [and] that the rule's prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances." *Id*. These concerns mirror many of Plaintiffs' allegations.[2]

[2] *See* Am. Rivers Compl. ¶¶ 94, 98, 107, 112-14, 123, 130-31, 136; States' Compl. ¶¶ 1.9-1.13, 5.43-5.46, 5.48-5.50, 5.54-5.61; Suquamish Compl. ¶¶ 62-76.

Courts have granted remand in similar situations. For example, in *SKF USA*, the Federal Circuit found a remand to the Department of Commerce appropriate in light of the agency's change in policy. 254 F.3d at 1025, 1030. Likewise, in *FBME Bank Ltd. v. Lew*, the District Court for the District of Columbia remanded a rulemaking to the Department of the Treasury to allow the agency to address "serious 'procedural concerns'" with the rule, including "potential inadequacies in the notice-and-comment process as well as [the agency's] seeming failure to consider significant, obvious, and viable alternatives." 142 F. Supp. 3d at 73.

A confession of error is not necessary for voluntary remand so long as the agency is committed to reconsidering its decision. *SKF USA*, 254 F.3d at 1029. For example, remand may be appropriate if an agency "wishe[s] to consider further the governing statute, or the procedures that were followed," or if an agency has "doubts about the correctness of its decision or that decision's relationship to the agency's other policies." *Id.*; *see also Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (an agency does not need to "confess error or impropriety in order to obtain a voluntary remand" so long as it has "profess[ed] [an] intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge"); *N. Coast Rivers All.*, 2016 WL 11372492, at *2 (explaining that an "agency may request a remand (without confessing error) in order to reconsider its previous position") (emphasis in original) (quoting *SKF USA*, 254 F.3d at 1029). That standard is met here, as EPA has made clear that it intends to reconsider and revise the Certification Rule to address "substantial concerns" associated with the Rule. 86 Fed. Reg. at 29,542; Goodin Decl. ¶ 14. Along with receiving public input through a docket, EPA has held a series of webinar-based listening sessions to solicit stakeholder feedback on potential approaches to revise the Certification Rule. *Notice*, 86 Fed. Reg. at 29,544; Goodin Decl. ¶ 17.

In sum, "an agency must be allowed to assess 'the wisdom of its policy on a continuing basis.'" *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (citation omitted). EPA's actions are consistent with that principle, and this Court "should permit

such a remand in the absence of apparent or clearly articulated countervailing reasons." *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004).

Second, granting remand here is in the interest of judicial economy. "Remand has the benefit of allowing 'agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete.'" *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)); *see Nat. Res. Def. Council v. United States Dep't of Interior*, 275 F. Supp. 2d at 1141 ("Voluntary remand also promotes judicial economy by allowing the relevant agency to reconsider and rectify an erroneous decision without further expenditure of judicial resources."). Here, allowing EPA to reconsider its decision made during the prior Administration—including the legal basis and policy effects of the Rule—and address its substantial concerns with the Rule through the administrative process will preserve this Court's and the parties' resources. *See FBME Bank*, 142 F. Supp. 3d at 74; *see also B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) ("[A]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." (quoting *Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978))). Continuing to litigate the very same issues that EPA is currently reconsidering and "would be inefficient," *FBME Bank*, 142 F. Supp. 3d at 74, and a waste of "scarce judicial resources," *Friends of Park v. Nat'l Park Serv.*, No. 13-cv-03453-DCN, 2014 WL 6969680, at *2 (D.S.C. Dec. 9, 2014).

In addition, continuing to litigate this case would interfere with EPA's ongoing reconsideration process by forcing the Agency to structure its administrative process around pending litigation, rather than the Agency's priorities and expertise. *See Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013) (noting that because agency did "not wish to defend" action, "forcing it to litigate the merits would needlessly waste not only the agency's resources but also time that could instead be spent correcting the rule's deficiencies"), *aff'd*, 601 F. App'x 1 (D.C. Cir. 2015).

Third, any prejudice Plaintiffs may suffer due to a remand without vacatur would be limited here because EPA has committed to reconsidering the Certification Rule to ensure that Clean Water Act Section 401 is implemented in a manner consistent with the policies set forth in Executive Order 13,990, many of which implicate the same concerns that Plaintiffs have raised in this litigation. *See* 86 Fed. Reg. at 7037. As noted above, EPA is considering revising provisions in the Certification Rule related to many of the issues raised in this case:

- pre-filing meeting requests, *Notice*, 86 Fed. Reg. at 29,543;
- certification requests, 86 Fed. Reg. at 29,543;[3]
- reasonable period of time, 86 Fed. Reg. at 29,543;[4]
- scope of certification, 86 Fed. Reg. at 29,543;[5]
- certification actions and federal agency review, 86 Fed. Reg. at 29,543;[6]
- certifying authority enforcement of certification conditions, 86 Fed. Reg. at 29,543; and
- certifying authority modification of certifications, 86 Fed. Reg. at 29,543.

Moreover, EPA has committed to ensuring that stakeholders and the public, including Plaintiff States, Defendant-Intervenor States, Plaintiff Tribes and Industry Defendant-Intervenors, have the opportunity to provide input to EPA in its reconsideration process. 86 Fed. Reg. at 29,544; Goodin Decl. ¶¶ 17, 18, 23.

A new rulemaking process will necessarily take time, but Plaintiffs cannot demonstrate undue prejudice from the time required under the Administrative Procedure Act to revise agency regulations. Nor have Plaintiffs identified harms that outweigh the benefits of remand here. The Plaintiff States allege that the Certification Rule "forces the States either to incur the financial

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[3] *See* Am. Rivers Compl. ¶¶ 39, 71, 100; States' Compl. ¶¶ 5.54-5.58.
[4] *See* Am. Rivers Compl. ¶¶ 19, 25, 28, 99-102; States' Compl. ¶¶ 6.11-6.13, 6.17; Suquamish Compl. ¶¶ 62, 70.
[5] *See* Am. Rivers Compl. ¶¶ 19, 36, 39, 94, 115-18; States' Compl. ¶¶ 6.4, 6.16-6.17; Suquamish Compl. ¶¶ 37, 62-68, 75, 80, 84.
[6] *See* Am. Rivers Compl. ¶¶ 130-32; States' Compl. ¶¶ 1.11, 7.4, 7.11-7.12; Suquamish Compl. ¶¶ 69-76, 80.

and administrative burdens associated with instituting or expanding their water protection programs or to bear the burdens of degraded waters." States' Compl. ¶ 6.15.[7] The States further allege that the Certification "Rule increases the chances that section 401 requests will be needlessly denied, leading to administrative inefficiencies and unnecessary litigation, and the loss or delayed benefits of projects that would have been certified had the States been operating under the previous regime." *Id.* ¶ 6.17. The Plaintiff Tribes allege harm from "EPA's attempts to dilute the authority under CWA Section 401 of tribes eligible for [Treatment in the same Manner as a State ("TAS")] to review, set conditions upon, and deny federal licenses for activities that may discharge waters into its jurisdiction." Suquamish Compl. ¶¶ 17, 18. The Tribes also allege harm from a lack of meaningful consultation with the Tribes. *Id.* ¶¶ 36, 60, 88-89. But these harms are "too abstract and speculative to clearly outweigh [remand's] benefits," *Am. Forest Res. Council v. Ash*e, 946 F. Supp. at 43, including the critical benefit of allowing EPA to reconsider the Rule in light of the concerns raised by Plaintiff States and Tribes.

The other Plaintiffs[8] are not directly regulated by the Certification Rule, which regulates the conduct of states, federal agencies, tribes, and project proponents. Those Plaintiffs' alleged harms all flow from the implementation of the Certification Rule to specific future projects.[9] But those harms are too speculative to overcome EPA's interest in remand, because they depend on a causal chain of events for potential future projects that may or may not occur, including (1) how a state may apply the Certification Rule to a specific project; (2) how a federal agency will apply

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[7] *See* States' Compl. ¶¶ 6.11-6.13 (alleging financial harm from increased regulatory expenses).

[8] Non-state or TAS-tribe plaintiffs include American Rivers, American Whitewater, California Trout, Idaho Rivers United, Sierra Club, Columbia Riverkeeper, and Orutsararmiut Native Council.

[9] *See, e.g.*, Am. Rivers Compl. ¶ 12 (explaining that there are "numerous projects requiring federal permits in each of those which are potentially impacted" by the Certification Rule and of interest to plaintiff American Rivers); ¶ 16 (alleging that plaintiffs "frequently participate in state certification determinations under Section 401, and are directly injured by the [Certification] Final Rule's attempt to narrow the applicability, scope, and outcome of Section 401 certifications"), ¶¶ 18-19 (alleging interest in future certification for "modifications at the Camp Far West Hydroelectric Project" and for the "Goldendale Energy Storage Project").

certifications and conditions to a particular project; (3) how challenges to a state certification or condition would be adjudicated in a judicial or administrative proceedings; and (4) whether resolution of any challenges or implementation concerns would take longer than EPA's rulemaking process. These Plaintiffs' allegations are also "too abstract and speculative to clearly outweigh [remand's] benefits," *Am. Forest Res. Council v. Ash*e, 946 F. Supp. 2d at 43, including allowing EPA to address its concerns with the Certification Rule, and potentially Plaintiffs' concerns as well, through the administrative process. Further, in the interim, Plaintiffs continue to have the option to challenge individual 401 certifications or federal actions taken pursuant to the Certification Rule as they arise, to the extent they may threaten imminent, concrete harm to a party or its members in the future. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (plaintiff "will have ample opportunity later to bring [their] legal challenge" in the context of a future agency action applying the challenged plan "when harm is more imminent and more certain.").

In any event, any possible prejudice to Plaintiffs caused by the Rule remaining in effect while EPA revises it pursuant to the required process of the Administrative Procedure Act should not be considered "undue" prejudice. During the rulemaking period, EPA is committed to providing technical assistance to all stakeholders, including States and Tribes, regarding interpretation and implementation of the Certification Rule and working with its federal agency partners to address implementation concerns raised by Plaintiffs. Goodin Decl. ¶¶ 29-30. EPA's efforts may mitigate or eliminate alleged potential harms of concern to all Plaintiffs.

CONCLUSION

EPA has identified numerous concerns with the Certification Rule, many of which have been raised by Plaintiffs in this case, and the Agency has already begun reconsidering the Rule. Where an agency has committed to reconsidering the challenged action, the proper course is remand to allow the agency to address its concerns through the administrative process. *See Am. Forest Res. Council*, 946 F. Supp. 2d at 43. Rather than requiring EPA to litigate a rule that it is

currently reconsidering, Defendants respectfully ask the Court to remand the Certification Rule to the Agency without vacatur.

Respectfully submitted this 1st day of July, 2021.

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U.S. Environmental Protection Agency

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-04869 (Consolidated) Declaration of John Goodin

I, John Goodin, 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 Director of the Office of Wetlands, Oceans and Watersheds within the Office of Water for the U.S. Environmental Protection Agency. I have been employed by EPA since August 1990. I have held my current position since January 2017, first in the capacity of Acting Director before being appointed to the role permanently in December 2018. For approximately six weeks between January 2021 and February 2021, I served as the Acting Deputy Assistant Administrator for Policy for the Office of Water. In my job as Director, I currently supervise approximately 100 federal employees working to monitor and assess water quality, develop restoration plans and nonpoint source pollution reduction plans, promulgate rulemakings and guidance related to the Clean Water Act's jurisdiction, administer permitting responsibilities related to inland and ocean discharges of dredged and fill material, and advance state and local efforts under our National Estuary Program and Urban Waters program. In my capacity as Director, I managed and oversaw my office’s efforts to develop the agency’s 2019-

2020 proposed and final revisions to its regulations implementing Clean Water Act section 401, including management and oversight of development of the proposed and final regulations, which included the preambles and response to comments document, as well as management and oversight of the creation and maintenance of the Agency's public docket and the preparation of the administrative record and certified index.

2. In this declaration, I will be offering testimony based on my personal knowledge or information supplied to me by others about the following subjects: Clean Water Act Section 401; EPA's Clean Water Act Section 401 Regulations; Executive Order 13,990; EPA's Decision to Reconsider and Revise the 2020 Clean Water Act Section 401 Regulation ("Certification Rule"); and EPA's Planned Rulemaking Process and Schedule.

Clean Water Act Section 401

3. Section 401 of the Clean Water Act (CWA or the Act) requires that any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Act. 33 U.S.C. § 1341(a)(1). The certification is commonly referred to as a "section 401 water quality certification."

EPA's Clean Water Act Section 401 Regulations

4. EPA promulgated implementing regulations for water quality certification (1971 regulation) [1] prior to the 1972 amendments to the Federal Water Pollution Control Act (commonly known as the Clean Water Act or CWA), which created section 401. These regulations were in effect for almost 50 years.

5. In 2020, EPA revised these regulations found at 40 CFR part 121. Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020). I am informed that following promulgation of the Certification Rule, multiple parties

[1] 36 FR 22487, November 25, 1971, redesignated at 37 FR 21441, October 11, 1972, further redesignated at 44 FR 32899, June 7, 1979.

filed lawsuits in three federal district courts challenging the rule. I am making this declaration in support of EPA's motions in each of those cases for orders remanding the Certification Rule to EPA without vacatur for reconsideration and revision.

Executive Order 13,990

6. On January 20, 2021, President Biden signed Executive Order 13,990 directing federal agencies to review rules issued in the prior four years that are, or may be, inconsistent with the policy stated in the order. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order 13990, 86 FR 7037 (published January 25, 2021, signed January 20, 2021).

7. The order provides that "[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." *Id*. at 7037, section 1. The order "directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id*. "For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." *Id*. at 7037, section 2(a).

8. The Certification Rule was identified for review under Executive Order 13,990. *See* Fact Sheet: List of Agency Actions for Review, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ (last accessed on May 20, 2021).

EPA's Decision to Reconsider and Revise the 2020 Clean Water Act Section 401 Regulations

9. The EPA has completed its initial review of the Certification Rule and determined that it will reconsider and propose revisions to the rule through a new rulemaking effort.

10. On May 26, 2021, EPA Administrator Regan signed a "Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule." The notice was published in the Federal Register on June 2, 2021 (86 Fed. Reg. 29,541).

11. As stated in the Notice, EPA intends to reconsider and revise the Certification Rule to restore the balance of state, Tribal, and federal authorities consistent with the cooperative federalism principles central to CWA section 401. 86 Fed. Reg. at 29,542-44.

12. The Agency has considered a number of factors in making this determination, including but not limited to: the text of section 401; Congressional intent and the cooperative federalism framework of section 401; concerns raised by stakeholders about the Certification Rule, including implementation-related feedback; the principles outlined in Executive Order 13,990; and issues raised in these cases. The Agency has identified substantial concerns with a number of provisions of the 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.

13. The Agency does not intend to replace the Certification Rule with the 1971 regulation. Instead, EPA plans to reconsider and revise the Certification Rule consistent with the principles outlined in Executive Order 13,990 and the Agency's legal authority. Additionally, the EPA seeks to revise the rule in a manner that promotes efficiency and certainty in the certification process, that is well-informed by stakeholder input on the rule's substantive and procedural components, and that is consistent with the cooperative federalism principles central to section 401. *Id.*

14. Among the issues addressed in the Certification Rule that the Agency intends to reconsider is whether the rule appropriately considers cooperative federalism principles central to CWA section 401. The Agency has substantial concerns about whether portions of the rule impinge on those principles. The

Agency also intends to reconsider whether certain procedural components of the rule improve, or impede, the certification and licensing/permitting processes. *Id.*

15. To assist in its development of a proposed revision, the Agency is considering specific provisions of the Certification Rule for potential revision, including but not limited to, the following: (1) Pre-filing meeting requests; (2) Certification requests; (3) Reasonable period of time; (4) Scope of certification; (5) Certification actions and federal agency review; (6) Enforcement; (7) Modifications; (8) Neighboring jurisdictions; (9) Data and other information; and (10) Implementation coordination. 86 Fed. Reg. 29,542-44.

EPA's Planned Rulemaking Process and Schedule

16. The following paragraphs describe, to the best of my present ability, and recognizing that all of the described actions and dates are subject to change for a variety of reasons, the Agency's planned process and schedule for reconsidering and revising the Certification Rule.

17. The Agency is aware that CWA section 401 and the Certification Rule are of interest to many States, Tribes, federal agencies, project proponents, and the public because of the relationship between water quality certifications and federal licensing and permitting processes. As a result, the Agency wants to ensure that it has the opportunity to consider stakeholder input prior to revising the Certification Rule. To that end, the Agency held multiple webinar-based stakeholder-targeted listening sessions to solicit feedback on potential approaches to revise the Certification Rule. The Agency has already held six different stakeholder listening sessions on June 14, 15, 23, and 24. During these listening sessions, stakeholders had the opportunity to provide input to the Agency on the topics identified for potential revision and any other relevant information on the Certification Rule for the Agency's consideration. The Agency also participated in individual listening sessions with specific stakeholders, at their request, including the Association of State Wetland Managers, the Association of Clean Water Administrators, the National Hydropower Association, the Interstate Natural Gas Association of America, the Western States Water Council, and the Environmental Council of the States. The Agency has also held individual listening sessions with counsel for plaintiffs in the pending litigation. The Agency will continue to hold and/or participate in individual listening sessions for stakeholder groups, upon request and as time and resources allow. Additionally, the Agency opened a public docket to

receive written feedback from stakeholders for 60 days following publication of the Notice on June 2, 2021. This docket is located at Docket ID No. EPA-HQ-OW-2021-0302, which may be accessed at https://www.regulations.gov/docket/EPA-HQ-OW-2021-0302. This initial stakeholder outreach phase will conclude on August 2, 2021.

18. On June 7, 2021, EPA initiated a 90-day tribal consultation process pursuant to Executive Order 13,175 on Consultation and Coordination with Indian Tribal Governments regarding its decision to reconsider and revise the Certification Rule. During the consultation period, EPA hosted a webinar for Tribes on June 29, 2021 and plans to hold another on July 7, 2021. EPA is also looking for other opportunities to engage with tribes during the tribal consultation period. Additionally, tribal governments may request one-on-one consultation meetings with EPA, and EPA will work to accommodate these requests as time and resources permit. This tribal consultation period will conclude on September 7, 2021.

19. In late May 2021, EPA initiated the establishment of an intra-Agency rulemaking workgroup. The workgroup will consist of staff level employees from relevant offices within the Agency. The workgroup is responsible for developing regulatory options for consideration by career management and Agency leadership and drafting a Federal Register Notice consisting of proposed regulatory text and explanatory preamble, as well as ancillary materials.

20. Between July and September 2021, the workgroup plans to review the results of stakeholder outreach and tribal consultation and develop options for revising, as appropriate, the Certification Rule consistent with the principles outlined in Executive Order 13,990, the Agency's legal authority, and early policy guidance from Agency leadership.

21. Between September and December 2021, Agency leadership plans to consider rulemaking options and make options selection decisions, and the workgroup plans to draft preamble and regulatory language, and ancillary documents, including a tribal consultation summary, an Information Collection Request (ICR), and an Economic Analysis.

22. In January 2022, pursuant to Executive Order 12,866, the Agency plans to submit the draft rule and preamble to the Office of Management and Budget (OMB) for interagency review.

23. In spring 2022, following OMB clearance, the EPA Administrator plans to sign the proposed rule and preamble. Shortly thereafter, EPA expects the proposed rule and preamble will be published in the Federal Register, initiating a public comment period.

24. In summer 2022, after the public comment period ends, EPA plans to begin reviewing the public comments and input from stakeholder outreach and receive leadership direction on developing the final rule and responses to comments.

25. In fall 2022, the workgroup plans to revise the final rule and preamble and ancillary documents and draft responses to comments.

26. By December 2022, the workgroup plans to submit the draft final rule and preamble to EPA leadership for final review and then submit it to OMB for interagency review.

27. Following OMB clearance, in spring 2023, the Administrator is expected to sign the final rule and preamble.

28. In the context of the pending litigation, each of the plaintiffs has raised a number of concerns with EPA about alleged adverse effects and harms they believe implementation of the Certification Rule will have on their interests, including the protection of water quality. Radhika Fox, the Assistant Administrator for Water, met by video conference with counsel for plaintiffs on May 7, 2021 to better understand these concerns. EPA has informed plaintiffs, through their counsel, that it will do what it can, working with other federal agencies, to address these concerns while it is working to revise the current regulations.

29. EPA is committed to working with its federal agency partners, e.g., the Army Corps of Engineers, to address implementation concerns raised by plaintiffs. EPA's efforts may mitigate or eliminate alleged potential harms of concern to plaintiffs.

30. In addition, EPA is committed to providing technical assistance to all stakeholders regarding interpretation and implementation of the Certification Rule per § 121.16. In specific cases, EPA's efforts may mitigate or eliminate alleged potential harms of concern to plaintiffs.

In witness whereof, I have signed this statement on June 30, 2021, at Fairfax, VA.

_____

John Goodin
Office Director, Wetlands, Oceans & Watersheds
Office of Water
U.S. Environmental Protection Agency
Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Clean Water Act Rulemaking This Document Relates to: ALL ACTIONS	Case No. 3:20-cv-04636-WHA (consolidated) **[PROPOSED] ORDER**

Defendants United States Environmental Protection Agency and Michael S. Regan, in his official capacity as the Administrator of the United States Environmental Protection Agency (collectively, "EPA"), moved to remand the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (the "Certification Rule"), to EPA without vacatur (Dkt. No. 143).

The Court, having considered EPA's motion, defendant-intervenors' responses, all plaintiffs' memoranda in opposition and EPA's replies thereto, and otherwise being sufficiently advised, hereby **GRANTS** the motion.

It is therefore **ORDERED** that the Certification Rule is remanded to EPA, this case is **DISMISSED WITH PREJUDICE**, and the parties shall bear their own attorneys' fees and costs.

IT IS SO ORDERED.

Dated: September __, 2021.

_____
WILLIAM ALSUP
United States District Court Judge

NOs. 21-16958; 21-16960; 21-16961

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED; COLUMBIA RIVERKEEPER; SIERRA CLUB; SUQUAMISH TRIBE; PYRAMID LAKE PAIUTE TRIBE; ORUTSARARMIUT NATIVE COUNCIL; CALIFORNIA STATE WATER RESOURCES CONTROL BOARD;
AND
STATES OF WASHINGTON, CALIFORNIA, NEW YORK, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, WISCONSIN, AND COMMONWEALTHS OF VIRGINIA AND MASSACHUSETTS,
PLAINTIFFS-APPELLEES,
V.
MICHAEL S. REGAN and U.S. ENVIRONMENTAL PROTECTION AGENCY,
DEFENDANTS,
AND
AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL HYDROPOWER ASSOCIATION,
INTERVENORS-DEFENDANTS-APPELLANTS,
AND
STATES OF ARKANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, WEST VIRGINIA, WYOMING, AND TEXAS,
INTERVENORS-APPELLANTS.

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

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS, INTERVENOR-DEFENDANTS-APPELLANTS AND INTERVENORS-APPELLANT'S MOTION TO STAY PENDING APPEAL

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INTRODUCTION

In September 2020, the Environmental Protection Agency's *Clean Water Act Section 401 Certification Rule* took effect, embracing the reasoning of a Supreme Court dissent and upending a half-century of successful Section 401 practice and procedure. The rollout created administrative chaos for state and tribal water quality officials and gutted their authority to apply key environmental protections—previously relied on for *decades*—to ensure compliance with local water quality requirements. Because of the significant harms to fiscal and natural resources posed by the 2020 Rule, the undersigned Plaintiffs mounted a legal challenge to the Rule.

In May 2021, before that litigation could reach the merits, EPA announced its intent to revisit the 2020 Rule in order to "restore" the federal-state balance enshrined within the Clean Water Act. EPA asked the district court to remand the rule without vacatur, which would have cut off judicial review with no relief to Plaintiffs. The district court granted EPA's motion to remand, but agreed with Plaintiffs that the 2020 Rule's significant flaws and resulting environmental harms warranted vacatur. EPA did not appeal.

Intervenors appealed and now move this Court for a stay, which the Court should deny for three reasons. First, Intervenors cannot establish a likelihood of success on appeal. Vacating an agency rule on a pre-merits request for voluntary remand is a proper exercise of well-established equitable authority that enables

courts to avoid injustice when remand thwarts judicial review. The district court correctly recognized the requisite "significant doubt" as to the validity of the 2020 Rule, as well as the disruptive consequences and irreversible environmental impacts of retaining it, and Intervenors fail to show that vacatur was erroneous. Second, Intervenors fail to show how they are harmed by returning to a status quo that successfully governed the Section 401 certification process for fifty years, and their vague claims of economic impacts and alleged future Section 401 abuses fall well short of establishing the irreparable harm required to justify a stay. Finally, significant and irreparable environmental harms will occur if the 2020 Rule is reinstated. As a result, injury to Plaintiffs and the public interest weigh heavily against issuing a stay.

BACKGROUND

A. Congress Preserved State Authority Over Water Quality with Section 401 of the Clean Water Act

The Clean Water Act (CWA) was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress expressly intended to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." *Id.* § 1251(b). Accordingly, nothing in the Act "impair[s] or in any manner affect[s] any right or jurisdiction of the States" with respect to their waters. *Id.* § 1370.

Section 401 of the Act, *id.* § 1341, is "essential" to Congress' "scheme to preserve state authority to address the broad range of pollution" affecting their waters. *S.D. Warren Co. v. Maine Bd. of Envt'l Protection*, 547 U.S. 370, 386 (2006). Under Section 401, applicants for a federal permit for "any activity" that "may result in any discharge" into navigable waters in a state must obtain a certification from that state setting forth any "limitations" and "monitoring requirements" necessary to assure that the applicant will comply with federal water quality standards as well as "any other appropriate requirement of State law." 33 U.S.C. §§ 1341(a), (d). The Supreme Court has recognized that both the Act and the Environmental Protection Agency's (EPA) 1971 regulations allow states and tribes to place "additional conditions and limitations on the activity as a whole," rather than just the discharge itself. *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994) (*PUD No. 1*).

B. EPA Issued the 2020 Rule, Reversing Fifty Years of Practice and Binding Supreme Court Precedent, to Promote Fossil Fuel Infrastructure

For fifty years, states and tribes processed thousands of Section 401 certification requests annually with little controversy. N.Y. Decl. (Sheeley) ¶¶18-21, ECF#146-8.[1] But in 2019, after unsuccessful industry challenges to high-profile certification denials for large-scale projects, *see, e.g.*, *Const. Pipeline Co. v. N.Y.*

[1] Unless otherwise indicated, all ECF citations are to the docket below.

State Dep't of Env't Conservation, 868 F.3d 87, 90-91 (2d Cir. 2017), then-President Trump directed the EPA to revise its Section 401 regulations to "promot[e] … energy infrastructure." 84 Fed. Reg. 15,495-96 (Apr. 10, 2019).

The resulting rule was a drastic blow to state and tribal authority. *See Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (the 2020 Rule). Rejecting decades of consistent practice, and hewing to the two-justice *dissent* in *PUD No. 1*, the 2020 Rule limited certifying agencies' authority to specific point-source discharges, rather than regulating water quality impacts from the applicant's proposed activity as a whole. 85 Fed. Reg. at 42,232-235; *see* 40 C.F.R. § 121.3. This change severely curtailed state and tribal authority to regulate water-quality impacts of other aspects of a proposed activity, such as environmental impacts from impoundment of water in hydroelectric dam reservoirs, Wash. Decl., ECF#146-2, ¶7, or the cumulative impacts from multiple crossings of the same waterbody by a pipeline, N.Y. Decl. (Gosier), ECF#146-7, ¶18.

The 2020 Rule also limited the timeframe and scope of review of certification requests by, among other things, dictating the contents of requests and state and tribal certification decisions, attempting to slash the timeframe for state and tribal review and allowing federal agencies to overrule state and tribal certification decisions. 40 C.F.R. §§ 121.5-121.9. EPA promulgated the 2020 Rule without analyzing how it would impact water quality or state/tribal administrative

procedures. 85 Fed. Reg. at 42,263-42,280. The 2020 Rule went into effect in September 2020, wreaking havoc for state and tribal water quality authorities. *See generally* ECF#146-1 to ECF#146-9.

C. The District Court Remanded and Vacated the Rule.

Three distinct sets of plaintiffs, including 20 states, the District of Columbia, and several Tribal nations (collectively, Plaintiffs) challenged the 2020 Rule in the Northern District of California. Eight states, together with industry groups representing hydropower companies and fossil fuel interests (collectively, Intervenors), intervened to defend the Rule.

After President Biden took office, EPA announced its "intention to reconsider and revise" the 2020 Rule. 86 Fed. Reg. 29,541 (June 2, 2021). EPA moved for a voluntary remand, ECF#143, noting its intent "to reconsider and revise the [2020 Rule] to restore the balance of state, Tribal, and federal authorities consistent with the cooperative federalism principles central to CWA section 401." Goodin Dec., ECF#143-1, ¶11. EPA specifically sought remand "with prejudice" but "without vacatur," ECF#143-2, which would have left the Rule in effect pending EPA's reconsideration.

Plaintiffs opposed the request, arguing that the Court should order merits briefing or, alternatively, remand *with* vacatur. ECF#145, 146, 147. Plaintiffs submitted declarations describing the host of problems and environmental harms that

the 2020 Rule had already caused and would continue to cause if left in place. ECF#145-1 to 145-2; ECF#146-1 to 146-9. The declarations documented that the states and tribes would have to process *thousands* of Section 401 certification requests under the restrictive requirements of the 2020 Rule during EPA's reconsideration. Nevada Decl., ECF#146-6, ¶¶11-13; N.Y. Decl. (Sheeley), ECF#146-8, ¶20-21; N.C. Decl., ECF#146-4, ¶¶32-35. Although Intervenors took no position on EPA's motion for remand without vacatur, ECF#143 at 1, they opposed Plaintiffs' oppositions to the extent they sought remand *with* vacatur. ECF#148.

The district court granted EPA's motion to remand, but vacated the 2020 Rule. ECF#173 (Remand Order). The court observed that the APA does not preclude equitable relief. Applying the two-factor test from *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n* (*Allied-Signal*), 988 F.2d 146 (D.C. Cir. 1993), the district court determined vacatur was appropriate. Remand Order 12-17. Following the court's decision, certifying authorities returned to their familiar pre-2020 practices. Declaration of Scott E. Sheeley, ¶¶15-18; Declaration of Laura Watson, ¶6.

A month later, Intervenors appealed and moved in the district court to stay the order. EFC#179. EPA, which did not appeal, opposed the stay. ECF#185. After the district court denied the stay, ECF#191 (Stay Order), this motion followed.

ARGUMENT

A stay is "an intrusion into the ordinary process of administration and judicial review, and accordingly is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). "It is instead an exercise of judicial discretion" with the propriety of issuance "dependent upon the circumstances of the particular case." *Id.* at 433. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34.

Courts consider four factors in determining whether to issue a stay: (1) whether the applicant has made a "strong showing" of likely success on the merits; (2) whether the applicant will be irreparably injured without a stay; (3) whether the stay will "substantially injure" other parties; and (4) whether the public interest favors a stay. *Id*. at 434. As demonstrated below, Intervenors fail to meet their burden on any of these factors, and their motion should be denied.

I. INTERVENORS FAIL TO MAKE A STRONG SHOWING OF SUCCESS ON THE MERITS

Intervenors fail to show that they are likely to succeed on the merits. Courts possess broad equitable authority to vacate an agency rule when that agency seeks pre-merits voluntary remand. And, in exercising that authority here, the district court properly applied *Allied-Signal* in determining that equity required vacatur under the facts of this case. Moreover, as set out in Tribal Plaintiff Group's Motion to Dismiss,

significant doubt exists as to whether Intervenors can even appeal the Remand Order.[2]

A. Courts Possess Broad Equitable Authority to Vacate or Maintain Rules on Motions for Voluntary Remand

To do "complete rather than truncated justice," *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), a court must have the power to vacate a rule when granting an agency's request for pre-merits remand, lest the challengers of the rule be left subject to a rule they claim is invalid. *See Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000) (denying motion for voluntary remand without vacatur for this reason). This is so because voluntary remand before final judgment is a unique and drastic form of equitable relief that enables an agency to circumvent judicial review. *See Cent. Power & Light Co. v. United States*, 634 F.2d 137, 145 (5th Cir. 1980).

Despite the unique posture and significant implications of voluntary remand, courts have developed a permissive framework where voluntary remand is ordinarily granted, even when the agency does not confess error, so long as the request is not "frivolous or in bad faith." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012)

[2] For example, Intervenors' failure to establish harm beyond their mere desire that the 2020 Rule remain in effect pending remand is insufficient to establish their standing to appeal—much less sufficient to constitute irreparable harm for purposes of a stay.

(adopting *SKF* framework for remand). However, this permissive approach is workable *only* if courts retain authority to couple voluntary remand orders with vacatur—the remedy that presumptively accompanies remand and may only be avoided in rare circumstances. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 532 (9th Cir. 2015).

The retention of such authority fits well within the equitable powers of the courts. Far from the "remarkable judicial overreach" claimed by Intervenors, Mot. 1, courts have long recognized the "'inherent' authority" of a reviewing court "to condition its remand order as it deems appropriate." *Tyler v. Fitzsimmons*, 990 F.2d 28, 32 n.3 (1st Cir. 1993) (citing *Melkonyan v. Sullivan*, 501 U.S. 89, 101-02 (1991)); *see also Indiana & Michigan Elec. Co. v. Fed. Power Comm'n*, 502 F.2d 336, 346 (D.C. Cir. 1974) (noting courts' equitable powers when reviewing actions of administrative agencies include power to adjust relief to exigencies of the case). And the vacatur determination here operates as a condition of the court's Remand Order. Endorsing the Intervenors' attempt to prohibit vacatur on voluntary remand, however, would hamstring the courts: it would instruct courts to grant good-faith requests for voluntary remand, but leave them powerless to guard against harms to public interests and litigants during the often lengthy remand period. For these very reasons, multiple district courts have held as the district court did here—i.e., that they possess the authority to vacate agency actions on a motion for voluntary

remand, even absent a final determination on the merits. *Navajo Nation v. Regan*, 2021 WL 4430466, at *3 (D. N.M. Sept. 27, 2021); *All. for Wild Rockies v. Marten*, 2018 WL 2943251, at *2-4 (D. Mont. June 12, 2018); *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064-65 (C.D. Cal. 2016); *N. Coast Rivers All. v. Dep't of the Interior*, 2016 WL 8673038, at *6 (E.D. Cal. Dec. 16, 2016); *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241-42 (D. Colo. 2011).

Contrary to Intervenors' argument, Mot. 9-12, the APA did not preclude vacatur here. Congress' intent to foreclose equitable remedies "must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. Nothing in the APA, however, suggests an intent to foreclose equitable remedies, let alone clearly does so. Indeed, this Court has recognized that "[s]ingular equitable relief," up to and including nationwide preliminary injunctions barring implementation of a rule, "is 'commonplace' in APA cases." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 681 (9th Cir. 2021).

Because vacatur is similarly an equitable remedy, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994), its scope and availability does not depend on the APA's express provisions. To be sure, under Section 706(2)(A) of the APA a court "shall" set aside unlawful agency actions. 5 U.S.C. § 706(2)(A); *see*

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("the mandatory 'shall'... normally creates an obligation impervious to judicial discretion"). If Intervenors were right that the APA's vacatur power begins and ends with that provision, *see* Mot. 9, then vacatur of an unlawful rule would always be mandatory. Yet this Court has repeatedly held that, as equity demands, courts may refuse to vacate an unlawful rule on remand. *See Pollinator Stewardship Council*, 806 F.3d 520 at 532-33 (discussing equitable considerations requiring remand *with* vacatur); *Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (discussing equitable considerations requiring remand *without* vacatur).

Accordingly, the vacatur power is not limited by the provisions of the APA but rather rests in the sound equitable discretion of the court. Intervenors' attempt to limit vacatur to Section 706(2) of the APA is irreconcilable with this Court's precedents and, if adopted, would unduly constrain equity jurisdiction. *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) (judicial review of agency action is vested in a court "with equity powers" that can "adjust its relief to the exigencies of the case."). Regardless of how the High Court of Chancery operated, Mot. 14, limitations on federal courts' discretion to craft equitable remedies on remand were long ago rejected by the Supreme Court. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *Porter*, 328 U.S. at 397-98.

Finally, and contrary to Intervenors' suggestions, Mot. 10-11, vacatur did not afford Plaintiffs complete relief. While EPA has expressed significant concerns about the 2020 Rule, nothing in the court's order prohibits EPA from adopting the same rule—or another rule adverse to Plaintiffs' interests—on remand. The Remand Order did not vindicate Plaintiffs' assertions about the Rule's flaws, nor did it require EPA to address them on remand. To the contrary, it is voluntary remand *without* vacatur—which EPA sought and Intervenors did not contest—that allows an agency to "snatch a temporary victory from the jaws of defeat" and leave in place a possibly unlawful rule. Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 Admin. L. Rev. 361, 370 (Spring 2018).

Nor was the district court proceeding process-free. The familiar *Allied-Signal* framework provides a significant procedural safeguard allowing district courts to reach equitable outcomes when an agency seeks remand without vacatur. Following that framework, the district court considered nearly 100 pages of briefing, hundreds of pages of declarations and other pleadings, and the text and preamble to the rule itself. After soliciting additional briefing from Intervenors, the district court thoroughly analyzed the 2020 Rule's deficiencies and the disruptive consequences of ordering or not ordering vacatur. Remand Order 12-17. Contrary to Intervenors' assertions, the process below was robust.

Intervenors fail to make the required strong showing that the district court lacked authority to order vacatur.

B. The District Court Correctly Applied the *Allied-Signal* Factors

Intervenors also fail to establish that they are likely to succeed on their claim that vacatur was inappropriate under the *Allied-Signal* test. Under *Allied-Signal*, a decision to vacate a rule depends on: (1) "the seriousness of the [rule's] deficiencies," and (2) "the disruptive consequences of an interim change that may itself be changed" by further agency action. *Allied-Signal*, 988 F.2d at 150-51; *see also Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (applying factors to voluntary agency remand). The district court properly applied these factors.

1. The district court correctly found significant doubt as to the legality of the 2020 Rule

The district court correctly concluded that "significant doubt exists that EPA correctly promulgated" the 2020 Rule. Remand Order at 15. The district court properly found that the 2020 Rule lacked reasoned decisionmaking, was "antithetical" to Supreme Court precedent in restricting the scope of certification, likely contravened the structure and purpose of the Clean Water Act, and was further undermined by EPA's own doubts about whether it could adopt the same rule upon remand. *Id.* at 12-15.

Intervenors incorrectly assert that the district court's conclusion was based on an insufficient record. To begin, the first *Allied-Signal* factor merely requires a court

to assess "the extent of doubt" regarding an agency's interpretation, *Allied-Signal*, 988 F.2d at 150, to determine "whether the agency would likely be able to offer better 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. It does not require a conclusive adjudication of the merits—indeed, the very point of a pre-merits remand is to avoid such adjudication—or a line-by-line review of the rule. *See, e.g., id.* at 532.

Moreover, the district court found ample evidence of significant flaws *on the face* of the 2020 Rule. Most critically, the Rule—without explanation or justification—abandoned fifty years of consistent practice that the U.S. Supreme Court held in *PUD No. 1* was authorized by the Act's plain text. That text does not limit state 401 certification authority to discharges that will result from an applicant's activities, but rather allows states to review the water quality impacts of those activities as a whole. *PUD No. 1*, 511 U.S. at 711-12. By expressly limiting 401 certification authority to such discharges, the 2020 Rule rejected this core holding.

Intervenors, like EPA in the 2020 Rule, rely on the Supreme Court's decision in *Brand X*, which allows agencies to depart from circuit court precedent interpreting *ambiguous* statutory language. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). But, as the district court recognized, *Brand X*

does not authorize an administrative agency to ignore a statute's plain text, *id.* at 984, as the 2020 Rule did. The district court thus properly found that *PUD No. 1* casts "significant doubt[]" on the validity of the 2020 Rule. Remand Order 13. The Rule is also arbitrary and capricious because EPA failed to address decades-long reliance interests, *see* 85 Fed. Reg. at 42,227-228, or adequately explain its abrupt departure from an interpretation upheld by the Supreme Court. *See FCC v Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("reasoned explanation" for agency action requires a "good reason" for a policy change and an explanation for disregarding circumstances such as reliance interests). Indeed, given the pervasive and fundamental flaws the court identified, it would have been futile to consider severability, as Intervenors suggest, Mot. 16-18, as such consideration could not have saved the central components of the Rule.

Finally, EPA's own "substantial doubts regarding nearly every aspect of the 2020 rule" further support the district court's conclusion that vacatur was appropriate. Stay Order 9 (citing ECF 143-1); *see also Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (noting that although EPA did not concede rule was arbitrary and capricious, the agency's concession of "flaws" sufficed to find it invalid). Indeed, EPA has now "determine[d]" that the 2020 Rule "erodes state and tribal authority as

it relates to protecting water quality," further supporting the district court's vacatur of the Rule.[3]

2. The district court correctly found that vacatur of the 2020 Rule would be less disruptive than leaving it in place

The district court also correctly concluded that the second *Allied-Signal* factor weighed heavily in favor of vacatur "because the disruptions caused by vacatur," which would merely return to the pre-2020 status quo that had existed for fifty years, did "not outweigh the deficiencies of the current rule." Remand Order 16-17. "When deciding whether to vacate" EPA regulations, courts must consider the "possible environmental harm" that may result. *Pollinator Stewardship Council*, 806 F.3d at 532. Here, Plaintiffs provided voluminous declarations documenting specific and concrete harms to water quality that would occur if the 2020 Rule were left in place. *See* ECF#145-1 to 2; ECF#146-1 to 9. By vacating the 2020 Rule, the Remand Order temporarily returns states and tribes to the pre-2020 status quo that long governed water quality certifications.

Moreover, throughout the thirteen months that the 2020 Rule was in place, certifying authorities struggled to implement it. There was no reason to continue that turmoil for a rule that would likely change substantially. An order *staying* vacatur

[3] *See* EPA, Statement of Priorities, at 13, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_2000_EPA.pdf (last visited Dec. 23, 2021).

and reinstating the 2020 Rule would thus have even more disruptive consequences than vacatur, as EPA, other federal agencies, and state and tribal water quality agencies would once again have to grapple with the upheaval that the 2020 Rule caused, only to likely have to reverse course once again when EPA promulgates a replacement rule. Sheeley Decl. ¶18; Watson Decl. ¶7.

II. INTERVENORS FAIL TO ESTABLISH IRREPARABLE INJURY

Irreparable injury is the "bedrock requirement" of obtaining a stay pending appeal, with stays denied to parties failing to establish irreparable injury "regardless of their showing on the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011). Thus, irreparable injury remains "a necessary but not sufficient condition" for a stay. *Id*. Intervenors fail to establish irreparable injury here, and their stay motion should be denied on that basis alone.

A. Intervenors Fail to Show That Vacatur Improperly Deprives Them of Statutory or Constitutional Rights

Intervenors' claims of statutory and constitutional harms are both factually and legally insufficient to establish irreparable harm.

Intervenors first complain that the Remand Order deprives them of statutory process under the APA. But, as the district court observed, they fail to explain *how*. Stay Order 10. The 2020 Rule has been remanded, not repealed. EPA is currently working on a revised Section 401 rule pursuant to notice-and-comment rulemaking. And, while EPA has expressed doubt about the 2020 Rule, it has not committed itself

to a repeal or to any particular outcome. 86 Fed. Reg. 29,541. The Remand Order neither dictates the outcome of EPA's process nor limits Intervenors' participation in any way. In fact, Intervenors have already submitted voluminous written comments to EPA's ongoing revision effort, urging EPA to retain most of the 2020 Rule as written, and will no doubt continue to participate throughout the rulemaking process. Nothing forecloses EPA from adopting most of what Intervenors seek to revive via a stay, making their alleged APA injuries *by definition* not irreparable. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (the key word in the inquiry is "irreparable").

Nor are Intervenors entitled to defend the 2020 Rule on the merits in court. As discussed above, the judicial policy favoring agency remand inevitably means *some* party will be temporarily shut out of the courthouse. The choice of remanding a rule with or without vacatur allows courts to weigh the equities and decide the appropriate status quo while the agency acts on remand. *See Ford Motor Co.*, 305 U.S. at 373. Intervenors are not deprived of any statutory right and suffer no irreparable harm merely because they failed to establish that the equities favored their preferred regulatory environment while EPA conducts its rulemaking process.

Additionally, courts are not bound by the APA's notice-and-comment requirements when exercising the authority to remand agency rules. All of the cases cited by Intervenors suggesting a deprivation of APA process constitutes irreparable

harm involve actions by *agencies*, not the courts. Mot. 20-21. Moreover, and as the district court correctly pointed out, "the vacatur order did not substitute the 2020 Rule with a judicially manufactured replacement. It temporarily reinstated the 1971 rule that EPA employed for half a century" that was itself the result of notice-and-comment rulemaking. Stay Order 10-11. Intervenors' claims of APA harms are groundless.

Next, Intervenors' mere belief that harm to their "constitutional and sovereign interest[s]" will "assuredly return" without the 2020 Rule, Mot. 20-21, falls well short of establishing irreparable harm. Intervenors fail to identify a single planned project where such an abuse might currently arise. Nor do they cite to *any* case in which a court has found such a violation to have occurred in the more than fifty years Section 401 and its predecessor have been on the books. Such speculation utterly fails to meet the applicable standard requiring that the party seeking a stay "will" be injured, not just that injury is possible. *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017); *see also Herb Reed Enter., LLC v. Florida Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250-51 (9th Cir. 2013) (mere belief that injury might occur is insufficient to establish harm for preliminary injunction).

In the end, Intervenors suggest at most that they have "lost the Rule." Mot. 19. But this suggestion only shows how empty their assertions of harm are: because they cannot show concrete consequences flowing from vacatur, their only claimed harm

is that the Rule itself is gone. Such abstract interest in the existence of regulations that favor them is not irreparable harm.

B. Concerns About "Whipsawing" and "Regulatory Uncertainty" Are Too Speculative To Support a Stay

As the district court below found, Intervenors' hypothetical and highly speculative assertions about "whipsawing" and "regulatory uncertainty" fail to rise to the level of the concrete, well-articulated harms necessary to justify a stay. Stay Order at 10-12. Intervenors are forced to concede that the Army Corps' brief pause in processing certain permits was lifted weeks ago. Intervenors' Mot. 21. And their claim that general uncertainty will "deter" large projects fails on its face: the status quo to which the Remand Order returned is the same regime that successfully governed Section 401 for fifty years and under which thousands of massive infrastructure projects were completed. That regime is, in fact, much more familiar to regulated entities and certifying authorities than is the 2020 Rule. Watson Decl. ¶6. It is, therefore, no surprise that Intervenors fail to identify a single project that has been cancelled, significantly delayed, or otherwise jeopardized in any way since the Remand Order issued.

Moreover, any harms caused by whipsawing would be *worsened* by the issuance of a stay. It was EPA's promulgation of the 2020 Rule that dramatically broke with prior precedent. In fact, at least one of Intervenors' own regulatory agencies acknowledged the dysfunction and confusion caused by the 2020 Rule. *See,*

e.g., Letter from the Texas Commission on Environmental Quality regarding EPA's Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule[4] (identifying numerous deficiencies and explaining that the Rule "caused considerable implementation confusion" and "brought about the breakdown of a long-standing, formally established and cooperative process" between Texas and the Army Corps). Thus, and contrary to Intervenors, a stay of the Remand Order pending appeal would only exacerbate any "whipsawing" and resulting "regulatory uncertainty."

C. Alleged Economic Injuries Are Speculative and Insufficient to Establish Irreparable Injury

Because Intervenors fail to establish any real delay or significant uncertainty flowing from the Remand Order, their claims of economic injuries are "too speculative to rank as irreparable." Stay Order 11. But, even if returning to the pre-2020 Rule did impose some economic harm on Intervenors, such harms would not justify a stay because the cost of complying with a regulatory regime pending judicial review is ordinarily not irreparable injury. *State of Calif. v. Latimer*, 305 U.S. 255, 260 (1938).

Cases cited by Intervenors do not counsel otherwise and are distinguishable. In *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016), plaintiffs challenging an EPA

[4] Available at https://www.regulations.gov/comment/EPA-HQ-OW-2021-0302-0079 (last visited on Dec. 31, 2021).

"regional haze" rule established that, absent a stay, energy facilities would be required to either immediately begin installing costly new emissions controls or shutter their facilities completely. *Id*. at 433. In *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021), the challenged agency action halted the petitioner's ability to engage in e-cigarette sales altogether, eliminating 90 percent of its annual revenue and threatening its very existence. *Id*. at 1134. Intervenors present no such evidence here. They identify no modifications or alterations to any facility that would be required by the Remand Order or any existing permit that has been invalidated—including those issued under the 2020 Rule. In fact, Intervenors fail to identify any industry practice that would be halted or any expenditure that would be required above-and-beyond a vague and unsubstantiated claim that some projects "can" be "deter[red]." Mot. 22. There is no irreparable harm, and a stay should be denied.

III. HARMS TO PLAINTIFFS AND THE PUBLIC INTEREST WEIGH HEAVILY AGAINST A STAY

Because Intervenors fail to satisfy the likely-to-succeed and irreparable-harm requirements, the Court need not address the final two factors. *See Leiva-Perez*, 640 F.3d at 965. If the Court nonetheless addresses those factors—which are merged in this case, *East Bay Sanctuary Covenant*, 993 F.3d at 668—it should find that they weigh against a stay.

First, a stay would run counter to the "well-established 'public interest in preserving nature and avoiding irreparable environmental injury.'" *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008)). The record is replete with specific examples of the harms of leaving the 2020 Rule in effect—harms not controverted by Intervenors. To note one critical example among many, leaving the 2020 Rule in effect and allowing it to control certifications for the relicensing of hydropower dams on the Skagit River in Washington would cause increased water quality harms for decades. *See* Pl. States' Opp'n to Mot. for Remand, ECF#146 at 7. Plaintiffs also established myriad other harms, including frustration of efforts to:

> implement environmental protections to limit the water quality impacts of federally approved projects, such as hydropower projects and dams, on state natural resources and endangered species; ensure critical drought protections of water resources are put in place timely; and impose conditions required by state law on federal projects governed by Army Corps' nationwide permits, among others.

Pl. States' Opp'n to Mot. for Remand, ECF#146 at 22 (citing supporting declarations).

Second, Intervenors assert that the public interest supports a stay of the vacatur because of a purported "whipsawing caused by reinstatement of the prior rule." *See* Mot. 21, 24. They are incorrect. As described above, these claims are baseless, and reinstatement of the 2020 Rule would actually *increase* whipsawing and disruption. As noted, even states that are now seeking to keep the unlawful 2020

Rule in effect have noted its disruptive effects, thereby underscoring the conclusion that the public interest supports maintaining the vacatur. *See supra* n.4.

In sum, the Remand Order preserves the status quo by returning to a familiar and successful regulatory regime while EPA undertakes a new rulemaking. This familiar regime governed the application of section 401 certifications for decades. Intervenors' interests will continue to be protected in the interim as projects will be reviewed under well-established state, tribal, and federal processes, applicants may challenge certification decisions they believe are unlawful, and they may actively participate in the new rulemaking process. Given "the lack of harm to [Intervenors] from maintaining the status quo pending resolution of this appeal," and the serious risk of harm to the Plaintiffs and environment posed by the 2020 Rule, "the public interest favors preserving the status quo" and denying the requested stay. *Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020).

CONCLUSION

Intervenors' Stay Motion should be denied.

RESPECTFULLY SUBMITTED this 11th day of January, 2022.

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

This motion contains 5,459 words, excluding the parts of the motion exempted by Federal Circuit Rule 27(d), and accordingly complies with the length limit in Circuit Rule 27-1(d) and 32-3(2).

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

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

s/ Kelly T. Wood
KELLY T. WOOD
Date: January 11, 2022

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECT system on January 11, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: January 11, 2022.

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Nos. 21-16958; 21-16960; 21-16961
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Clean Water Act Rulemaking	**DECLARATION OF SCOTT E. SHEELEY IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO INTERVENORS-APPELLANTS' MOTION FOR STAY PENDING APPEAL**

DECLARATION OF SCOTT E. SHEELEY

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

1. I am the Chief Permit Administrator in the New York State Department of Environmental Conservation (DEC). I previously submitted a declaration in support of plaintiff-states opposition to defendants' motion in the U.S. District Court for the Northern District of California to remand, without vacating, the "Clean Water Act Section 401 Certification Rule" (the 2020 Rule). In that declaration, I described the harms that had been caused by the 2020 Rule, and the harms that would continue to occur if the 2020 Rule was left in place until 2023 while the U.S. Environmental

Protection Agency (EPA) considered how to revise it. I submit this declaration to describe the impacts of the District Court's order remanding and vacating the 2020 Rule (the Remand Order), and the adverse impacts that would result from a stay of the Remand Order pending appeal.

I. SUMMARY

2. For decades, DEC used its authority under section 401 of the Clean Water Act, 33 U.S.C.§ 1341, in conjunction with state administrative procedures and authority, to protect the physical, chemical, and biological health of New York's waterways and wetlands. EPA promulgated the 2020 Rule over the objections of the State of New York, and apparently without regard to how the 2020 Rule would impact state water quality and administrative procedures.

3. As explained in my prior declaration and in the declaration of DEC employee Corbin J. Gosier, the 2020 Rule created massive administrative confusion and increased administrative burdens for DEC employees who are responsible for reviewing the thousands of section 401 certification requests that DEC receives each year. Staff time that could have been devoted to other important program activities instead had to be devoted to complying with the burdensome and unnecessary requirements of the 2020 Rule, even after EPA announced its intent to revise the rule. Moreover, the narrow scope of certification unlawfully established by the 2020 Rule threatened DEC's ability to protect state water quality. Additionally, the 2020

Rule created confusion for applicants for section 401 certifications, resulting in unnecessary delay and additional – sometimes duplicative – work for applicants, the vast majority of whom are small business owners or homeowners unfamiliar with DEC's administrative processes.

4. After the District Court vacated the 2020 Rule, there was a short period of initial uncertainty as federal and state regulators determined the scope and effect of the Remand Order. However, DEC has now largely returned to familiar federal-state status quo that was in effect for almost 50 years prior to the issuance of the 2020 Rule. An order from this Court staying the Remand Order and reinstituting the 2020 Rule while EPA considers how to revise it will result not only in a return of the administrative and environmental harms caused by the 2020 Rule, but additional administrative confusion as the DEC must adjust to a temporary return to an administrative framework EPA intends to revise anyway.

II. PERSONAL BACKGROUND AND EXPERIENCE

5. I am the Chief Permit Administrator in DEC. Working in DEC's central office headquarters in Albany, New York, I am responsible for developing policy and guidance for the Division of Environmental Permits in the processing of environmental permit applications, including applications for Section 401 Water Quality Certification. Most permit applications are processed by the Division of Environmental Permits in DEC's regional offices, of which there are nine, each

supervised by a Regional Permit Administrator. I provide guidance on permitting matters to the nine Regional Permit Administrators, including guidance on the processing of applications for Section 401 Water Quality Certification.

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

7. I have been an employee of DEC since 1998, working in the Division of Environmental Permits as an Environmental Analyst since that time. I have worked 10 years in the DEC Region 3 office in New Paltz, New York, 11 years in the DEC Region 8 office in Avon, New York, and 2 years in the DEC Central Office in Albany, NY. Since 2003 I have also been designated as a Permit Administrator[1], with authority to review and issue decisions on all state environmental permits subject to the provisions of the New York State Uniform Procedures Act, including those applications processed by subordinate staff who are not designated as Permit Administrators. In addition to Section 401 Water Quality Certifications, environmental permits subject to the provisions of the New York State Uniform

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

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

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

401 Water Quality Certifications for regional and nationwide permits issued by the U.S. Army Corps of Engineers (Army Corps) under Section 404 of the Clean Water Act.

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

9. DEC generally issues permits, including Section 401 Water Quality Certificates, with conditions to assure compliance with regulatory standards. In rare situations, DEC denies permits and certifications when applicants do not provide all necessary information to evaluate the impacts on aquatic resources or when projects cannot meet regulatory standards.

10. DEC issues approximately 4,050 individual Section 401 Water Quality Certificates each year. Of the more than 4,000 section 401 certification requests DEC receives each year, the vast majority are for small-scale projects with relatively limited water quality impacts. Many applications received by DEC involve the concurrent review and issuance of permits and certifications using authority granted under state statutes (e.g., Environmental Conservation Law Article 15-Protection of Waters, Article 24-Freshwater Wetlands, or Article 25-Tidal Wetlands) and under federal statutes (e.g., Section 401 of the Clean Water Act). Additionally, most applicants are homeowners or other individuals with little experience with DEC's administrative process. Historically, the vast majority of section 401 requests have been granted within 60 days from receipt of a complete application.

11. During the almost 50 years between enactment of section 401 and the effective date of the 2020 Rule, DEC relied upon section 401 to ensure that applicants for federally licensed projects provided sufficient information to DEC to ensure that they would comply with state water quality requirements. DEC also relied upon section 401 to ensure that federally licensed projects would comply with conditions sufficient to protect state water quality.

12. The 2020 Rule upended the decades of administrative practice relied upon by DEC, creating confusion and duplicative work for applicants and administrative burdens for DEC, while simultaneously weakening DEC's ability to ensure that federally licensed projects would comply with state water quality laws and requirements.

13. In July 2021, EPA announced its intent to revise the 2020 Rule, but asked the District Court to leave the 2020 Rule in effect until a new rule was promulgated, which EPA projected would not occur until Spring 2023. However, leaving the 2020 Rule in effect for almost two years while EPA decided how to revise it would have led to a host of administrative and environmental harms, which are described in my prior declaration.

IV. EFFECT OF THE REMAND ORDER

14. On October 21, 2021, the District Court vacated the 2020 Rule and remanded the matter to EPA.

15. Following the District Court's issuance of the Remand Order, DEC initially sought to obtain clarity regarding the effect of the Remand Order and the federal regulations currently applicable to CWA 401 requests. Following EPA's announcement that it considered the 2020 Rule to no longer be in effect, DEC worked to return to the processes under the pre-2020 status quo that had existed for almost 50 years prior to the 2020 Rule.

16. Also following the District Court's issuance of the Remand Order, I was notified by the Army Corps that they were temporarily pausing their review of Section 404 Nationwide Permit verifications for projects relying on CWA 401 certifications issued by states during the period the 2020 rule was in effect while they sought clarification on the effects of the Remand Order. I was then notified on November 19, 2021 that the Army Corps Buffalo and New York Districts had resumed processing Section 404 Nationwide Permit verifications.

17. Although the Remand Order initially required clarification from EPA and the Army Corps and created some uncertainty at DEC, this uncertainty was temporary, short-lived, and minor when compared to the administrative chaos created for over 11 months by the 2020 Rule. Additionally, whatever short-lived uncertainty the Remand Order may have created, the overall effects of the Remand Order have been to simplify procedures and to restore adequate protections for water quality.

18. DEC has now almost entirely returned to the familiar, pre-2020 status quo for processing of CWA 401 certification requests. This process is more efficient and better protects water quality than the processes created by the 2020 Rule. Any re-institution of the 2020 Rule at this point will only create additional procedural confusion and uncertainty for both certifying authorities like DEC and for applicants. It would also re-institute the other substantive harms created by the 2020 Rule. Moreover, EPA has already announced its intent to replace the 2020 Rule, meaning DEC will need to adjust to yet another shift in the governing regulations when the new regulation is promulgated.

V. CONCLUSION

19. The 2020 Rule created huge administrative burdens for DEC and for the vast majority of CWA 401 applicants. Whatever small, short-term uncertainty was created when the District Court vacated the 2020 Rule, it is far outweighed by the overall administrative and environmental benefits of returning to the pre-2020 status quo, which had been in effect for almost 50 years. This Court should not resurrect the 2020 Rule by staying the Remand Order.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed on January 11, 2022.

Signature: Scott E. Sheeley

Printed name: Scott E. Sheeley
Address: NYS DEC, 625 Broadway, Albany, NY 12233
Phone Number: 518-402-2125

Nos. 21-16958; 21-16960; 21-16961
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Clean Water Act Rulemaking	**DECLARATION OF LAURA WATSON IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO INTERVENORS-APPELLANTS' MOTION FOR STAY PENDING APPEAL**

DECLARATION OF LAURA WATSON

I, Laura Watson, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

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

2. I am the Director of the Washington State Department of Ecology and have held this position since January 8, 2020. Before that, I was the Division Chief of the Ecology Division of the Washington State Attorney General's Office for five years and legal counsel to the Department of Ecology as an

Assistant Attorney General for a total of sixteen years. I've worked on Clean Water Act and Section 401 issues for most of my career.

3. The Department of Ecology (Ecology) is the certifying agency in Washington state under Section 401 of the U.S. Clean Water Act. As such, Ecology reviews and approves, approves with conditions, or denies proposed projects, actions, and activities directly affecting waters of the United States. Ecology receives Section 401 requests daily, typically four hundred per year.

4. For roughly 50 years between the time Section 401 was enacted and the issuance of the "Clean Water Act Section 401 Certification Rule" (2020 Rule), Ecology relied on Section 401, in conjunction with state laws, to protect Washington's waterways by applying key environmental protections to proposed federally licensed projects. Ecology's Section 401 Policy Lead, Loree' Randall, explained in detail in Ecology's prior declaration[1] how the Environmental Protection Agency's 2020 Rule upended longstanding 401 certification practice and caused significant harms to Washington State, its residents, and its waters.

[1] Declaration of Loree' Randall in Support of Plaintiff-States Opposition to Defendant's Motion to Remand Without Vacating the 2020 Rule, ECF #146-2.

5. For instance, the 2020 Rule dramatically narrowed the scope of water quality impacts that Washington could look at and attempt to address in reviewing project proposals; shortened timeframes for review; limited the amount of information Ecology could seek from project proponents; caused significant internal procedural changes; strained agency resources; and removed key provisions, weakening Ecology's ability to ensure federally permitted or licensed projects would comply with state water quality requirements.

6. Following the district court's remand order vacating the 2020 Rule, Ecology returned to the pre-2020 regulatory framework that successfully governed Section 401 practices for half a century. Ecology processed thousands of large-scale projects under this prior framework, making it much more familiar to Ecology than the 2020 Rule.

7. If this court grants a stay of the remand order, substantial confusion, wasted resources, enormous administrative burdens and overall uncertainty would result. Ecology would be forced to again abruptly shift administrative procedures while at the same time enduring the well-documented inefficiencies and environmental injuries the 2020 Rule imposed—all to reverse course yet again when EPA revises the rule in 2023. Staying the course now until EPA promulgates a new rule would be least disruptive, and would avoid forcing

states, applicants, and other permitting agencies to once again grapple with the upheaval and administrative chaos the 2020 Rule caused.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and this declaration was executed on January 10, 2022.

Signature: s/ Laura Watson
Printed name: Laura Watson
Address: 300 Desmond Drive SE, Lacey, WA 98503
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