No. _____

In the Supreme Court of the United States

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

APPENDIX TO APPLICATION FOR STAY PENDING APPEAL
VOLUME III OF IV

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

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

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TABLE OF CONTENTS

Volume I

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

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

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

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

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

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

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

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

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

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

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

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

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

Volume II

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

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

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

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

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

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

Volume III

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

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

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

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

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

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

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

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

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

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

Volume IV

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

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

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

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

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: Clean Water Act Rulemaking

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

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

INTERVENOR DEFENDANTS' SUPPLEMENTAL BRIEF ON *ALLIED-SIGNAL* FACTORS

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INTRODUCTION

The Plaintiffs want this Court to strike down EPA's 2020 Clean Water Act Section 401 Certification Rule. But to get that extraordinary relief, they must prove that EPA acted arbitrarily, capriciously, or contrary to law when promulgating the Rule. EPA, for its part, wants to revisit the policy decisions reflected in the Certification Rule. But to change the Rule at all, EPA must go through notice and comment rulemaking. The fact that Plaintiffs and EPA want these things at the same time does not relax their respective burdens before this Court.

Plaintiffs in these consolidated actions have not met the exacting burden for vacating the Certification Rule. EPA has not confessed error or admitted that any aspect of the Rule is legally deficient, and the Intervenor Defendants continue to defend every aspect of the Rule in any event. The Court has not received full merits briefing and has made no adjudication of error. If the *Allied-Signal* test is applicable at all in this scenario—and it is not—Plaintiffs must show at the very first step of that test that there is some legal deficiency serious enough to justify the disruptive consequences of vacatur. The abbreviated discussion of the merits in Plaintiffs' responses to EPA's motion to remand without vacatur presents only a limited engagement with *some* of the many features of the Certification Rule and relies on the incorrect premise that EPA has conceded the Rule is unlawful. It falls well short of the predicate necessary to justify vacating agency action. Plaintiffs have not fully briefed any aspect of the Rule, let alone all of the Rule's many complicated, detailed provisions and how Plaintiffs believe a severability analysis should apply here.

The disruption that vacatur of the Rule would wreak on many states and the regulated community is profound. EPA promulgated the Certification Rule to fill a regulatory void that has existed for nearly 50 years. The absence of clarity about basic features of the section 401 certification process spawned a series of abuses that distorted the cooperative-federalism framework on which the Clean Water Act depends. Vacating the Rule would invite the return of those abuses and cast substantial uncertainty over dozens of pending certification requests and the processes states have implemented in the wake of the Certification Rule. That uncertainty will lead inexorably to regulatory chaos, which will trigger needless litigation.

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The states of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming (collectively the "State Defendants"), American Petroleum Institute ("API"), Interstate Natural Gas Association of America ("INGAA"), and National Hydropower Association ("NHA") (collectively "Intervenor Defendants") intervened in this case because they have substantial interests that would be impaired should the Rule be vacated. Vacating the Rule without holding Plaintiffs to their well-established burden as challengers to agency action would violate Intervenor-Defendants' basic right as a party in civil litigation—the right to be heard on the merits of the dispute and put Plaintiffs to their proof. Plaintiffs' request for vacatur should be denied.

BACKGROUND

A. Clean Water Act

Since 1970, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91, 108 (Apr. 3, 1970). In 1972, Congress enacted the Clean Water Act ("CWA"), a "total restructuring" and "complete rewriting" of the nation's water pollution control laws, including the provision requiring certification. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U.S.C. § 1341). Of particular relevance here, Congress narrowed the certification requirement from "*activity* [that] will be conducted in a manner which will not violate applicable *water quality standards*," 84. Stat. at 108 (emphases added), to a certification only "that any such *discharge* will comply with *the applicable provisions of sections 301, 302, 306, and 307 of this Act*," 86 Stat. at 877 (emphases added). Congress also created a prominent role for states and tribes in implementing the new regulatory program. *See* 33 U.S.C. 1251(b).

The CWA uses a "cooperative federalism" approach to achieve its aims. It carves out complementary roles for federal agencies, on the one hand, and states and tribes, on the other. CWA Section 401 gives each state and tribe an important but limited say in the licensing of federal

projects that could affect water quality. Specifically, federal agencies cannot license activities that may result in a discharge into waters of the United States until the state or authorized tribe where the discharge would originate certifies that the discharge will comply with applicable water quality requirements or waives the Section 401 requirement, either affirmatively or through inaction. 33 U.S.C. § 1341. Section 401 authority is powerful—when triggered, state certification or waiver is an essential requirement for the federally-licensed activity to proceed. But to preserve the CWA's federal-state balance, that authority is also limited—Section 401 only authorizes states to address water quality, and only within reasonable time limits that can never exceed one year.

B. Certain States Abused Their Section 401 Certification Authority

Despite the statutory change in 1972, EPA failed to revise its prior regulations, promulgated in 1971, that governed the certification process, which is known as a 401 Certification. As a result, for nearly fifty years, EPA's regulations were incongruent with the new statutory language. *Cf.* NPDES; Revision of Regulations, 44 Fed. Reg. 32,854, 32,856 (June 7, 1979) (indicating need for updated certification rules). Certain states began using the incongruity and ambiguities in EPA's prior regulations effectively to veto projects based on non-water quality considerations, such as preferences regarding energy policy, which infringes on the federal government's exclusive authority.

A particularly egregious example is Washington State's treatment of the Millennium Bulk Terminals – Longview LLC project. In the course of a five-year review of the project, the State compiled an Environmental Impact Statement that expressly concluded that the terminal would not result in significant adverse effects on water quality, aquatic life, or designated uses; and that any potential water quality impacts could be fully mitigated. Ex. 1, Joint Fuel & Petroleum Industry Comments To Clean Water Act Section 401 Rule. And yet, the State denied the certification request based on concerns about capacity of the interstate rail system, the impact of trains operating anywhere in that system, and impacts on the overall capacity of the Federal Columbia River Navigation Channel to accommodate additional vessels at state ports. *Id.*

Other examples abound in the administrative record. In December 2017, Virginia approved a water quality certification for the Atlantic Coast Pipeline, a $5.1 billion pipeline project that

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would transport gas produced in the Marcellus Shale region to the Mid-Atlantic region of the United States. Dreskin Decl. ¶ 13 (Dkt. 56-2). Virginia then included conditions regulating activities in upland areas that may indirectly affect state waters beyond the scope of federal CWA jurisdiction and the project's direct discharges to navigable waters. *Id.* According to Virginia, "all proposed upland activities associated with the construction, operation, maintenance, and repair of the pipeline, any components thereof or appurtenances thereto, and related access roads and rights-of-way," are subject to the stringent conditions of the certification. *Id.* Another example took place in August 2020, when North Carolina denied water quality certification for Mountain Valley Pipeline Southgate, one of INGAA's members, for reasons outside of water quality. *Id.* ¶ 14. The State determined that the purpose of the project was "unachievable" due to the "uncertainty" of completing a different pipeline project even though FERC had determined that the public convenience and necessity required approval of the $468 million, 75-mile natural gas pipeline project. *Id.*

States have also unlawfully exploited the regulatory ambiguity to extend the amount of time they have to act on a certification request, which can effectively kill a project. One example is the Constitution Pipeline, a $683 million, 124-mile natural gas pipeline designed to connect natural gas production in Pennsylvania to demand in northeastern markets. Dkt. 84-1 ¶ 12. The New York State Department of Environmental Conservation ("NYSDEC") requested additional information and deemed the request complete in December 2014. *Id.* In April 2015, NYSDEC requested that the API member withdraw and resubmit its request in order to restart the statutory period of time that NYSDEC had to act on the request. *Id.* In April 2016, nearly three years after the project's initial request for certification, NYSDEC denied water quality certification. Following litigation over NYSDEC's determination, Federal Energy Regulatory Commission ("FERC") determined in August 2019 that NYSDEC had waived the Section 401 certification requirement. *Id.* Nevertheless, after years of delay, the project's sponsor halted investment in the pipeline and cancelled the project in February 2020. *Id.*

The Millennium Pipeline Company faced a similar roadblock when it submitted a certification request to NYSDEC for the Millennium Valley Lateral project, a 7.8-mile pipeline

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connecting a natural gas mainline to a new natural gas-fueled combined cycle electric generation facility in New York. *Id.* ¶ 13. Nearly two years after the project's initial request for certification, NYSDEC denied certification on the grounds that FERC's environmental review of the project lacked an adequate analysis of the potential downstream greenhouse gas emissions, not water quality concerns. *Id.* In September 2017, FERC concluded that NYSDEC's twenty-one-month delay constituted waiver of the certification requirement, and the Second Circuit agreed. *See N.Y. State Dep't of Env't Conservation v. Fed. Energy Regul. Comm'n*, 884 F.3d 450 (2d Cir. 2018).

A number of courts have recognized that allowing states to delay the start of the period of review violates the CWA's plain text. The Second Circuit concluded that the CWA creates a "bright-line rule" that the "receipt" of a Section 401 request is the beginning of the state's one-year period for review. *Id.* at 455. As the D.C. Circuit explained, "the purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). The D.C. Circuit thereafter invalidated the process of withdrawing and refiling the same Section 401 request in order to restart the review period. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

C. EPA Adopts The Section 401 Certification Rule

An update to the 1971 regulations was necessary to conform the regulations to the 1972 CWA amendments and to provide necessary clarity and transparency that would also remedy the abuses described above. 85 Fed. Reg. 42,210 (July 13, 2020). EPA explained that "[t]he Agency's longstanding failure to update its regulations created the confusion and regulatory uncertainty that were ultimately the cause of those controversial section 401 certification actions and the resulting litigation." 85 Fed. Reg. 42227. In particular, EPA cited the D.C. Circuit and Second Circuit decisions discussed above as recognizing that allowing states to extend their review beyond one year is contrary to the CWA. *Id.*

The Rule fixes these problems. The Rule begins by defining fourteen key terms, most of which are not defined in the Clean Water Act. 40 C.F.R. § 121.1; *see also* 85 Fed. Reg. at 42237

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(describing the need for definitional clarity achieved through EPA's rulemaking process). The Rule then reaffirms EPA's longstanding interpretation of when a water quality certification is required under Clean Water Act section 401. 40 C.F.R. § 121.2; 85 Fed. Reg. 42237 ("Section 121.2 of the final rule is consistent with the Agency's longstanding interpretation and is not intended to alter the scope of applicability established in the CWA."). The Rule sets out the scope of certification, as developed through the rulemaking process. 40 C.F.R. § 121.3. The Rule provides a procedure to ensure meaningful coordination occurs between project proponents and state and tribal certifying authorities before the certification process even begins. 40 C.F.R. § 121.4 (Pre-filing meeting request). The Rule lays out a uniform procedure for establishing the reasonable period of time for states and tribes to act on a certification request, clear rules for when that period of time begins and ends, and a procedure for communicating to all parties when the period of time begins and ends. 40 C.F.R. §§ 121.5–9. The Rule requires an action on a certification request, whether it is a grant, grant with conditions, or a denial of certification, to be in writing and to contain certain information that explains the state or tribe's action. 40 C.F.R. § 121.7; 85 Fed. Reg. 42256 (explaining that such requirements are intended to promote the development of comprehensive administrative records for certification actions and to increase transparency). The Rule describes the effect of certain actions and explains how waiver of the certification requirement can occur proactively or by operation of law. 40 C.F.R. §§ 121.8–9. The Rule also provides a procedure for neighboring jurisdictions to participate in the certification process, as required by the Clean Water Act, 40 C.F.R. §§ 121.12; describes how certification conditions are to be enforced, 40 C.F.R. §§ 121.11; and describes EPA's role as a certifying authority and advisor, 40 C.F.R. §§ 121.13–16.

D. Plaintiffs Bring This Lawsuit, EPA Moves To Remand Without Vacatur, And Then Plaintiffs Ask This Court To Vacate The Rule.

Plaintiffs are three groups who filed complaints in this Court: Idaho Rivers United, American Rivers, California Trout, and American Whitewater (collectively "Plaintiff American Rivers"), Dkt. 75; twenty states and the District of Columbia (collectively "Plaintiff States"), Dkt. 96; and Columbia Riverkeeper, Sierra Club, Suquamish Tribe, Pyramid Lake Paiute Tribe,

Orutsaramiut Native Council (collectively "Plaintiff Tribes"), Dkt. 98. Intervenor Defendants moved to intervene to defend the Rule, Dkt. 27, and this Court granted their motions, Dkt. 62.

On January 20, 2021, President Biden directed "all executive departments and 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" the new Administration's objectives. EO 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021). In a press statement the same day, the Administration identified the Certification Rule as among those that would be reviewed under President Biden's Executive Order.[1]

On June 2, 2021, EPA pointed to the Executive Order and announced it intended 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. 29541 (June 2, 2021). EPA then moved for remand without vacatur in this case, Dkt. 143 at 2, among others. Although EPA noted "substantial concerns" with some portions of the Rule, EPA made clear that it was not confessing error. *Id.* at 13. Without filing a motion of their own, Plaintiffs argued for vacatur in their oppositions, while failing to meaningfully discuss most aspects of the Rule. *See generally* Dkts. 145–47.

ARGUMENT

I. Plaintiffs Are Not Entitled To Vacatur Because They Have Utterly Failed To Show That They Satisfy The First *Allied-Signal* Factor

A. Plaintiffs Failed To Establish The Necessary Legal Predicate For Application Of The First *Allied-Signal* Factor, Rendering Such Relief Unavailable

Plaintiffs failed to establish the predicate for vacatur and thus the application of the first *Allied-Signal* factor—that the rule is, in fact, unlawful—and thus their request for vacatur should be denied on that basis alone. The first *Allied-Signal* factor asks how "serious[ ]" the agency's errors are. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). This assessment of error can only logically occur after a court has concluded that a legal error has occurred. *See id.* (applying the two-factor test after determining that the agency acted

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

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without "reasoned decision-making"); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (same). And there is good reason for that well-established approach. Vacating a rule prior to adjudicating the merits affords plaintiffs complete relief without ever proving the merits of their case, while also circumventing the Administrative Procedure Act's ("APA") notice-and-comment requirements for repeal of a rule. *See Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) ("[G]ranting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits."); *accord Maine v. Wheeler*, No. 1:14-cv-00264-JDL, 2018 WL 6304402, at *3 (D. Me. Dec. 3, 2018); *California v. Regan*, No. 20-cv-03005-RS, 2021 WL 4221583, at *1 (N.D. Cal. Sept. 16, 2021) ("there has been no evaluation of the merits—or concession by defendants—that would support a finding that the rule should be vacated"). And unlike the cases that Plaintiffs cite to advocate that vacatur before full adjudication on the merits is permissible, *see* Dkts. 146 at 19, 147 at 2–3, here there remains a live controversy between the parties regarding the legality of the Rule because Intervenor Defendants would vigorously defend every aspect of the Rule from legal challenge.

To the extent that it ever would be appropriate for a court to vacate a rule that a party in the case is defending on the merits without issuing a decision on the rule's legality—and to be clear, it would *never* be permissible—that type of relief could only be ordered after full merits briefing. To illustrate, the district court in *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, __ F. Supp. 3d __, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021), vacated a rule without making a merits determination on the rule's legality,[2] but at least in that case the plaintiffs submitted a full 61-page

[2] The *Pascua Yacqui Tribe* court observed that two Ninth Circuit cases indicate that "in the Ninth Circuit, remand with vacatur may be appropriate even in the absence of a merits adjudication." *Pascua Yaqui Tribe*, 2021 WL 3855977 at *4 (citing *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012); *Safer Chemicals, Healthy Fams. v. EPA*, 791 F. App'x 653 (9th Cir. 2019)). But both of those Ninth Circuit cases involved different circumstances than those presented here. In *California Communities Against Toxics*, no party defended EPA's reasons for adopting the rule as legally permissible, with EPA seeking to salvage the rule based on new reasoning not found in the administrative record, 688 F.3d at 993, which it cannot do, *see id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Similarly, in *Safer Chemicals*, EPA asked for remand with vacatur, thus conceding the rule was unlawful, and no party opposed such relief. 791 F. App'x at 656.

merits brief, *see* No. CV-20-00266-TUC-RM, Dkt. 48, and intervenor-defendants submitted a response in support of the rule, *see id.* Dkt. 77. The court considered all of these fully briefed and developed merits arguments and only then concluded that there were serious errors on the first *Allied-Signal* factor, finding "fundamental, substantive flaws." *Pasqua Yaqui Tribe*, 2021 WL 3855977, at *5. Here, on the other hand, as discussed in more detail below, Plaintiffs have not fully briefed any aspect of their legal challenges to the Rule, let alone all of the Rule's many complicated, detailed provisions and how they would approach the issue of severability.

B. The Limited Discussion of the Merits That Plaintiffs Submitted Is Insufficient For This Court To Hold That Any Aspect Of The Rule Is Unlawful Under The First *Allied-Signal* Factor, Let Alone That The Entire Rule Is Unlawful

Plaintiffs have failed to present to this Court anything resembling a developed argument as to why any aspect of the Rule fails on the first *Allied-Signal* factor, which provides an independently sufficient basis for denying their request. In particular, the State Plaintiffs do not develop any argument that any aspect of the Rule is unlawful, instead claiming that EPA, as a general matter, admitted the Rule's illegality in various statements. *See* Dkt. 146 at 20–21. The Tribes Plaintiffs, in turn, also fail to develop any argument that the Rule is unlawful, merely listing three general considerations—"(1) the agency failed to provide sufficient justification for departing from a half century of practice and policy related to the interpretation and implementation of Section 401; (2) it based its decision to do so on an [Executive Order] aimed at promoting fossil fuel infrastructure, not clean water; and (3) EPA did not present any explanation for how the [ ] Rule would be more protective of water quality," Dkt. 145 at 12—and then parroting the Plaintiff States' claim that EPA somehow admitted these errors, Dkt. 145, at 12–13. American Rivers Plaintiffs do make a few brief arguments on a couple of aspects of the Rule, Dkt. 147 at 4–10, while pointing to the same claimed concession by EPA, *see* Dkt. 147 at 9, 10, but such perfunctory analysis is nowhere near developed enough for this Court to make any judgment as to the Rule's legality.

As a threshold matter, all of these Plaintiffs are simply wrong that EPA conceded the Rule's illegality, and any such concession would be legally insufficient in any event, given that Intervenor Defendants are parties in this case and defend fully every aspect of the Rule. EPA has

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unequivocally denied that it made any concession. *See generally* Sept. 30, 2021 Hr'g. Instead, EPA merely stated that it "will undertake a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule." Dkt. 143 at 2, *see id.* at 7, 8; *see* Dkt. 155 at 2–3. EPA could not in fact concede anything as to the Rule's legality without violating the APA. EPA is currently in the middle of its rulemaking process, Dkt. 153 at 2; *see* Dkt. 155 at 3, during which process the agency must keep an open mind on all issues, including as to whether to retain the entire Rule, *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); Dkt. 155 at 2–3.

Plaintiffs also failed to satisfy the first *Allied-Signal* factor because the few merits arguments that they briefly mention are mismatched entirely with the full vacatur remedy that they seek. The Rule is complex and multifaceted, with many operative provisions that cover numerous topics. *See supra* pp. 6–7. Plaintiffs assert that the errors in the Rule are significant, but their arguments only touch on a few discrete sections, which Plaintiffs discuss out of context, Dkt. 146 at 20–21, or only offer passing speculative harms, rather than cite to actual alleged legal errors in the Rule, Dkt. 146 at 4–14. At most, Plaintiffs address a fraction of the Rule's provisions, cherry-picking from EPA's statements in its briefing rather than the Rule itself, *see* Dkt. 146 at 20–21, and vaguely alluding to "other detrimental provisions" without any elaboration, *see, e.g.*, Dkt 146 at 7. Plaintiffs also fail to provide any severability analysis, which would be mandatory if Plaintiffs want this Court to vacate the entire Rule. *See Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 351–52 (D.C. Cir. 2019). For example, Plaintiffs do not even attempt to argue that EPA "would [not] have adopted" the various aspects of the Section 401 Rule if some other aspects were declared invalid. *Id.* Courts, after all, must ordinarily "limit the solution to the problem" that the plaintiff has demonstrated. *See Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 82 (D.C. Cir. 2020) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006)).

The same conclusion follows if this Court looks at the specific, brief arguments that the various Plaintiffs groups included in their vacatur requests.

The State Plaintiffs make no substantive argument with regard to the legality of any aspect of the Rule. *See generally* Dkt. 146.

The Tribes Plaintiffs' one-paragraph merits "argument" is conclusory and without merit.

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See Dkt. 145 at 11–12. The Tribes Plaintiffs make broad claims about the Rule's "serious legal errors," namely that the Rule "runs afoul" of the CWA's text, purpose, and "cooperative federalist framework" without developing these claims beyond a brief description of the Rule's purported effect. Dkt. 145 at 11–12. Such an undeveloped argument fails. *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 570 (9th Cir. 2018) ("Inadequately briefed and perfunctory arguments are [ ] waived."); *Wells Fargo Bank, N.A. v. Renz*, 795 F. Supp. 2d 898, 911 (N.D. Cal. 2011). Notably, EPA addressed concerns related to these issues in the Rule's preamble. *See* 85 Fed. Reg. 42226 (responding to public comments that the "rule is inconsistent with the concept of cooperative federalism"), *id.* at 42228–29 (responding to public comments about the Rule's adherence to the statutory text and outlining the scope of EPA authority to clarify the statute), *see also* 42215 (listing the changes made to the proposed Rule after consideration of public comments). The Tribes Plaintiffs do not even attempt to explain what aspect of EPA's discussion was legally incorrect with any sufficient clarity to allow Defendant Intervenors to address that argument, or for this Court to evaluate whether that argument carries the day under the first *Allied-Signal* factor.

The American Rivers Plaintiffs, in turn, offer various critiques of the Section 401 Rule that are too conclusory and meritless to prevail under the first *Allied-Signal* factor.

These Plaintiffs' attack on the Rule's scope of certification is insufficiently developed for this Court to evaluate this aspect of the Rule's legality and, in any event, is wrong. *See* Dkt. 147 at 5–7. They argue that the Rule's scope of certification "is inconsistent with the Clean Water Act" and that the definitions of "discharge" and "water quality requirements" "bear little resemblance to how the Clean Water Act defines those terms." Dkt. 147 at 5–7. But the Clean Water Act does not provide "a single, clear, and unambiguous definition of the appropriate scope of section 401" and Section 401 does not define the terms "discharge" or "water quality requirements," eliminating any possible direct inconsistencies. 85 Fed. Reg. 42250. Moreover, the Rule's scope of certification and related definitions were drafted to "reasonably resolve any ambiguity" in the statute, after taking into consideration "the text and structure of the Act, as well as the history of modifications between the 1970 version and the 1972 amendments." *Id.* The Rule was developed after consideration of all public comments, including "varying interpretations" described in the

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preamble. *Id.* at 42256. The final definition of "water quality requirements" "strikes a balance among various competing considerations while remaining loyal to the text of the CWA" and with an intent to "provide additional clarity and regulatory certainty for certifying authorities, project proponents, and federal licensing and permitting agencies." *Id.* EPA fully and correctly engaged with the text and history of the Act with regard to the Section 401 certification process. *See* 85 Fed. Reg. 42229–30 (describing the scope of certification under the Rule in the context of the CWA's text and history), *id.* at 42230–36 (engaging in a plain text analysis of the statute and showing how the definitional clarifications in the Rule are supported by the ordinary meaning of the text); *see also* 40 C.F.R. §§ 121.2–121.11 (laying out the uniform set of certification procedures). These Plaintiffs do not explain what aspect of EPA's discussion or legal conclusions were legally insufficient. Their arguments fail to offer any concrete reasoning, and, therefore, are not sufficiently developed. *See Cal. Pac. Bank*, 885 F.3d at 570; *Renz*, 795 F. Supp. 2d at 911.

The American Rivers Plaintiffs claim that the Rule is unlawful because it limits states and tribes to considering potential impacts of only the "discharge" from a proposed project, rather than "the activity as a whole," pointing to *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)*; see* Dkt. 147 at 5–7. As EPA explained in the Rule preamble, in 1972 Congress replaced the word "activity" in section 401(a) with the word "discharge" to reflect the "total restructuring" and "complete rewriting" of the statutory framework to regulate discharges under the Clean Water Act. 85 Fed. Reg. 42251. "The final rule gives due weight to Congress' intentional choice to change the language in section 401(a) to ensure that 'discharges' from federally licensed or permitted activities, rather than the activity as a whole, comply with appropriate water quality requirements." *Id.* EPA concluded in the Rule preamble that the text of section 401 is not unambiguous and that "the variation in public comments received" demonstrates that "section 401 is susceptible to a multitude of interpretations." *Id.* Further, as described in the Rule's preamble, the Supreme Court in *PUD No. 1* analyzed section 401 and EPA's prior regulations and concluded, based on its interpretation, that certification conditions and limitations could be based on the activity as a whole, not just the discharge. 85 Fed. Reg. 42251. The American Rivers Plaintiffs appear to believe that the Supreme Court's decision was based on a plain language

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analysis of the Clean Water Act, such that EPA would have no authority to interpret this language. But "[n]owhere in the opinion does the Court conclude that section 401 is unambiguous. In fact, the Supreme Court in *PUD No. 1* offered its own interpretation of the ambiguous language in section 401 when it 'reasonably read' the scope of section 401 to allow conditions and limitations on the activity as a whole." *Id.* EPA also noted that the Court "found the EPA's regulations to be consistent with the Court's own reasonable reading of the language in sections 401(a) and (d)." *Id.* These Plaintiffs assert that *PUD No. 1* is "binding," Dkt. 147 at 5, but fail to acknowledge that EPA analyzed applicable law and concluded that the scope of certification established in 40 C.F.R. § 121.3 "is not foreclosed by the holding in *PUD No. 1"* because the Court's conclusion "did not follow from the unambiguous terms of the statute," and thus the agency could use its delegated rulemaking authority to adopt a different approach, 85 Fed. Reg. 42251.

The American Rivers Plaintiffs' limited argument that the Rule limits or circumscribes states' abilities to implement their certification programs is meritless. The American Rivers Plaintiffs offer no support for their sweeping assertion that the Rule "impermissibly intrudes on the states' and tribes' ability to effectively manage their 401 certification programs and meaningfully review federally licensed projects." Dkt. 147 at 7–9. As such, this perfunctory argument is also waived. *See Cal. Pac. Bank*, 885 F.3d at 570; *Renz*, 795 F. Supp. 2d at 911. In any event, Plaintiff American Rivers' discontent with the procedures set out in the Certification Rule is just that—subjective discontent. But nothing suggests that these procedures are illegal. The Certification Rule simply establishes predictable and consistent procedures for certification processes, regardless of what state or tribe is issuing certification. EPA explained in the Rule preamble, "[a]s the Agency charged with administering the CWA, as well as a certifying authority in certain instances, the EPA is responsible for developing a common regulatory framework for certifying authorities to follow when completing section 401 certifications." 85 Fed. Reg. 42211 (footnote omitted). Throughout the Rule preamble, EPA provides legal rationale and support for each of the procedures that the American Rivers Plaintiffs complain are illegal, but the Plaintiffs do not acknowledge let alone rebut EPA's analysis or conclusions. *See, e.g.*, 85 Fed. Reg, 42240–43 (explaining the basis for a pre-filing meeting request and responding to public comments concerning same); 42243–49

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(explaining the rationale for establishing a specific set of information to be included in a certification request; the statutory basis for starting the reasonable period of time "upon receipt" of a certification request; and responding to public comments concerning same); 42258–63 (explaining the timeline for certification actions; concluding that federal permit and licensing agencies "should continue to [establish the reasonable period of time] as they have done for the past several decades"; explaining the factors that must be considered when establishing the reasonable period of time; providing federal agencies maximum flexibility in establishing the reasonable period of time by declining to adopt a default reasonable period of time of six months; explaining procedures for requesting an extension of the established reasonable period of time; explaining that the Clean Water Act does not contain any provisions for tolling the reasonable period of time for any reason; providing legal citations to applicable case law; responding to public comments concerning same).

II. Vacating The Rule Would Cause Significant Disruption To Pending Section 401 Reviews

The Certification Rule fills a gaping regulatory void. It sets basic rules for the section 401 process, including a common rule for defining when the clock starts on a state's reasonable period of time to act on a certification request and procedures for establishing how much time is reasonable. And critically, it more clearly defines the scope of authority granted by Congress in section 401, so that section 401 cannot be used by states to make policy decisions squarely reserved to the federal government and thereby impair the interests of other states. Vacating the rule would eliminate these salutary improvements and return to the dysfunction fostered by EPA's decades-long failure to set basic rules for the section 401 process.

Most problematic is the interstate conflict that a return to the old regime is sure to foster. Before the Certification Rule, some states—including some Plaintiff States—used the prior outdated rules to exert control over activities in other states and to protect their own industries.[3]

[3] The abuses under the prior rule raise issues of constitutional magnitude. Indeed, "[o]ne of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). A particular "source of

See, e.g., Lighthouse Resources Letter (Dkt. 27-7 at 1–4). Even when states did not outright deny section 401 certifications, they imposed uncertainty, never-ending demands for information, interminable delays, and conditions unrelated to the discharges actually regulated by the CWA. The result was to greatly increase the cost of some interstate projects and fully defeat others, with attendant harms to other states' economies and ability to develop their natural resources. *See* Rorick Decl (Dkt. 56-1); Dreskin Decl. (Dkt. 56-2). Curbing such abuses is a core benefit of the Rule. There is no reason to think the abuses won't return if the Certification Rule is vacated.[4]

More practically, the Rule would upend the substantial progress made by states and federal agencies to improve the section 401 process in the wake of the Certification Rule. Reinstating the prior rule would result in substantial disruption from general whipsawing of both regulators and regulated entities. Ex. 2, Declaration of David M.S. Dewhirst ¶ 8. Such uncertainty and the attendant risk of delay deters large capital projects that benefit the Intervenor Defendant States economically and, indeed, which are necessary for the development of their natural resources. *Id.* ¶¶ 7-9. And that is without even considering the likely return of the outright abuses the Certification

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dissatisfaction was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, [through] whose ports, their commerce was carryed on." *Id.* (quoting Records of the Federal Convention of 1787 (M. Farrand ed. 1966)). "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542 (2015) (citations omitted); *see also Tenn. Wine and Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2459 (2019) ("[W]e have long held that this Clause also prohibits state laws that unduly restrict interstate commerce[.]"); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 545 (1949) (holding denial of license for new milk facility to be unconstitutional protectionism). Accordingly, a State certainly "may not use the threat of economic isolation" to control its sister states. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976).

[4] The Intervenor Defendant States asserted as affirmative defenses that Plaintiffs had "neither factual nor legal support for injunctive or equitable relief," "[a]ny claim for injunctive or equitable relief is barred by Plaintiffs' unclean hands," and "Plaintiffs' theories would render the Clean Water Act unconstitutional in whole or part." Answer (Dkt. 82) at 20. Intervenor Defendant States have not had the opportunity to take discovery on these defenses, but the existing record supports widespread unclean hands by Plaintiffs, such that any claim to equitable relief is barred. *See, e.g.*, Lighthouse Resources Letter (Dkt. 27-7); Rorick Decl. (Dkt. 56-1) ¶¶ 11-15; Dreskin Decl. (Dkt. 56-2) ¶¶ 8-14.

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Rule was intended to address. At the federal level, multiple federal agencies have applied the new rule to pending actions. Since 2020, EPA has issued a number of implementation documents, including recommended best practices and template certifications that can be used by states and tribes in different circumstances. EPA, 2020 Rule Implementation Materials.[5] And FERC completed its own notice-and-comment rulemaking in March 2021 to set a uniform one-year deadline for states to complete certification actions on FERC authorizations and to explain how that time-period would be calculated. Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act, 86 Fed. Reg. 16298 (Mar. 29, 2021).

Vacating the Rule would cast doubt on these independent regulatory actions, and the businesses and municipalities that need section 401 certifications for critical infrastructure projects would shoulder the burden of that disruption. *See* Dreskin Decl. (Dkt. 56-2) ¶¶ 21, 23. These new rules and procedures are now being applied to thousands of pending requests for section 401 certifications. *See* Moyer Decl. ¶ 14, *N. Plains Resource Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-44 (D. Mont. Apr. 27, 2020), Dkt. 131-1 (explaining that "[o]n average, the Corps receives 3,000 standard individual permit applications annually."). INGAA members alone have numerous certification requests pending for projects that involve billions of dollars in capital investment. *See, e.g.*, Dreskin Decl. (Dkt. 56-2) ¶¶ 14, 22, 24. NHA members have 30 federal license applications that require section 401 certifications and expect another 54 projects will be required to submit licensing applications between now and October 1, 2022. Ex. 3, Declaration of Dennis Cakert ¶ 10. And that's just a thin sliver of the potential harm to the regulated community. Section 401 certificates are required for all manner of infrastructure projects requiring federal licenses, the vast majority of which are not connected to natural gas, petroleum projects, or hydropower.

Vacating the Rule—especially without any actual finding that any particular portion of it is deficient—casts substantial uncertainty over all of those pending authorizations and raises a host of questions that lack any clear answer:

[5] Available at https://www.epa.gov/cwa-401/2020-rule-implementation-materials.

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- What regulations would apply?
- What effect would the rule have on section 401 rulemakings by other agencies?
- Would pending certification requests need to be resubmitted?
- Would states be free engage in the same scope and timing abuses that plagued the old regime?

Open questions such as these will cause substantial delay in completing pending section 401 reviews. Ex. 3, Cakert Decl. at ¶ 11; Dreskin Decl. (Dkt. 56-2) ¶¶ 21, 23, 24. Those delays will impose substantial costs on the regulated community and delay critical reliability and maintenance projects. Dreskin Decl. (Dkt. 56-2) ¶¶21, 23. And the swirl of uncertainty is sure to invite future litigation.

The prejudice to Intervenor Defendants of vacating the Rule is real and cannot be mitigated. In contrast, Plaintiffs each have the ability to seek redress for the prejudice they claim to suffer through further administrative or judicial process. Administratively, EPA and the U.S. Army Corps of Engineers have both indicated their willingness to address concerns raised by Plaintiffs within the context of the existing rule.[6] Judicially, each Plaintiff here can challenge any particular application of the Rule that causes the harms they claim they will suffer. *See* Pls.' Opp'n to EPA's Motion to Remand Without Vacatur at 9–11 (Dkt. 145).

CONCLUSION

If the Court is not persuaded by EPA's arguments that remand without vacatur is appropriate here, the solution is to deny the EPA's remand motion and proceed to merits briefing. Vacating the Rule without affording Intervenor Defendants the opportunity to defend the rule on the merits, as Plaintiffs request, violates the most fundamental right of a party in civil litigation—the right to be heard on the merits of the dispute.

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

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Respectfully submitted,

Dated: October 4, 2021

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EXHIBIT 1

August 2, 2021

Via Regulations.gov

Water Docket
U.S. Environmental Protection Agency
EPA West, Room 3334
1301 Constitution Ave., NW
Washington, DC 20004

Re: Comments from American Fuel & Petrochemical Manufacturers, American Petroleum Institute, the American Exploration and Production Council, and the Independent Petroleum Association of America in response to the U.S. Environmental Protection Agency's request for comment on reconsidering and revising the Clean Water Act Section 401 Certification Rule
(EPA-HQ-OW-2021-0302)
86 Fed. Reg. 29,541 (June 2, 2021)

To whom it may concern:

This letter provides comments from the American Fuel & Petrochemical Manufacturers ("AFPM"), the American Petroleum Institute ("API"), the American Exploration and Production Council ("AXPC"), and the Independent Petroleum Association of America ("IPAA") (collectively, "the Associations") in response to the U.S. Environmental Protection Agency's ("EPA's" or "the Agency's") request for comment on reconsidering and revising the Agency's 2020 Clean Water Act Section 401 Certification Rule[1] ("401 Certification Rule").[2] As explained in more detail below, the 401 Certification Rule provided long-overdue clarification on the role of states and other certifying authorities under Section 401 of the Clean Water Act ("CWA" or "the Act").

The clarifications furnished in the 401 Certification Rule were also necessary to address some states' misuse of Section 401 certification procedures in pursuit of policy goals wholly distinct from considerations of potential water quality impacts. Indeed, the 401 Certification Rule was also necessary to incorporate a growing body of case law interpreting Section 401 of the Act consistent with Congress's intent to preserve for states a highly circumscribed role in evaluating a proposed project's potential impacts on certain enumerated CWA provisions.

The Associations therefore recommend EPA refrain from altogether setting aside the 401 Certification Rule. If EPA intends to promulgate revisions to portions of the 401 Certification

[1] 85 Fed. Reg. 42,210 (July 13, 2020).
[2] 86 Fed. Reg. 29,541 (June 2, 2021).

Rule, we urge the Agency to do so in a way that adheres to congressional intent, conforms to relevant current and pending court decisions, and restrains misuse of Section 401 certification procedures. Indeed, as EPA considers revisions to the 401 Certification Rule, we are optimistic that the Agency will recognize that Congress did not intend CWA Section 401 to allow a single state to wield disproportionate power over projects of national importance, and to further recognize that the imposition of reasonable limits on the disproportionate use of Section 401 certification authority is consistent with the principles of cooperative federalism.

To that end, and the interest of constructively engaging with EPA in this reconsideration process, the Associations provide the following comments. Because of the length of this letter, we have included a table of contents below.

TABLE OF CONTENTS

Page

I. SUMMARY 4

II. THE ASSOCIATIONS AND THEIR INTERESTS 6

III. GUIDELINES FOR INTERPRETING CWA SECTION 401 7

a. Consideration of the context for, and role of, CWA Section 401 certifications 8

1. Natural Gas Act of 1938 8

2. National Environmental Policy Act 10

3. Other federal statutes with impact reviews and opportunities for stakeholder engagement 11

4. EPA must implement CWA Section 401 in accordance with Congress's intent to assert exclusive federal jurisdiction through statutes like the NGA and in the context of more comprehensive environmental review processes Congress established through NEPA and other statutes 13

b. Reasonable limits on the Section 401 certification process are consistent with principles of cooperative federalism 15

c. The legislative history of the CWA illustrates the reasonable limits Congress intended for the Section 401 certification process 17

d. Any revisions to the 401 Certification Rule must include provisions sufficient to meaningfully enforce Congress's statutorily prescribed time limits 21

1. Enforcing the CWA's Section 401 deadlines requires a clear and objective starting point for review 23

2. EPA must prohibit states from artificially extending timeframes by stopping and restarting the certification process 25

e. Section 401 certification is required only when a federally licensed or permitted activity has the potential to result in a discharge from a point source to navigable waters 27

f. The scope of certifying authorities' Section 401 review and conditioning authority is not unbounded, and must be interpreted in accordance with the text, structure, and history of the Act 30

1. "Applicant" 31

2. "Any other appropriate requirement of State law" 32

IV. RESPONSES TO EPA'S QUESTIONS FOR CONSIDERATION 35

1. Pre-filing meeting requests 35

2. Certification request 36

3. Reasonable period of time 37

4. Scope of certification 39

5. Certification actions and federal agency review 42

6. Enforcement 44

7. Modification 45

8. Neighboring jurisdictions 46

9. Data and other information 48

10. Implementation Coordination 49

V. CONCLUSION 50

I. SUMMARY

The Associations urge EPA to refrain from substantially revising the 401 Certification Rule.[3] The final rule provided a long-overdue and increasingly necessary clarification of the role of states and other certifying authorities under Section 401 of the Act.

Section 401 certification proceedings be efficient, reasonably predictable, and appropriately focused on potential water quality impacts. Our members are on the forefront of a transformational era of increased domestic oil and natural gas production that has greatly enhanced U.S. energy security and lowered consumer costs. The growth of domestic oil and natural gas production and our ability to responsibly develop these resources in new areas of the country have created the need for more infrastructure to safely bring these resources to refineries and processing facilities, and ultimately, consumers. While there has been a great deal of discussion about an energy transition away from fossil fuels, experts agree acknowledge that modern society will continue to depend on oil and natural gas for several decades. As these products are needed in the world, it makes sense to expand and update America's energy infrastructure. Prudent investment for the safe and environmentally responsible movement of these critically important resources is important for affordability and environmental protection. To those opposed to any oil or natural gas development, permitting of America's energy infrastructure needs are viewed as convenient opportunities to deploy regulatory and litigation strategies designed to delay needed projects and sever resources from markets. This is counter-productive since the products are needed worldwide and such opposition only increases costs and environmental risks, risks good-paying jobs, and endangers energy security.

The need for an efficient and appropriately regulated certification process extends well beyond our industry. President Biden recently announced his support for a Bipartisan Infrastructure Framework that the White House anticipates will fund "transformational and historic investments in clean transportation infrastructure, clean water infrastructure, universal broadband infrastructure, clean power infrastructure, remediation of legacy pollution, and resilience to the changing climate."[4] Many of these types of projects require federal licensing or permitting actions that will trigger Section 401 certification proceedings.

The Associations therefore urge EPA to continue to interpret Section 401 in a manner that reasonably limits the ability of single state to wield disproportionate power over interstate projects of national importance. The efficient permitting of essential infrastructure projects requires the collaboration of state and federal authorities and the consideration of state and national interests. In enacting Section 401, Congress preserved an important role for states in evaluating the water quality impacts of federal infrastructure projects, but it did not prescribe that role without limit or to the detriment of federal licensing or permitting authorities.

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[3] 85 Fed. Reg. 42,210 (July 13, 2020).

[4] *See* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-president-biden-announces-support-for-the-bipartisan-infrastructure-framework/.

More specifically, Section 401 preserves for states the highly circumscribed role of evaluating a proposed project's potential impacts on certain enumerated CWA provisions. CWA Section 401 does not empower a state to deny a certification request based on generalized objections about hydrocarbon development, or concerns about the continued role of fossil fuels in product manufacturing and power generation. Nor does CWA Section 401 allow states to deny or condition certification based on potential environmental impacts of the proposed project other than potential point source discharges to waters of the United States that can result in possible violations of water quality standards.[5]

The text, structure, and history of Section 401 reflect Congress's recognition that certain projects of national importance could not be subjected to the parochial interests of a single state. And yet, as acknowledged by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), "it is now commonplace for states to use Section 401 to hold federal licensing hostage."[6] Using Section 401 "to hold federal licensing hostage,"[7] or basing state certification decisions on policy considerations that cannot realistically be construed as credible concerns over water quality impacts is impermissible under the CWA and conflicts with several other statutes through which Congress tasked federal agencies with decision-making authority.

The Associations therefore urge EPA to ensure that the Agency's regulations adhere to Congress's readily discernable intent that Section 401 be implemented to provide states certification authority that is limited in time and scope. We believe that the Agency must, at a minimum, retain those provisions of the 401 Certification Rule necessary to curb the well documented tactics a handful of states have utilized to artificially extend their review deadlines and improperly expand the scope of their certification and conditioning authority. EPA's regulations implementing Section 401 can and should be appropriately tailored to curtail the known avenues for state misuse of Section 401, while preserving the important but highly circumscribed role Congress intended.

In Section III, the Associations provide interpretive guidelines that we believe can be useful to EPA as it reconsiders the 401 Certification Rule. These guidelines interpret Section 401 utilizing the text and structure of the CWA, extensive analysis of case law, and a detailed legislative history of the Act and its key amendments.

Section III also describes the natural gas pipeline permitting process to illustrate the comprehensive review and approval process within which Section 401 certification is but one part. Natural gas permitting is only one example of the types of federal actions that can trigger Section 401 certifications, but it is a good example because it helps provide context necessary to understand why Congress limited the scope and duration of the Section 401 certification process. Section III also explains why reasonable limits on Section 401 certification processes comport with principles

[5] 40 C.F.R. § 121.2(a)(3).
[6] *Hoopa Valley Tribe* v. *FERC ("Hoopa Valley")*, 913 F. 3d. 1099, 1104 (D.C. Cir. 2019).
[7] *Hoopa Valley*, 913 F. 3d. at 1104.

of cooperative federalism and are necessary to ensure that one state cannot inappropriately wield its Section 401 authority to the detriment of other states or the nation as a whole.

In Section IV, the Associations respond to each of the Agency's enumerated "questions for consideration." Each of our responses are grounded in a fundamental recognition that Congress, through Section 401, expressly assigned an important project review role for states and tribes, but it did so in the context of multiple statutes unambiguously preserving exclusive federal jurisdiction over certain projects and multiple other statutes subjecting those projects to environmental reviews beyond the limited scope of Section 401.

The Associations hope that these interpretive guidelines and responses will inform EPA's reconsideration of the 401 Certification Rule and any future interpretation of CWA Section 401.

II. THE ASSOCIATIONS AND THEIR INTERESTS

AFPM is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM members strengthen economic and national security while supporting more than 3 million jobs nationwide. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible. To produce these essential goods, AFPM members depend on all modes of transportation to move their products to and from refineries and petrochemical facilities and have made significant infrastructure investments to support and improve the safety and efficiency of the transportation system. AFPM member companies depend upon an uninterrupted, affordable supply of crude oil and natural gas as feedstocks for the transportation fuels and petrochemicals they manufacture. Pipelines are the primary mode for transporting crude oil and natural gas to refiners and petrochemical facilities and refined products from those same facilities to distribution terminals serving consumer markets. Pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances. AFPM member companies own, operate, and rely on pipeline infrastructure as part of their daily operations. AFPM member companies also are leaders in human safety and environmental responsibility. AFPM supports robust analyses of infrastructure projects to ensure that environmental impacts are appropriately considered.

API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. API and its members are committed to the safe transportation of natural gas, crude oil and petroleum products, and support sound science and risk-based regulations, legislation, and industry practices that have demonstrated safety benefits. API members engage in exploration,

production, and construction projects that routinely involve both state and federal water permitting and are, and will continue to be, affected by CWA Section 401.

The AXPC is a national trade association representing 29 of America's largest and most active independent natural gas and crude oil exploration and production companies. The AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts which operate in different segments of the energy industry, such as refining and marketing. The AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce the natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

The IPAA represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will most directly be impacted by federal regulatory policies. Independent producers develop about 91 percent of American oil and natural gas wells, produce about 83 percent of American oil, and produce more than 90 percent of American natural gas and natural gas liquids. The IPAA is dedicated to ensuring a strong, viable American oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

III. GUIDELINES FOR INTERPRETING CWA SECTION 401

The Associations' responses to the Agency's enumerated "questions for consideration" follow in Section IV below. But the Associations believe it is important to furnish the analytical framework and interpretive guidelines that inform our construction of Section 401 and our specific recommendations for EPA's reconsideration of the 401 Certification Rule. We believe this background provides necessary context and support for the Associations' responses to the Agency's specific inquiries. And more broadly, we hope these interpretative guidelines will be useful to EPA as it reconsiders the 401 Certification Rule.

The Associations' members have a substantial interest in ensuring that the CWA Section 401 certification process preserves the important role of states in protecting water quality, while at the same time providing appropriate limits where states use their certification authority to achieve policy goals or outcomes unrelated to water quality. Therefore, the Associations provide interpretive guidelines that EPA should use to reasonably interpret important provisions of CWA Section 401. These interpretive guidelines follow from the text and structure of the Act, relevant case law, and - where necessary to ascertain congressional intent - the legislative history of the Act and its key amendments.

The Association's framework was also informed by the way Congress structured the Act to promote cooperative federalism. Finally, our framework examines the Section 401 certification process in the context of other federal statutes that assign the federal government exclusive

jurisdiction over certain projects and/or provide alternate mechanisms for state review of federally permitted projects.

a. Consideration of the context for, and role of, CWA Section 401 certifications

Under Section 401 of the CWA, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" must seek "a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions" of the CWA.[8] Section 401 further provides that "[n]o license or permit shall be granted if certification has been *denied* by the State," but, if a state "*fails or refuses to act* on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived."[9]

The statute is clear on its face; however, when state certification authority under CWA Section 401 is read in the context of the exclusive jurisdiction preserved for the federal government in issuing certain permits and licenses, the narrow role of states under the CWA Section 401 program becomes even more apparent.

The Natural Gas Act of 1938 ("NGA") is an example of a statute that preserves exclusive jurisdiction for the federal government, and it is relevant to many of the Associations' members. The NGA illustrates that state Section 401 review is a component in a much larger, and more complex, interstate approval process that is inherently federal in nature.

1. NGA

Companies seeking to build interstate natural gas pipelines must first obtain federal approval. The NGA provides the statutory framework for this process.[10] Congress passed the NGA to ensure patch-work state-by-state regulatory regimes would not impede interstate commerce. Specifically, under Section 7(c) of the NGA, "a natural gas company must obtain from the Federal Energy Regulatory Commission ("FERC") a 'certificate of public convenience and necessity' before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce."[11] In assessing "public convenience and necessity," FERC considers "all factors bearing on the public interest,"[12] including potential environmental impacts.[13] "FERC will

[8] 33 U.S.C. § 1341(a)(1).
[9] *Id*. (emphasis added).
[10] 15 U.S.C. § 717.
[11] *Schneidewind v. ANR Pipeline Co.("Schneidewind")*, 485 U.S. 293, 302 (1988); *See also* 15 U.S.C. § 717f(c)(1)(A).
[12] *See Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1146 (D.C. Cir. 1980).
[13] *See e.g., Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967–68 (D.C. Cir. 2000).

grant the certificate only if it finds the company able and willing to undertake the project in compliance with the rules and regulations of the federal regulatory scheme."[14]

FERC's authority under the NGA is exclusive: "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."[15] "FERC's exclusive purview" includes regulating "facilities [that] are a critical part of the transportation of natural gas and sale for resale in interstate commerce."[16] In this "exclusively federal domain," states may not regulate.[17]

Pipeline routing is the definitive example of an issue committed to FERC's exclusive authority.[18] Nor could it be otherwise. Determining an interstate pipeline's route—including which states it will cross, where it will do so, and how far it will travel within their borders—is a task that must be completed by a centralized body with the entire nation's public interest in mind, not by local "agencies with only local constituencies."[19] Otherwise, each state could say, "not in my backyard," thereby depriving other states and the nation of the pipeline's benefits and undermining the NGA's purpose of "ensur[ing] that natural gas consumers have access to an adequate supply of natural gas at 'just and reasonable rates.'"[20]

Thus, the NGA vests FERC with exclusive authority over all salient aspects of the natural gas pipeline permitting process to facilitate the nation's collective interest in promoting the safe movement of natural gas in interstate commerce. And while the NGA is necessarily limited to natural gas pipeline permitting, we believe it demonstrates why EPA must implement CWA Section 401 to prevent a single state from using its Section 401 certification authority to commandeer the exclusive jurisdiction that Congress provided to the federal government for projects of national importance.

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[14] *Schneidewind*, 485 U.S. at 302.
[15] *Schneidewind* 485 U.S. at 305.
[16] *Schneidewind*, at 485 U.S. 308.
[17] *Schneidewind*, at 485 U.S. 305; *See, e.g., N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 819–20, 822–24 (8th Cir. 2004) (NGA preempted state-law environmental provisions); *E. End Prop. Co. No. 1, LLC* v. *Kessel*, 851 N.Y.S.2d 565, 571 (N.Y. App. Div. 2007); *No Tanks Inc*. v. *Pub. Utils. Comm'n*, 697 A.2d 1313, 1315 (Me. 1997).
[18] *See Wash. Gas Light Co*. v. *Prince George's Cty. Council*, 711 F.3d 412, 423 (4th Cir. 2013) ("the NGA gives FERC jurisdiction over the siting of natural gas facilities"); *See also, e.g., Guardian Pipeline, LLC v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002) (where "FERC has approved the route … [a]ny objections to the condemnation of public land for the construction of a natural gas pipeline [are] preempted"); *Skyview Acres Co-op., Inc. v. Pub. Serv. Comm'n*, 558 N.Y.S.2d 972, 975 (N.Y. App. Div. 1990) (State's "authority [was] preempted … to the extent that it purported to approve the route of an interstate gas pipeline"); *No Tanks*, 697 A.2d at 1315 ("[State] review of safety and environmental issues surrounding the siting of the [natural gas] tank would be an attempt to regulate matters within FERC's exclusive jurisdiction").
[19] *Schneidewind*, 485 U.S. at 1316.
[20] *Wash. Gas*, 711 F.3d at 422–23.

The NGA also illustrates the important but highly circumscribed role of Section 401 reviews in light of the far more comprehensive federal environmental review process. Indeed, FERC has primary authority to consider a pipeline project's potential environmental impacts, which includes considering routes that could reduce environmental impacts.

Under the NGA, FERC is "the lead agency . . . for the purposes of complying with" the National Environmental Policy Act ("NEPA").[21] Thus, "FERC undertakes its own environmental analysis pursuant to the requirements of" NEPA, "which . . . FERC considers in reaching its ultimate routing determination."[22] Like the authority to issue certificates of public convenience and necessity, the authority to conduct this broader environmental analysis and to make routing decisions based on that analysis is exclusively within FERC's purview, except as to the narrow question of water-quality compliance under Section 401.[23]

2. NEPA

For any "major Federal action[] significantly affecting the quality of the human environment," NEPA requires federal agencies to prepare "a detailed statement," known as an Environmental Impact Statement ("EIS"), on "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action."[24]

Preparing an EIS has three basic stages. First, the agency must "determin[e] the scope of issues to be addressed," with the input of (among many others) "affected Federal, State, and local agencies."[25] Second, the agency prepares a draft EIS, which must "disclose and discuss … all major points of view on the environmental impacts of the alternatives including the proposed action."[26] The agency must then obtain comments from any other federal agency with relevant jurisdiction or expertise, "[a]ppropriate State and local agencies," and the public.[27] Finally, the agency must prepare a final EIS that "respond[s] to comments," "discuss[es] … any responsible opposing view," and "indicate[s] the agency's response to the issues raised."[28]

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[21] 15 U.S.C. § 717n(b)(1).
[22] *Skyview Acres*, 558 N.Y.S.2d at 975.
[23] 15 U.S.C. § 717b(d)(3); The NGA also preserves States' authority under the Coastal Zone Management Act and the Clean Air Act, 15 U.S.C. § 717b(d)(1)–(2), which are not at issue here.
[24] 42 U.S.C. § 4332(c) Agencies typically begin by preparing an Environmental Assessment, or EA, which must "provide sufficient evidence and analysis for determining whether" the project will have a "significant impact." 40 C.F.R. § 1508.9(a). If so, an EIS must be prepared. If not, the EA's thorough assessment helps ensure NEPA compliance. *See id.*
[25] 40 C.F.R. § 1501.7(a)(1).
[26] *Id.* § 1502.9(a).
[27] *Id.* § 1503.1(a).
[28] *Id.* § 1502.9(b).

These "'action-forcing' procedures" serve to ensure "that agencies take a 'hard look' at environmental consequences."[29] Affected parties - including states - can challenge the adequacy of an agency's NEPA review and its consideration of an EIS by seeking judicial review of the final agency determination.[30] The courts carefully review an agency's NEPA compliance to ensure that its "duty . . . to consider environmental factors not be shunted aside in the bureaucratic shuffle."[31] "NEPA itself does not mandate particular results," however: "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[32]

For natural gas pipeline permitting, FERC's regulations require preparation of an EIS for "[m]ajor pipeline construction projects . . . using rights-of-way in which there is no existing natural gas pipeline."[33] A FERC EIS must comply with the NEPA regulations and also summarize the project's "significant environmental impacts"; any "alternative . . . that would have a less severe environmental impact," which includes alternative routes; any potential "mitigation measures" and impacts that cannot be mitigated; and studies that might provide useful data.[34]

FERC's "public convenience and necessity" analysis carefully accounts for these environmental impacts, alternatives, and potential mitigation measures. Based on this comprehensive process, FERC may deny approval, or it may require the adoption of alternatives or mitigation measures.[35] FERC's "environmental assessment . . . is not subject to modification" by state agencies; instead, they can submit comments to FERC or intervene in the FERC proceedings to offer their input and then, if necessary, seek judicial review.[36] And with good reason: "Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate needs."[37]

3. Other federal statutes with impact reviews and opportunities for stakeholder engagement

Importantly, while the NEPA review process provides meaningful opportunities for states and other stakeholders to engage with federal agencies on the potential impacts of a proposed federal action, the NEPA review process is far from the only avenue for state and local engagement.

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[29] *Robertson* v. *Methow Valley Citizens Council ("Robertson")*, 490 U.S. 332, 350 (1989).
[30] *Robertson*, 490 U.S. at 345–46.
[31] *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976).
[32] *Robertson*, 490 U.S. at 350.
[33] 18 C.F.R. § 380.6(a)(3).
[34] 18 C.F.R. § 380.7.
[35] *See e.g., Midcoast Interstate*, 198 F.3d at 966, 968.
[36] *Skyview Acres*, 558 N.Y.S.2d at 975; *See also* 18 C.F.R. § 385.214(c)(1); 15 U.S.C. § 717r(a).
[37] *No Tanks*, 697 A.2d at 1316.

Numerous other statutes provide mechanisms for state and stakeholder engagement on a wide variety of potential impacts from proposed federal projects:

- Endangered Species Act ("ESA")[38] - Section 7 of the ESA requires that federal agencies consult with the ESA administering services to ensure that any projects authorized, funded, or carried out by them are not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of critical habitat of such species.
- National Historic Preservation Act ("NHPA")[39] - Section 106 of the NHPA and implementing regulations require federal agencies, before issuing a license (permit), to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places. The Act's requirements are to be implemented in cooperation with state historic preservation officers.
- Coastal Zone Management Act ("CZMA")[40] – Under CZMA Section 307, applicants for federal licenses or permits must obtain from potentially impacted coastal states certification that the proposed project complies with the states' coastal zone management plan.
- Essential Fish Habitat Provisions ("EFH") of the Magnuson-Stevens Act – The EFH provisions promote the protection of essential fish habitat in the review of projects conducted under federal permits, licenses, or other authorities that affect or have the potential to affect such habitat. EFH requires that federal agencies consult with the National Marine Fisheries Service for any permits which may adversely affect essential fish habitat identified under the Magnuson-Stevens Act.

These are just a few of the statutory provisions through which states and other stakeholders can engage with agencies like FERC, raise concerns about potential impacts from proposed federally licensed or permitted projects, and request consideration of alternatives.[41] They are an important part of the cooperative federalism approach through which Congress apportioned jurisdiction between the federal government and the states. These statutory provisions, and others like them, demonstrate that states have multiple opportunities outside of Section 401 to provide input on proposed federal projects. They also provide context for the narrow but important jurisdiction conferred to states by Section 401. In light of all these other meaningful engagement and review

[38] 16 U.S.C. § 1531 *et seq.*
[39] 16 U.S.C. § 470 *et seq.*
[40] 16 U.S.C. § 1451 *et seq.*
[41] Indeed, these are just a few of the examples of statutory provisions through which federal projects are reviewed and state feedback is solicited and considered. For a large pipeline project that would traverse federal, state, and tribal lands, the statutory authorities under which the project is reviewed are far more numerous.

opportunities, one recognizes that the statutory requirement for states to focus their Section 401 reviews on water quality furthers, rather than undermines, cooperative federalism.

Further, the statutory provisions cited above do not represent the full extent of states' authority to address environmental impacts from the operation of federally licensed or permitted projects. States can and often do regulate the operation of federally licensed or permitted projects pursuant to authority delegated under the Clean Air Act ("CAA"),[42]the CWA,[43] as well as other statutes. Section 401 does not constrain states' authority under these statutes to issue and enforce environmental permits on the operation of federally licensed or permitted projects. Section 401 only limits states' roles in reviewing the potential impacts from certain projects that require federal licenses or permits.

4. EPA must implement CWA Section 401 in accordance with Congress's intent to assert exclusive federal jurisdiction through statutes like the NGA and in the context of more comprehensive environmental review processes Congress established through NEPA and other statutes

In this subsection, the Associations discuss Section 401 for natural gas pipeline permitting.[44] By examining Section 401 in the context of other statutes, like the NGA and NEPA, one appreciates that Section 401 certification is but one part of a larger federal process.

As noted above, the NGA vests FERC with exclusive authority over all salient aspects of the natural gas pipeline permitting process, which facilitates the safe movement of natural gas in interstate commerce. The rigorous process by which FERC analyzes the "public convenience and necessity" of a natural gas pipeline requires an extensive and meticulous review of potential environmental impacts, including consideration of potential impacts to water quality, drinking water resources, and aquatic species. It is from this comprehensive analytical framework that CWA Section 401 carves out a carefully cabined exception to FERC's exclusive authority in this area by permitting states to certify whether potential discharges from a federally licensed project will comply with water-quality standards.[45]

Embedded within the text of CWA Section 401 are meaningful limits on the requirements to obtain a certification. Most significantly, applicants are only required to obtain certification from states where a project could result in a *point source* discharge *to "navigable waters,"* defined in the

[42] *See* 42 U.S.C. §§ 7411(d); 7412.
[43] *See* 33 U.S.C. §§ 1342(b); 1344(g).
[44] While the Associations herein discuss Section 401 in the context of the NGA's federal approval process for natural gas pipelines, it is important to note that Section 401 certifications are important to a number of other types of essential energy projects. All types of energy projects can require individual, regional, or nationwide general Section 404 permits that are also subject to state review under Section 401.
[45] 33 U.S.C. § 1341(a).

statute as "waters of the United States" ("WOTUS.")[46] Section 401 is not implicated for nonpoint discharges or other diffuse releases to groundwater. Nor is Section 401 implicated when the discharge enters purely state, rather than federal waterbodies. Thus, states can only deny a certification request based on potential point source discharges to WOTUS that can result in possible violations of water quality standards.

With few exceptions, courts have correctly construed this limited delegation as "[r]elinquish[ing] only one element of the otherwise exclusive jurisdiction granted [to FERC] …. It authorizes states to determine and certify only the narrow question whether there is 'reasonable assurance' that the construction and operation of a proposed project 'will not violate applicable water quality standards.'"[47] "Congress did not empower the States to reconsider matters unrelated to their water quality standards, which [FERC] has within its exclusive jurisdiction …."[48] Such second-guessing would "countermand the carefully worded authority of section 401(a)(1)" and "usurp the authority that Congress reserved for FERC."[49]

States exercising authority under CWA Section 401 must do so in a way that is reasonable and adequately explained.[50] When deciding whether or not to issue a certification, a state must examine "the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.'"[51] Therefore, when a state endeavors to use Section 401 "to hold federal licensing hostage,"[52] or otherwise base its certification decision on policy considerations that cannot realistically be construed as credible concerns over water quality impacts, that determination is impermissible under the CWA and several other statutes through which Congress tasked federal agencies with decision-making authority.

The forgoing discussion focuses on natural gas pipeline permitting under the NGA to illustrate the comprehensive statutory framework within which the Section 401 certification process is conducted. However, it is by no means the only federal permitting or licensing program to trigger Section 401 certification processes. Nor is natural gas pipeline permitting the only licensing or licensing process to be misused by some states as a lever to pursue policy objectives unrelated to water quality. In fact, Section 404 permitting is perhaps the most common trigger for Section 401 permitting, and it impacts each segment of the energy industry and a wide variety of other industries as well. Therefore, as the agency tasked with implementing the CWA, EPA must ensure

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[46] *See Oregon Natural Desert Assoc. v. Dombeck*, 151 F. 3d. 945 (9th Cir. 1998); *See also Oregon Natural Desert Assoc. v. US Forest Service*, 550 F.3d 778 (9th Cir. 2006).); 33 U.S.C § 1362(7).
[47] *Niagara Mohawk Power Corp*. v. *DEC*, 624 N.E.2d 146, 149 (N.Y. 1993).
[48] *Power Auth*. v. *Williams*, 60 N.Y.2d 315, 325 (N.Y. 1983).
[49] *Niagara Mohawk*, 624 N.E.2d at 150.
[50] *National Fuel Gas Supply Corporation v. New York State Dep't. of Envtl. Conservation*, 761 F. Appx. 68, 72 (2d Cir. Feb 5, 2019).
[51] *Appalachian Voices v. State Water Control Bd*., No. 18-1079, (4th Cir. 2019) (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).
[52] *Hoopa Valley Tribe* v. *FERC ("Hoopa Valley")*, 913 F. 3d 1099, 1104 (D.C. Cir. 2019).

that its regulations facilitate functional and efficient Section 401 certification processes. This means that any potential revisions to the 401 Certification Rule must perpetuate Section 401's important but highly circumscribed role for states, while prohibiting states from arrogating authority Congress exclusively entrusted to the federal government.

b. Reasonable limits on the Section 401 certification process are consistent with principles of cooperative federalism

Grounded on principles of cooperative federalism, the CWA establishes states as the primary permitting and enforcement authorities under Sections 402, 404, and a number of other provisions of the Act:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination or pollution.[53]

Thus, in recognition of the states' sovereignty and the fact that states are best situated to regulate their own resources, the CWA required EPA to coordinate its water resource protection efforts with the states.[54] Nonetheless, while the Associations oppose federal intrusion in those areas where Congress preserved state primacy, we also recognize those circumstances where Congress deemed it necessary to rest primary decision-making authority with federal agencies and/or more closely circumscribe the otherwise broad authority of states.

In CWA Section 401, Congress prescriptively delineated a more narrow and focused role for states, so that the jurisdiction that the Act provides to states could not overwhelm or subsume the federal government's ability to issue licenses and permits for projects of national importance. Of particular relevance to the Associations' members, these projects of national importance include pipeline projects requiring "Notices to Proceed" from FERC and dredge-and-fill activities in WOTUS that require CWA Section 404 permits from the Army Corps. But Congress also designated federal agencies as the approval authorities for Section 402 industrial and municipal point source discharge permits issued by EPA, Army Corps permits issued under Sections 9 and 10 of the Rivers and Harbors Act ("RHA"), U.S. Coast Guard permits for bridges and causeways under Section 9

[53] 33 U.S.C. § 101(b).
[54] 33 U.S.C. § 101(g); 33 U.S.C. § 102(a).

of the RHA, hydroelectric projects requiring FERC licenses, and nuclear power plants licensed by the Nuclear Regulatory Commission ("NRC").

Congress certainly understood that projects authorized pursuant to these statutes would have localized impacts, but it viewed it as inappropriate to allow these projects to be principally steered by parochial interests. Congress uniquely provided these boundaries in Section 401 because, unlike other provisions of the Act, like Sections 402 and 404, that direct federal agencies to cede authority to states when certain conditions of delegation are satisfied, Congress recognized that for certain federal projects, federal agencies must share their authority with, rather than cede their authority to, the states.

Congress's intent to reasonably limit the scope and duration of state Section 401 certifications is consistent with cooperative federalism. States that have misused Section 401 certification authority can wield a disproportionate level of decision-making authority over a wide variety of essential interstate projects or other projects of national importance such as transportation infrastructure, nuclear and hydroelectric power generation facilities, energy distribution infrastructure, and projects requiring dredge-and-fill permits under Section 404. Misapplying Section 401 to allow any state unilateral veto authority over these projects has adverse impacts, not only on project proponents and federal licensing and permitting authorities, but other states with interests in the project.

This was certainly the case with Washington State's denial of the Millennium Bulk Terminals – Longview LLC project.[55] The project proponents intended the terminal to receive rail cars of coal mined principally in Montana and Wyoming so that the coal could be exported to overseas markets. Washington State employed various regulatory strategies to extend their certification review over five years before denying the certification request based on grounds having nothing to do with water quality.[56] Having minimal financial interest in facilitating the export of a product that was not produced in the state and policy objections to coal-fired power generation, Washington State used its Section 401 certification authority to deny Montana and Wyoming access to foreign markets. Thus, the exercise of expansive authority under Section 401 by one state harms, rather than serves, other states' rights.

Similar dynamics underlie many instances of state misuse of Section 401 certification authority in pipeline projects. States along the proposed route of a pipeline that would not supply their state have occasionally used their Section 401 certification authority to block projects desperately needed by other states. This acutely harmed New England consumers who pay significantly more

[55] WDEC, In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC, Order # 15417 (Sept. 26, 2017); *See also Montana v. Washington*, No 22o152, (motion by Montana and Wyoming for leave to file the bills of complaint denied June 28, 20921. Justice Thomas and Justice Alito indicated they would grant the motion).

[56] *See* Section IV.4.

for their electricity than the U.S. average in part because pipeline project delays have inhibited access to natural gas supplies from the Marcellus Shale.

The principles of cooperative federalism are also well served by preventing states from evading Section 401 statutory deadlines for review. ''Congress intended Section 401 to curb a *state's* 'dalliance or unreasonable delay.'''[57] In the permitting context, extensive delays in the 401 certification process can cause projects that are important to other states to be cancelled altogether.

In sum, principles of cooperative federalism simply do not provide states unbounded authority to subjugate the interests of one state to the parochial whims of another. Cooperative federalism under Section 401 requires a balanced approach that conforms to the balance Congress itself struck when enacting Section 401. As such, if the Agency revises the 401 Certification Rule, the Associations urge EPA preserve the important role of states under Section 401, but prevent states from misusing the certification process to unlawfully elevate their own interests over the interests of other states or the nation as a whole.

c. <u>The legislative history of the CWA illustrates the reasonable limits Congress intended for the Section 401 certification process</u>

While Congress amended the CWA's predecessor statutes, Federal Water Pollution Control Act of 1948 ("FWPCA"),[58] no statutory revision was more central to Congress's transformation of the FWPCA to today's CWA than the 1972 amendments to the FWPCA ("1972 Amendments").[59] Indeed, as Congress noted at the time, the 1972 Amendments represented a "total restructuring" and "complete rewriting" of the existing statutory framework.[60] The transformative nature of the 1972 Amendments is critical to interpreting Section 401 for many reasons, including the need to distinguish court decisions that were based on EPA regulations predating the 1972 Amendments[61] from those court decisions that more directly interpreted Section 401 of the Act as it appears today.

Prior to the 1972 Amendments, the regulatory framework for the FWPCA, as amended by the Water Quality Act of 1965,[62] was based exclusively on ambient water quality standards that Congress anticipated would be used to develop standards for discharge to the receiving waters. While the predecessor Act regulated only water quality (largely as defined by states) and could only be used to regulate the discharging sources of impairment if water quality standards were not being met,[63] practical application of the framework demonstrated its ineffectiveness; between 1948

[57] *Hoopa Valley*, 913 F. 3d at 1104–05 (emphasis in original).
[58] Pub. L. No. 80-845, 62 Stat. 1155 (1948).
[59] Pub. L. No. 92-500, 86 Stat. 816 (1972).
[60] *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history of 1972 amendments).
[61] *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994).
[62] Pub. L. No. 89-234, 79 Stat. 903 (1965).
[63] *See NDRC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). Thus, a discharger needed no permit to deposit pollutants into a water that had "room to spare" in achieving its water quality standards.

and 1972, the Act's enforcement framework "resulted in only one prosecution."[64] This informed Congress's 1972 effort to amend the Act, and was the impetus for Congress's enactment of Section 301, which states, "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."[65]

Congress then defined "pollutant" quite broadly to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[66] However, Congress much more narrowly defined the "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," such as a pipe, ditch, or other "discernible, confined and discrete conveyance."[67]

Therefore, the newly enacted Section 301 made it unlawful for the first time to discharge pollutants into WOTUS from a point source unless the discharge complied with the CWA, including obtaining authorizations pursuant to the Section 402 National Pollutant Discharge Elimination System ("NPDES") permit program or the Section 404 dredge-and-fill permit program.[68]

Because of the 1972 Amendments, the NPDES permitting program now constitutes "[t]he primary means for enforcing these limitations and standards" from point sources.[69] Point source dischargers must now obtain NPDES permits that "place limits on the type and quantity of pollutants that can be released"[70] into WOTUS through point sources, and "defines, and facilitates compliance with, and enforcement of … a discharger's obligations under the [CWA]."[71]

The 1972 Amendments similarly resulted in the first ever regulation of the discharge of dredged or fill material into WOTUS, including certain wetlands. Section 404 now requires putative dischargers to obtain a permit before any dredged or fill material may be discharged into WOTUS from activities such as fill for water resource development, infrastructure development, and mining projects.

In addition to fundamentally shifting the Act from its purely "harm-based" regulatory approach to its focus on point source discharges of pollutants to WOTUS, the 1972 Amendments also preserved a role for states and tribes. These amendments first authorized states to assume program

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[64] *See* David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 304 (2009).
[65] 33 U.S.C. § 1311(a).
[66] 33 U.S.C. § 1362(6).
[67] 33 U.S.C. § 1362(12), (14).
[68] 33 U.S.C. § 1342, 1344.
[69] *Arkansas et al. v. Oklahoma et al.*, 503 U.S. at 101 (1992).
[70] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. at 102 (2004).
[71] *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. at 205 (1976).

authority for issuing Section 402 and 404 permits within their borders.[72] States also became responsible for developing water quality standards for WOTUS within their borders,[73] developing total maximum daily loads ("TMDLs") for waters that are not meeting established water quality standards[74] while at the same time retaining authority to protect and manage waters that are not considered WOTUS.[75]

Most relevant here, however, the 1972 Amendments updated a preexisting state certification requirement (Section 21(b)) to create Section 401. As with Section 401, Congress developed enacted Section 21(b) to "recognize[ ] the responsibility of Federal agencies to protect water quality whenever their activities affect public waterways."[76] As Congress noted at the time, "[i]n the past, these [Federal] licenses and permits have been granted without any assurance that the [water quality] standards will be met or even considered."[77]

Because the state certification requirement in Section 21(b) under the FWPCA's water quality-based framework existed before Congress enacted the 1972 Amendments to focus on point source discharges to WOTUS, Section 21(b) required states to certify that "such *activity* will be conducted in a manner which will not violate applicable water quality standards."[78] The 1972 Amendments' changes to Section 21(b) were therefore intended to maintain consistency with the 1972 Amendments' broader focus on, and definition of, *point source discharges to WOTUS*. In other words, because the predecessor Act regulated only water quality and could only be used to regulate the pollution-contributing sources of impairment if water quality standards were not being met, Congress drafted Section 21(b), and EPA promulgated its 1971 regulations pursuant to Section 21(b)[79] to focus on those *federal activities* that could adversely impact ambient water quality standards. Once the 1972 Amendments fundamentally transformed the Act to provide authority to directly address discharges of pollutants rather than indirectly address pollutant discharges based on their impacts on water quality, Congress made a corresponding change to Section 21(b) so that it reflected the new prohibition and permitting regime for *discharges*.

As such, the Section 21(b)(1) requirement that the certifying authority certify "that such *activity* . . . will not violate water quality standards,"[80] was modified to state that the authority must certify "that any such *discharge* shall comply with the applicable provisions of sections 301, 302, 303,

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[72] 33 U.S.C. § 1342(b), 1344(g).
[73] 33 U.S.C. § 1313, 1315.
[74] 33 U.S.C. § 1313(d).
[75] *See, e.g.*, 33 U.S.C. § 1251(b), 1251(g), 1370, 1377(a).
[76] S. Rep. No. 91-351, at 3 (1969).
[77] S. Rep. No. 91-351, at 3 (1969).
[78] Public Law 91-224, 21(b)(1), 84 Stat. 91 (1970) (emphasis added).
[79] *See NDRC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). Thus, a discharger needed no permit to deposit pollutants into a water that had "room to spare" in achieving its water quality standards.
[80] Public Law 91-224 § 21(b)(1) (emphasis added).

306, and 307 . . ."[81] The 1972 Amendments also added an entirely new Section 4(d) which authorizes the imposition of certification conditions:

> to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification . . . [82]

Thus, the 1972 Amendments maintained Section 21(b)'s focus on water quality impacts but adapted those certification requirements ''to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.''[83] As explained by then-Senator Muskie, the sponsor of the legislation that would become Section 401:

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of *water quality standard[s]*. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with *water quality standards*. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of *water quality requirements*.[84]

The Senate Report that accompanied the 1972 Amendments likewise explained that Section 401:

> makes clear that any *water quality requirements* established *under State law*, more stringent than those requirements under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override *State water quality requirements*.[85]

As the foregoing makes clear, Congress intended Section 401 certifications and conditions to focus exclusively on water quality. Nothing in the legislative history of Section 401 reflects any intent to consider non-water quality considerations or conditions.

Notwithstanding the transformative nature of the 1972 Amendments, EPA did not update its 1971 regulations (implementing Section 21(b)), until promulgation of the 401 Certification Rule in

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[81] 33 U.S.C. § 1341(a) (emphasis added).
[82] 33 U.S.C. § 1341(d).
[83] S. Rep. No. 92–414, at 69 (1971).
[84] 116 Cong. Reg. 8,984 (Mar. 24, 1970) (discussing section 21(b) of the Water Quality Improvement Act of 1970) (emphasis added).
[85] S. Rep. No. 92-414, at 69 (1971) (emphasis added).

2020. Thus, for nearly five decades, the Agency's regulations remained out-of-step with Congress's most consequential changes to the CWA—the prohibition on point source discharges to WOTUS "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of th[e] Act."[86] The persistence of EPA's outdated 1971 implementing regulations is relevant to the Agency's current reconsideration of the 401 Certification Rule because a significant portion of the jurisprudence on Section 401, including the 1994 Supreme Court decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,[87] is based on courts deferring to EPA regulations that predate the 1972 Amendments.

The Associations also urge EPA to recognize that FWPCA Section 21(b) was enacted prior to the statutory requirement that the federal government consider the potential environmental impacts of its actions. It provided states authority to examine the water quality impacts of federal actions in the absence of any federal obligation to examine their own obligations. Section 401, on the other hand, is informed by the 1969 passage of NEPA, which requires the federal government to consider the potential environmental consequences—water quality-related or otherwise—of its actions. While NEPA does not subsume the Section 401 water quality certification process, it does place Section 401 in a statutory context distinct from that which existed in 1971. The state water quality certification process is not the sole means by which potential environmental impacts of federal actions are identified, scrutinized, mitigated, or avoided. The 1972 Amendments followed the passage of NEPA by a mere two years. Congress understood the important role NEPA would play in examining the impacts of federal actions, including those subject to state certifications under Section 401. Congress continued to view state water quality certifications as important, but it clearly did not intend them to duplicate NEPA's processes in scope, scale, or duration. Section 401 was intended to be, and should remain, a focused inquiry on very specific types of discharges and a very narrow set of potential impacts.

d. Any revisions to the 401 Certification Rule must include provisions sufficient to meaningfully enforce Congress's statutorily prescribed time limits

As EPA considers revisions to the 401 Certification Rule, we urge the Agency to recognize that the deadlines Congress imposed in Section 401 are explicit, unambiguous, and binding. The express text of Section 401 plainly states that a certifying authority waives its certification authority over a federal license or permit if the certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." [88] "[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."[89] Given the clarity of the CWA with respect to the one-year

[86] 33 U.S.C. § 1311(a).
[87] 511 U.S. 700, 712 ("*PUD No.* 1").
[88] 33 U.S.C. § 1341(a)(1).
[89] *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

deadline and the lack of ambiguity about the intended purpose of this language, the text of the CWA leaves EPA no room to interpret Section 401 as allowing certifying authorities any amount of time in excess of one year.[90]

Additionally, as explained by the D.C. Circuit, "while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."[91] Determining the "reasonable period of time" within that one-year period has for several decades fallen within the purview of the federal licensing and permitting agencies.[92] Relatedly, from the time EPA first promulgated its implementing regulations in 1971, federal licensing and permitting agencies have been tasked with determining when waiver occurs.[93] Thus, although EPA may have some discretion in describing the factors that an agency should consider when determining the "reasonable period of time" and the occurrence of a waiver, the longstanding nature of this aspect of EPA's regulations will require the Agency to provide a robust and reasoned explanation of the need for the change.[94]

Finally, as the agency charged with implementing the CWA,[95] EPA must ensure that its implementing regulations include meaningfully and reasonably preclude certification tactics that are plainly intended to evade, rather than comply with, Section 401's congressionally mandated deadlines. To that end, EPA's 401 Certification Rule examined the various ways in which a small minority of states have circumvented or attempted to circumvent certification deadlines. While the Agency is not precluded from varying the measures needed to ensure that certifications are completed within a reasonable period of time (not to exceed one year), the Agency cannot ignore those known tactics certain that states have employed to evade deadlines. As the implementation agency for the CWA, EPA must ensure that its regulations reasonably ensure statutory compliance,

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[90] Consistent with our comments in Section III.f., the Associations believe that Congress's establishment of one-year as the outermost limit for Section 401 certifications reveals that Congress understood and expected Section 401 reviews to be narrowly focused on discharges from the federal project, rather than broader or more tangentially related impacts.

[91] *Hoopa Valley*, 913 F. 3d at 1104.

[92] *See* Army Corps regulations at 33 CFR § 325.1(b)(ii) (51 Fed. Reg. 41,236) (Nov. 13, 1986)); *See also* FERC Rules at 18 §5.23(b)(1) (68 Fed. Reg. 61,743)(Oct. 30, 2003)); *See also Constitution Pipeline Company, LLC*, 164 FERC P 61029, 2018 WL 3498274 (2018) (''[T]o the extent that Congress left it to federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency, bounded on the outside at one year, we have concluded that a period up to one year is reasonable.'').

[93] *See Millennium Pipeline Company, L.L.C.*, 860 F.3d at 700–01 (acknowledging that a project proponent can ask the federal agency to determine whether a waiver has occurred).

[94] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[95] *See* 33 U.S.C. 1251(d) (''Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter.''); *Id*. at 1361(a); *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011); *Hoopa* Valley, 913 F.3d at 1104; *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296–97 (D.C. Cir. 2003); *Cal. Trout v. FERC*, 313 F.3d 1131, 1133 (9th Cir. 2002); *Am. Rivers, Inc. v. FERC*, 129 F. 3d 99, 107 (2d Cir. 1997).

rather than leaving loopholes. Accordingly, EPA must, at a minimum, preclude those deadline circumvention tactics that courts have held to be improper.

1. Enforcing the CWA's Section 401 deadlines requires a clear and objective starting point for review

EPA's regulations must reflect that the review period for a certification request begins when the project proponent submits the certification request to the certifying authority. This interpretation is required by the Act and, given examples where states have sought to toll the start date of their review long after their receipt of certification requests, this proposed interpretation is practically necessary.

Section 401 plainly states that:

> [i]f the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a *request for certification*, within a reasonable period of time (which shall not exceed one year) after *receipt* of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.[96]

The plain meaning of this language is that the Act provides the timeframe for a certifying authority's review and instructs that the receipt of the request for certification begins the review period. The statutory text therefore created a "bright-line rule"[97] for identifying the start of the review period, without which the Act's review deadlines would be rendered meaningless.

Although the term "receipt" is clear and widely understood through its common usage, the Associations nonetheless believe that EPA must implement and enforce a regulatory definition of "receipt" to prevent certain states from strategically sidestepping straight-forward interpretations of the term to extend their review period beyond statutorily mandated time limits. At a minimum, EPA, as the agency charged with implementing the CWA, must implement Section 401 of the Act to prohibit the impermissible constructions of the term "receipt" documented in the following examples.

For instance, the State of New York received a certification request for the Northern Access Pipeline on March 2, 2016. New York denied the certification application on April 7, 2017 and argued that its denial was timely because: (1) the certification review did not begin until the state deemed the application "complete;" and (2) that the state asked and received consent from the project proponent to change the date on which the application was deemed received so that New

[96] 33 U.S.C. § 1341(a)(1) (emphasis added).
[97] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

York's April 7, 2017 decision would appear to conform to the Section 401 time limits.[98] Notwithstanding New York's arguments, FERC concluded that the state waived its Section 401 obligation for failure to act within the prescribed deadlines,[99] and in two sequential decisions, the United States Court of Appeals for the Second Circuit ("Second Circuit") agreed.[100]

In the first case, the Second Circuit held that Section 401 prohibited New York from determining that the certification application was not "received" until the state deemed it complete.[101] The court reasoned that Section 401 provided a "bright-line rule regarding the beginning of the review," and that New York's approach would impermissibly "allow a state agency not only to dictate when the review process can begin but also to delay it indefinitely."[102]

The Second Circuit then remanded FERC's conditional approval back to the Commission to allow FERC to supplement its reasoning for the conditional approval. After FERC reaffirmed and further explained its approval, New York once again challenged the Commission's waiver determination. Once again, the Second Circuit held that Section 401 provides a "bright-line rule" that a state's action on a request for certification shall not exceed one year from receipt of such a request.[103] And regarding New York's agreement with the project proponent to stipulate that the application was received 36 days after it was actually received, the court held that "however modest and reasonable that extension may have been, allowing the state to dictate the beginning of review by agreement would 'blur th[e] bright-line rule into a subjective standard'"[104]

In another example, the New Jersey Department of Environmental Protection ("NJDEP") recently deemed as incomplete a certification request for a project proposed by PennEast Pipeline Company, LLC because the project proponent had not provided NJDEP with surveys of the entire pipeline route, including segments that had no rational relationship with potential water quality impacts.[105] Because this data request was irrelevant to the state's review of the proposed project's potential water quality impacts in New Jersey, it can only be construed as a tactic for delay. Indeed, the Supreme Court's June 29, 2021 decision in *PennEast Pipeline Co. v. New Jersey* suggests that

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[98] *See N.Y. State Dep't of Envtl. Conservation v. Nat's Fuel Gas Supply Corp.*, Slip Op. at No.s 19-1610-ag. 19-1618-ag (2d Cir. March 23, 2021); *See also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).

[99] *See Nat's Fuel Gas Supply Corp.*, 164 FERC 61,084 at PP 35,42 (2018).

[100] *See N.Y. State Dep't of Envtl. Conservation v. Nat's Fuel Gas Supply Corp.*, Slip Op. at No.s 19-1610-ag. 19-1618-ag (2d Cir. March 23, 2021); *See also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, (2d Cir. 2018).

[101] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 455.

[102] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 455-456.

[103] *N.Y. State Dep't of Envtl. Conservation v. Nat's Fuel Gas Supply Corp.*, Slip Op. at No.s 19-1610-ag. 19-1618-ag at p. 17 (2d Cir. March 23, 2021).

[104] *N.Y. State Dep't of Envtl. Conservation v. Nat's Fuel Gas Supply Corp.*, Slip Op. at No.s 19-1610-ag. 19-1618-ag at p. 17 (quoting *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 455).

[105] Letter from Virginia Kop'Kash, Assistant Comm'r, N.J. Dep't of Envtl. Prot., Re: Freshwater Wetlands Individual Permit Application, DLUR File #0000-17-0007.2 FWW170001,

the state's efforts to expand its Section 401 review time were part of a larger effort to frustrate and forestall construction of the pipeline.[106]

While the CWA clearly directs how the Section 401 review deadlines should be applied, these decision leave no doubt that the Agency's regulations must prohibit the arbitrary and strategic tolling of Section 401 review periods.

2. EPA must prohibit states from artificially extending timeframes by stopping and restarting the certification process

The CWA does not allow certifying authorities to stop and restart their review to artificially extend Section 401's statutorily prescribed deadlines. And as the agency charged with implementing Section 401 of the Act, EPA's regulations must incorporate enforceable procedures that prohibit this manner of evading Section 401's statutory deadlines. Here again, the need for these restrictions is made evident by the actions of a handful of states that have increasingly relied on a "withdrawal and resubmittal" tactic to circumvent statutory deadlines. Indeed, the D.C. Circuit's recent decision in *Hoopa Valley Tribe v. FERC* ("*Hoopa Valley*")[107] demonstrates the need for EPA to enforce regulations to compel compliance with the express Section 401 deadlines.

In *Hoopa Valley*, the D.C. Circuit considered whether California and Oregon could lawfully rely on a "withdrawal-and-resubmission scheme" to avoid the Section 401 deadline for certifying the relicensing of the Klamath Hydroelectric Project.[108] The project proponent had originally submitted its certification requests to the states in 2006, and pursuant to the states' demand, withdrew and resubmitted the same certification requests annually for more than a decade.[109] When the D.C. Circuit drafted its decision "*more than a decade later*, the states still ha[d] not rendered certification decisions."[110] The court went bemoaned that:

> it is now commonplace for states to use Section 401 to hold federal licensing hostage. At the time of briefing, twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*.[111]

While the problem identified by the D.C. Circuit was pervasive, its resolution was remarkably straight-forward. According to the court, "[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401's text is clear."[112]

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[106] 594 U.S. __ (Slip. Op. at 4) (June 29, 2021).
[107] 913 F. 3d 1099 (D.C. Cir. 2019).
[108] *Hoopa Valley*, 913 F. 3d at 1103.
[109] *Hoopa Valley*, 913 F. 3d at 1104.
[110] *Hoopa Valley*, 913 F. 3d at 1104 (emphasis in original).
[111] *Hoopa Valley*, 913 F. 3d at 1104 (emphasis in original).
[112] *Hoopa Valley*, 913 F. 3d at 1103.

> While the statute does not define 'failure to act' or 'refusal to act,' the states' efforts . . . constitute such failure and refusal within the plain meaning of these phrases. Section 401 requires state action within a reasonable period of time, not to exceed one year. California and Oregon's deliberate and contractual idleness defies this requirement. By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue. Thus, if allowed, the withdrawal-and-resubmission scheme could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters.[113]

The court explained that "Congress intended Section 401 to curb a *state*'s 'dalliance or unreasonable delay.' This Court has repeatedly recognized that the waiver provision was created 'to prevent a State from indefinitely delaying a federal licensing proceeding.'"[114] Therefore, the court "conclude[d] that California and Oregon have waived their Section 401 authority with regard to the Project."[115]

Recently, the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") rejected a FERC determination that North Carolina waived its Section 401 authority because the state took longer than one year to review a project proponent's initial certification application and two subsequent applications that were resubmitted after the initial application was withdrawn.[116] The court held that FERC did not have a sufficient basis to conclude that North Carolina had colluded with the project proponent on the withdrawal and resubmittal of the certification applications to artificially extend the time. Instead, the court found that the decision to withdraw and resubmit the initial and subsequent applications was made by the project proponent alone and without the direction of, or coordination with, the state.[117]

The Fourth Circuit's reasoning appears to conflict with holdings in the D.C. Circuit[118] and the Second Circuit,[119] it is also not a particularly sweeping decision because the court made a fact-specific determination that the record did not support FERC's determination that the project proponent's withdrawal and resubmittal of the certification application was coordinated with the state.[120] Simply put, the 401 Certification Rule does not prohibit project proponents from withdrawing and resubmitting certification applications. The final rule only prohibits states and other certifying authorities from requesting applications be withdrawn and resubmitted in order to

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[113] *Hoopa Valley*, 913 F. 3d at 1105.
[114] *Hoopa Valley*, 913 F. 3d at 1105-6 (internal citations omitted).
[115] *Hoopa Valley*, 913 F. 3d at 1105.
[116] *North Carolina Dep't of Envtl Quality v. FERC*, 2021 WL 2763265 (4th Cir. July 2, 2021).
[117] *North Carolina Dep't of Envtl Quality v. FERC*, 2021 WL 2763265.
[118] *See Hoopa Valley*, 913 F. 3d at 1105.
[119] *See N.Y. State Dep't of Envtl. Conservation v. See Nat's Fuel Gas Supply Corp.*, Slip Op. at No.s 19-1610-ag. 19-1618-ag (2d Cir. March 23, 2021); *See also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018).
[120] *North Carolina Dep't of Envtl Quality v. FERC*, 2021 WL 2763265.

extend the Section 401 review time limit. Thus, although it remains an outlier to the larger body of Section 401 jurisprudence, the Fourth Circuit's decision is not altogether inconsistent with the 401 Certification Rule. Therefore, EPA's regulations must continue to stipulate that a certifying authority is not authorized to request the project proponent to withdraw a certification request or to take any other action to modify or restart the established reasonable period of time.

e. Section 401 certification is required only when a federally licensed or permitted activity has the potential to result in a discharge from a point source to navigable waters

The 401 Certification Rule must continue to clarify that Section 401 certification procedures are triggered by Section 401(a)(1) only when a federally licensed or permitted activity has the potential to result in a discharge *from a point source into a WOTUS.* This restrained application of Section 401 is commanded by the text and structure of the CWA, consistent with the applicable case law, and in harmony with the Agency's longstanding interpretations.

As explained in Section III.c. above, the same 1972 Amendments through which Section 401 was enacted also shifted the Act's regulatory focus away from ambient standards and toward a prohibition and permitting framework for "the discharge of any pollutant by any person . . ."[121] The 1972 Amendments defined the phrase "discharge of any pollutant"[122] as "any addition of any pollutant to *navigable waters from any point source*."[123]

Congress then also further defined "navigable waters" as "the waters of the United States ["WOTUS"], including the territorial seas."[124] While the precise contours of this definition are the subject of a great deal of debate, Congress clearly intended the definition of WOTUS, and therefore "navigable waters," to refer to a subset of surface waterbodies within the United States. The Associations submitted comments in strong support of the Agency's most recent proposal to define WOTUS,[125] and we support the Navigable Waters Protection Rule that EPA and the Army Corps ultimately finalized.[126] The Act's definition of "navigable waters" as WOTUS and the Agency's interpretation of "WOTUS" act as a limit on the types of projects subject to Section 401 certification procedures just as these definitions limit the scope of activities subject to the Section 402 NPDES program or the Section 404 dredge-and-fill program. Like the permit requirements in Sections 402 and 404, Section 401 certification requirements are triggered based on discharges to WOTUS—not potential releases to groundwater, soil, isolated waterbodies, ephemeral flows, or any of the many other categories of waters that are outside of the definition of WOTUS.

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[121] 33 U.S.C. § 1311(a).
[122] 33 U.S.C. § 1311(a).
[123] 33 U.S.C. § 1362(12) (emphasis added).
[124] 33 U.S.C. § 1362(7).
[125] 84 Fed. Reg. 4,154 (Feb. 14, 2019).
[126] 85 Fed. Reg. 22,250 (Apr. 21, 2020).

While these waters can trigger Section 401 certification, only a potential "discharge" into those waters will actually trigger Section 401 certification. As the Supreme Court noted in *S.D. Warren Co. v. Maine Board of Environmental Protection*, the CWA only defines the phrase "discharge of a pollutant,"[127] but for the term "discharge" that is used in Section 401, Congress only noted that it "includes a discharge of a pollutant, and a discharge of pollutants."[128] The Court therefore interpreted the term "discharge" according to its common usage as "flowing or issuing out," and held that water releases from a dam constituted "discharges" for purposes of triggering Section 401 even if the releases contained no pollutants.[129]

Interpreting "discharge" as "from any point source" accords with *S.D. Warren*, and provides the best reading of that decision. The CWA defines "point source" as "any discernible, confined and discrete conveyance . . ."[130] The tailrace that discharged effluent from the dam at issue in *S.D. Warren* is clearly encompassed within this definition of "point source." Moreover, by defining "discharge" as "flowing or issuing out," the Court strongly implies the need for a "discernible, confined and discrete conveyance."[131]

Defining "discharge" as effluent "flowing or issuing out" of a "point source" is also consistent with the text, structure, and legislative history of the Act. "Discharge" was first defined (albeit sparsely) in the same 1972 Amendments that created Section 401 and "overhauled the regulation of water quality," such that, according to the Ninth Circuit in *Oregon Natural Desert Association v. Dombeck*, "[d]irect federal regulation now focuses on reducing the level of effluent that flows from point sources."[132] Thus, wherever it is used in the CWA, the term "discharge" refers to the release of effluent from a point source.[133] And, as applied to Section 401, if a federally permitted or licensed project or activity does not release effluent through a point source, Section 401 certification is not required.[134]

Importantly, the Ninth Circuit revisited the holding in *Dombeck* after the *S.D. Warren* decision and held that the Supreme Court's decision in *S.D. Warren* supported its prior holding.[135] The court held that distinguishing point source discharges and nonpoint source pollution is an "organizational paradigm of the Act."[136] Point source discharges "tended to be more notorious

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[127] "Discharge of a pollutant" means "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12).
[128] 547 U.S. 370 (2006) ("*S.D. Warren*") (quoting 33 U.S.C. § 1362(16)).
[129] *S.D. Warren*, 547 US at 378.
[130] 33 U.S.C. § 1362(14).
[131] 33 U.S.C. § 1362(14).
[132] *Oregon Natural Desert Association v. Dombeck ("Dombeck")*, 172 F.3d 1092 (9th Cir. 1998).
[133] *Dombeck*, 172 F.3d at 1098.
[134] *Dombeck*, 172 F.3d at 1099.
[135] *Or. Natural Desert Ass'n v. U.S. Forest Service ("ONDR")*, 550 F.3d 778 (9th Cir. 2008).
[136] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).

and more easily targeted"[137] and were therefore subjected to the CWA's broad prohibition against "the discharge of any pollutant."[138] Consequently, the CWA does not regulate nonpoint source pollution through the NPDES permitting program.[139] The Supreme Court has also recognized the CWA's disparate treatment of these types of pollution.[140]

"Virtually all water, polluted or not, eventually makes its way to navigable water."[141] But Congress did not structure the CWA to require permits or Section 401 certification for any action that could cause a release into a WOTUS. Rather, the legislative history of the 1972 Amendments shows that Congress intended that these provisions be triggered by discharges from point sources. Congress enacted Section 401 "to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants [which by definition applies only to point sources]."[142]

This organizational paradigm is also revealed in Congress's 1977 addition of Section 303 (state water quality standards) to the list of provisions requiring Section 401 certifications ("1977 Amendment"). The legislative history surrounding the 1977 Amendment cannot be read as expanding the scope of the potential pollution sources subject to the state certification requirement under Section 401. Rather, the history confirms that Section 401 was intended to reach only those sources covered by Section 301 of the CWA.

> The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirement of section 401. It is understood that section 303 is required by the provisions of section 301.[143]

EPA must recognize that Congress intended that Section 401's certification procedures apply only when a federally licensed or permitted activity has the potential to result in a discharge from a point source into a WOTUS.

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[137] *Or. Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 780 (9th Cir. 2008).
[138] 33 U.S.C. § 1311(a).
[139] *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n.4 (10th Cir. 2005).
[140] *County of Maui v. Hawaii Wildlife Fund ("Maui")*, 140 S. Ct. 1462, 1470 (2020).
[141] *Maui*, 140 S. Ct. at 1470.
[142] S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971).
[143] Conference Report on the 1977 CWA, H. Rep. No. 95-380 (95th Cong. 1st Sess. At 208 (1977). As previously noted, Section 301 applies only to "discharges" from "point sources" of pollution.

f. The scope of certifying authorities' Section 401 review and conditioning authority is not unbounded, and must be interpreted in accordance with the text, structure, and history of the Act

Section 401 affords states and tribes distinct and well-circumscribed authority to protect their water quality in the context of federal licensing and permitting processes that otherwise preempt state and tribal authority. This specialized and limited role is reflected in the procedures, time limits, and subject matter restrictions that Congress applied throughout Section 401.

"Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges".[144] As noted in Section III.e. above, the Associations believe that the text, structure, and history of Section 401 demonstrate that Congress intended Section 401 certification to apply only when a federally licensed or permitted activity has the potential to result in a discharge from a point source into a WOTUS.[145] Additionally, Section 401(a)(1) limits the scope of the certifying authority's inquiry to the "applicable provisions" of Sections 301, 302, 303, 306, and 307 of the CWA.[146]

Under Section 401(a)(1), a certifying authority's decision to grant or deny certification must be based on whether the discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Act:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.[147]

As such, limitations on the scope of a certifying authority's review under Section 401 are a function of the statutory constraints Congress imposed, rather than than the 401 Certification Rule. For instance, the phrase "water quality requirements" appears throughout Section 401, but it is not defined in the statute. Nonetheless, the enumerated provisions of the CWA (*i.e.*, Sections 301, 302, 303, 306, and 307) *are* specified within Section 401 and the requirements of those sections are a prerequisite to, and therefore delineate the scope of, the Section 401 certification. Thus, while the phrase "water quality requirements" is undefined, its meaning is clear. "Water quality requirements" refer to the federal, state, or tribal requirements adopted pursuant to authority under Sections 301, 302, 303, 306, and 307.

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[144] *PUD No. 1*, 511 U.S. 700, 711-12.

[145] The preceding section (III.e.) already provides the Associations' analysis in support of this interpretation, and we therefore refrain from repeating that discussion here.

[146] 33 U.S.C. § 1341(a)(1).

[147] 33 U.S.C. § 1341(a)(1).

In contrast to the more settled meanings throughout most of Section 401, Section 401(d) is one of the few provisions of Section 401 that affords meaningful room for interpretation. Section 401(d) requires a certification to:

> set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any *applicant* for a Federal license or permit will comply with [enumerated provisions of the CWA], and with *any other appropriate requirement of State law*.[148]

These two highlighted terms (*e.g.*, "applicant" and "any other appropriate requirement of state law") are the cause of most of the divergent interpretations of Section 401(d) certification authority.

1. "Applicant"

Section 401(a)(1) describes the prerequisites for, and the scope of, the Section 401 certification process. It states that the trigger for state certification is based on whether a federal permit/license applicant's activity may result in a "*discharge*,"[149] and it requires that a federal permit/license be withheld unless the applicant provides a state certification that the "*discharge*" will comply with specified water quality requirements.

Section 401(d) authorizes certifying authorities to include appropriate conditions in the certification described in Section 401(a)(1). But instead of characterizing the conditions as necessary to assure the "discharge's" compliance with water quality requirements, it describes the conditions as necessary to assure the "applicant" will comply with the specified water quality requirements.

Section 401(d)'s requirement that the certification "set forth" conditions and requirements for the *applicant*, and not the *discharge*, makes sense because the certification is not some abstraction; it is a document that a certifying authority gives to a person or entity, and it describes what that person or entity must do to ensure that its discharges comply with water quality requirements. This is consistent with the 1972 Amendments' "total restructuring" and "complete rewriting" of the CWA.[150] That 1972 restructuring of the Act generally, and Section 401 in particular, transformed the Act's regulatory regime away from the prior focus indirectly regulating activities through ambient standards toward direct regulation of discharges.

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[148] 33 U.S.C. § 1341(d) (emphasis added).

[149] As noted, Section 401(a)(1) also requires the potential discharge to be from a federally permitted or licensed activity into WOTUS, *etc.* The Associations are abbreviating the Section 401(a)(1) terms here because this analysis is more directly focused on the term "discharge."

[150] *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history of 1972 amendments).

Indeed, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[151] Thus, viewed holistically, the authority to condition a certification under Section 401(d) supports the certifying authority's Section 401(a)(1) right to grant or deny a certification request. Together, the certification and any conditions form an integrated whole, the overarching purpose of which is to assure discharges from a federally licensed or permitted project will not violate water quality requirements.

In 1994, a divided Supreme Court appears to have disagreed with this interpretation in its *PUD No. 1* decision. In *PUD No.1*, the Court considered the interplay between Section 401(a)(1) and Section 401(d), and concluded that Section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[152]

The Supreme Court's fact-specific holding in *PUD No.1* does not call into question the validity of the 401 Certification Rule, and it does not justify or even allow for the expansive interpretations that have been suggested by some. As previously noted, the Court based its decision in large part on the deference it afforded the Agency's 1971 regulations,[153] which obviously predated Congress's 1972 enactment of Section 401. But regulations cannot provide reasonable interpretations of the existing statutory language if they do not even interpret the existing statutory language. The Associations therefore agreed with EPA's determination in the 401 Certification Rule that *PUD No.1* does not preclude the Agency from adopting a different interpretation.[154]

2. "Any other appropriate requirement of State law"

As previously noted, Section 401(d) requires a certification to:

> set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [enumerated provisions of the CWA], and with *any other appropriate requirement of State law*.[155]

The CWA does not define what constitutes "any other appropriate requirement of state law." The Agency must, however, heed the Supreme Court's admonition in *PUD No. 1* that, "[a]lthough § 401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded."[156] The Court went on to determine that a state requirement imposed to "ensure

[151] *Deal v. United States*, 508 U.S. 129, 132 (1993).
[152] *PUD No. 1*, 511 U.S. 700, 712.
[153] *PUD No. 1*, 511 U.S. 700, 712.
[154] 85 Fed. Reg. at 42,251 (*citing Nat'l Cable & Telecomm. Ass'n v. Brand X internet Serv.*, 545 U.S. 967, 982 (2005).
[155] 33 U.S.C. § 1341(d) (emphasis added).
[156] *PUD No. 1*, 511 U.S. 700, 712.

compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water Act" was one such "appropriate requirement," but declined to "speculate on what additional state laws, if any, might be incorporated by this language."[157]

The scope Congress intended through use of the phrase "any other appropriate requirement" must therefore be discerned by looking to the specific provisions of the CWA that Congress expressly identified in Section 401. An agency, just like a court, must exhaust the tools of statutory interpretation before finding statutory text ambiguous,[158] and the agency's interpretation is only reasonable if it is within the bounds of the ambiguity. Using context to discern the meaning of specific terms falls "[u]nder the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'"[159] "While 'not an inescapable rule,' this canon 'is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.'"[160]

For example, in *Gustafson v. Alloyd Co.*, the Supreme Court considered a statute that defined the word "prospectus" as a "prospectus, notice, circular, advertisement, letter, or communication."[161] The Court held that although the word "communication" could in the abstract mean any type of communication, "it is apparent that the list refers to documents of wide dissemination," inclusion "of the term 'communication' in that list suggests that it too refers to a public communication."[162]

Without question, the phrase "any other appropriate requirement" is capable of many different meanings in the abstract, and some states have latched onto this phrase in attempts to greatly expand the conditions they can extract through the Section 401 certification process. For instance, the 401 Certification Rule cited to state certifications with conditions requiring "biking and hiking trails to be constructed, one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project, and public access for fishing and other activities along waters of the United States."[163] The conditions Maryland sought to impose on the license for Exelon Generation Co., LLC's Conowingo dam and hydroelectric project presents another particularly egregious example of this practice.[164] Even though the project does not discharge phosphorus or nitrogen, "[a]s the cost of such a federal license, Maryland insists that the Conowingo Project remove the phosphorus and nitrogen that

[157] *PUD No. 1*, 511 U.S. 700, 712.
[158] *Cf. Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019).
[159] *McDonnell v. United States ("McDonnell")*, 136 S. Ct. 2355 at 2368 (2015) (quoting *Jarecki v. G.D. Searle & Co. ("Jarecki")*, 367 U.S. 303, 307 (1961).
[160] *McDonnell*, 136 S. Ct. 2355 at 2368-69 (quoting *Jarecki.*, 367 U.S. at 307.
[161] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573-574 (1995).
[162] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575.
[163] 85 Fed. Reg. at 42,257.
[164] *Exelon Generation Co. v. Grumbles*, 380 F. Supp. 3.d 1 (D.D.C. 2019).

flow downriver from New York, Pennsylvania, and Maryland. In lieu of cleaning the Susquehanna, Maryland would accept $172 million from Exelon each year for the next 50 years."[165]

In context, when employing the traditional tools of statutory interpretation, such requirements are clearly unlawful. The interpretive canon *noscitur a sociis* shows that the CWA cannot reasonably be interpreted to make allowance for such requirements. The phrase "any other appropriate requirement" "follows an enumeration of four specific sections of the CWA that are all focused on the protection of water quality from point source discharges to waters of the United States."[166] Indeed, Section 401 in its entirety is replete with references to requirements deemed necessary to ensure compliance with "applicable effluent limitations" and "water quality requirements." Given the overall focus of Section 401, the phrase "any other appropriate requirement" must be interpreted to include only those EPA-approved provisions of state or tribal law that implement the Section 402 and 404 permit programs or otherwise control point source discharges to WOTUS.

EPA, in the 401 Certification Rule, reached a similar conclusion using the related *ejusdem generis* canon. Under this principle, where general words follow an enumeration of two or more things, they apply only to things of the same general kind or class specifically mentioned.[167] This canon also informed Justice Thomas's dissent in *PUD No. 1*, therefore the 401 Certification Rule mirrored Justices Thomas and Scalia's conclusion that "the general reference to 'appropriate' requirements of state law is most reasonably construed to extend only to provisions that, like other provisions in the list, impose discharge-related restrictions."[168]

As previously noted, this interpretation also accords with the legislative history of the 1977 Amendments that added Section 303, which governs state water quality standards and implementation plans, to Section 401's enumerated list of CWA provisions. According to the Conference Report for the 1977 Amendments:

> The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirement of section 401. It is understood that section 303 is required by the provisions of section 301.[169]

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[165] *Exelon Generation Co. v. Grumbles*, 380 F. Supp. 3.d at 3.

[166] Sections 301, 302, and 306 impose effluent limits on new and existing sources, Section 303 governs water quality standards and implementation plans, and Section 307 addresses pretreatment standards for effluents.

[167] *See Wash. State Dept. of Social and Health Services v. Keffeler*, 537 U.S. 371, 383–85 (2003).

[168] *PUD No. 1*, 511 U.S. at 728 (Thomas, J., dissenting).

[169] H. Rep. No. 95-380 (95th Cong. 1st Sess. (1977).

As relevant here, Section 303 is the provision through which EPA approves state standards - standards which, like those promulgated under Section 301, apply only to "discharges" from "point sources."

Therefore, the text, structure, and history of Section 401 requires the Agency to interpret Section 401(d) and the phrase "any other appropriate requirement" to include only those EPA-approved provisions of state or tribal law that implement the Section 402 and 404 permit programs or otherwise control point source discharges to WOTUS.

IV. RESPONSES TO EPA'S QUESTIONS FOR CONSIDERATION

1. Pre-filing meeting requests

EPA promulgated the requirement that a project proponent submit a pre-filing meeting request to a certifying authority at least 30 days prior to submitting a certification request in order to help certifying authorities conduct reviews "within a reasonable period of time (which shall not exceed one year."[170] As explained by the D.C. Circuit, "while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."[171]

This decision, and others like it,[172] leave little doubt that certifying authorities are not permitted to toll Section 401 review periods, even if the certifying authority believes it needs additional information to review the certification request. It is clear that some certifying authorities have issued requests in apparent attempts to circumvent review deadlines. That said, in most instances, when a certifying authority requests additional information, it is in furtherance of a legitimate review, and not a delay tactic. As such, we generally support early coordination between certifying authorities and project proponents, and other measures to help facilitate a thorough and efficient Section 401 review within statutorily mandated deadlines.

The Associations' members have not reported any issues or concerns specifically related to the pre-filing meeting requirements in the 401 Certification Rule, but given the short time since it was promulgated, it may be too soon to draw conclusions about the impact of the 401 Certification Rule's pre-filing meeting request requirement. The Associations note, however, that the Army Corps and FERC have utilized similar pre-filing procedures for a number of years,[173] and our members have had positive experiences in those contexts. Outside of the Section 401 context, pre-filing meeting requests are also frequently utilized by the Department of Interior and Bureau of Land Management in expediting permit reviews. In these contexts, the Associations' members

[170] 85 Fed. Reg. at 42,240-42,242.
[171] *Hoopa Valley*, 913 F. 3d at 1104.
[172] *See N.Y. State Dep't of Envtl. Conservation v. See Nat's Fuel Gas Supply Corp.*, Slip Op. at No.s 19-1610-ag. 19-1618-ag (2d Cir. March 23, 2021); *See also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018); *See also See Nat's Fuel Gas Supply Corp.*, 164 FERC 61,084 at PP 35,42 (2018).
[173] *See* 18 C.F.R. § 5.1(d)(1) and 33 C.F.R. § 325.1(b).

report that the pre-filing coordination process has helped facilitate upfront discussions about projects, and allowed for a more efficient and timely exchange of information.

2. Certification request

EPA's request for information conveys the Agency's concern that the 401 Certification Rule's definition of a "certification request" "constrains what states and tribes can require in certification requests, potentially limiting state and tribal ability to get information they may need before the CWA Section 401 review process begins."[174] The Agency's concerns are based on a misapprehension of the role and purpose of the 401 Certification Rule's definition of "certification request." The definition of "certification request" does not in any way limit the information that a certifying authority can request from a project proponent. Instead, it sets forth the minimal elements necessary for a project proponent's submission to be considered a "certification request" that starts the statutory clock for a Section 401 review. As explained by the Second Circuit:

> [t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.' It does not specify that this time limit applies only for 'complete' applications. If the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide that they have all the information they need. The state agencies could thus theoretically request supplemental information indefinitely.[175]

The 401 Certification Rule's definition of "certification request" provides this bright line rule so that all parties are clear about when the review has commenced. Identification of the specific elements of a "certification request" eliminates any confusion about whether the project proponent has, in fact, requested a certification and, at the same time, ensures that the certifying authority has the core information necessary to review the request. This definition also helps certifying authorities by prohibiting project proponents from attempting to prematurely start the statutory clock by submitting requests that lack the basic information necessary for review, but it does not limit what certifying authorities can request be included in a project proponent's initial submission or after the submission.

The Associations recognize that, in most instances, when a certifying authority requests additional information, it is in furtherance of a legitimate review, and not a delay tactic. For instance, it is likely that some highly complex projects may warrant the submittal of additional information either within or after the original certification request, but the 401 Certification Rule's definition of "certification request" can accommodate those project-specific requests as well. Under the 401 Certification Rule's definition of "certification request," certifying authorities remain free to

[174] 86 Fed. Reg. at 29,543.
[175] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d at 455-56.

request information relevant to a project's potential water quality effects after the original submittal of the certification request, but doing so does not render the original certification request incomplete or provide a basis to restart the clock on the Section 401 review.

3. Reasonable period of time

As previously noted, the express text of Section 401 plainly states that a certifying authority waives its certification authority over a federal license or permit if the certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request."[176] As explained by the D.C. Circuit, "while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."[177] This provision of Section 401 is necessary "to prevent a State from indefinitely delaying a federal licensing proceeding."[178]

The Associations are not aware of any issues with the 401 Certification Rule's determination that the federal licensing or permitting agency should establish the reasonable period of time for review of a certification request. Nor do we believe it is improper for federal licensing or permitting agencies to serve this role. It is consistent with applicable case law,[179] and administrative precedent.[180] This approach is also consistent with existing regulations promulgated by FERC, the Army Corps, and EPA itself.[181]

It also makes logical sense to commit the "reasonable period of time" determination to the agencies with decades of experience implementing their licensing and permitting programs. Among the other insights gained from this experience, federal licensing and permitting agencies are well positioned to determine the review time reasonably necessary for a state to assess potential discharges from the federal project, rather than broader or more tangentially related impacts. And in implementing the 401 Certification Rule, FERC and the Army Corps have both considered a full year to be a "reasonable period of time" for some projects, while for some smaller or simpler actions, the Army Corps has determined that certification review can be completed in less than a

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[176] 33 U.S.C. § 1341(a)(1).
[177] *Hoopa Valley*, 913 F. 3d at 1104.
[178] *Hoopa Valley*, 913 F. 3d at 1105-6 (internal citations omitted).
[179] *See Millennium Pipeline Co. v. Seggos*, 860 F. 3d 696, 700 (D.C. Cir. 2017); *See also Hoopa Valley*, 913 F.3d at 1104 (''Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year. Indeed, the [EPA]—the agency charged with administering the CWA—generally finds a state's waiver after only six months.")
[180] *Constitution Pipeline Company, LLC*, 164 FERC P 61029 (F.E.R.C.), (''[T]o the extent that Congress left it to federal licensing and permitting agencies, here the Commission, to determine the reasonable period of time for action by a state certifying agency, bounded on the outside at one year, we have concluded that a period up to one year is reasonable.'')
[181] *See* FERC's regulations at 18 CFR 5.23(b)(2); Army Corps' regulations at 33 CFR 325.2(b)(1)(ii); and EPA's regulations at 40 CFR 124.53(c)(3).

year. We believe this shows that the 401 Certification Rule is being implemented appropriately by the federal licensing and permitting agencies using their expertise and experience. It also shows that 401 Certification Rule's commitment of the "reasonable period of time" determination to the licensing and permitting agencies did not cause those agencies to arbitrarily reduce all certification review periods.

Furthermore, the Associations do not believe that states are the proper parties to determine the "reasonable period of time" for their Section 401 review. As the D.C. Circuit has explained, "Congress intended Section 401 to curb a *state*'s 'dalliance or unreasonable delay.'"[182] Thus, it is unclear how a regulatory interpretation that committed the "reasonable period of time" determination to states could prevent those states from using that discretion to unreasonably delay review of even the simplest certification requests.

While the Associations support the 401 Certification Rule's conclusion that the federal licensing and permitting agencies should determine the reasonable time periods for certifications applicable to their license or permit actions, we also agree with the factors that the 401 Certification Rule required the agencies to consider when setting timeframes for certification decisions.[183] These considerations include: (1) the complexity of the proposed project; (2) the nature of any potential discharge; and, (3) the potential need for additional study or evaluation of water quality effects from the discharge.[184] Regardless of the type of project under consideration or which federal agency is overseeing the certification process, these factors are relevant to ensuring that the timeframes are appropriately tailored and commensurate with the complexity of the task at hand. These factors are also relevant to the federal agencies' goal of ensuring that certifying authorities focus their analysis and decision-making on the potential water quality effects of discharges from the proposed project. Further, if the three factors described above fail to adequately capture all the considerations necessary to determine a "reasonable period of time," federal licensing and permitting agencies are free to consider additional factors.

In sum, while the Associations acknowledge that some states would prefer to establish and, if necessary, extend their Section 401 review deadlines, we urge EPA to recognize the examples of delay and misuse that make it necessary to clarify that federal agencies, and not states, should determine what review timelines within the statutorily mandated one-year maximum are reasonable. As the D.C. Circuit has bemoaned, "it is now commonplace for states to use Section 401 to hold federal licensing hostage."[185]

Accordingly, if EPA decides to revise this provision of the 401 Certification Rule, it must remain cognizant that the "reasonable period of time" for review may not exceed one year because the

[182] *Hoopa Valley*, 913 F. 3d at 1105 (emphasis in original).
[183] 40 C.F.R. § 121.6(c).
[184] 40 C.F.R. § 121.6(c).
[185] *Hoopa Valley*, 913 F. 3d at 1104.

Agency has no discretion to interpret Section 401 as allowing certifying authorities any amount of time more than one year. And while the Associations do not oppose the involvement of certifying authorities in determining the "reasonable period of time" within the one-year limit, we urge EPA to recognize that it must implement Section 401 in a manner sufficient to curb a state's "dalliance or unreasonable delay."[186]

4. Scope of certification

As detailed in Section III, the Associations believe that the 401 Certification Rule reasonably interpreted the scope of Section 401 certification review as well as the scope of requirements that certifying authorities can impose as conditions for certification. The text, structure, and history of the Act reflect that Section 401 certification procedures are triggered by Section 401(a)(1) only when a federally licensed or permitted activity has the potential to result in a discharge from a point source into a WOTUS.

Further, because Section 401(a)(1) states that the certification must conclude that potential discharges "will comply with the applicable provisions of 301, 302, 303, 306, and 307," Section 401(a)(1) also therefore limits the scope of the certifying authority's inquiry to those enumerated provisions. Thus, although the CWA does not define "water quality requirements," the meaning can be readily discerned by the scope of Section 401(a)(1). "Water quality requirements" refer to the federal, state, or tribal requirements adopted pursuant to authority under Sections 301, 302, 303, 306, and 307. While EPA could interpret "water quality requirements" more narrowly, the Agency is plainly precluded from defining the term such that its scope is more comprehensive than the limited scope of the Section 401 review.

The phrase "any other appropriate requirement" in Section 401(d) does not change Section 401's statutorily mandated limits on the scope of certification. For one, Section 401(a)(1) delineates the scope of the Section 401 certification review; not Section 401(d). Even if Section 401(d) could be construed as describing the scope of Section 401 review, the result is the same because the phrase "any other appropriate requirement" follows an enumeration of four specific sections of the Act that are all focused on the protection of water quality from point source discharges to WOTUS.

EPA's citation to the phrase "the activity as a whole" without describing the context of the Supreme Court's *PUD No. 1* decision creates an erroneous implication that the Court construed Section 401(d) as granting states limitless authority to condition approvals.[187] That is not the case. The Supreme Court expressly explained that the authority described in *PUD No. 1* "is not unbounded."[188] The Court then determined that a state requirement imposed to "ensure compliance with the state water quality standards adopted pursuant to § 303 of the Clean Water

[186] *Hoopa Valley*, 913 F. 3d at 1105.
[187] *PUD No. 1*, 511 U.S. 700, 712.
[188] *PUD No. 1*, 511 U.S. 700, 712.

Act" was an "appropriate requirement," but declined to "speculate on what additional state laws, if any, might be incorporated by this language."[189]

As Justices Thomas and Scalia cautioned in their dissent in *PUD 1*, "conditions that have little relation to water quality," if allowed, would significantly "disrupt[] the careful balance between state and federal interests" established under other statutory regimes.[190] In fact, outside the specific context at issue in the Supreme Court's *PUD No. 1* decision, use of Section 401(d) to regulate "the activity as a whole" is statutorily prohibited in many key respects.

Recall that Section 401 provides states and tribes a narrow and temporally limited exemption from the otherwise exclusive jurisdiction that Congress bestowed on the federal government over certain types of projects of national importance such as power generation, energy distribution, and interstate transportation infrastructure. For instance, FERC's authority under the NGA is exclusive: "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."[191] "FERC's exclusive purview" includes the regulation of "facilities [that] are a critical part of the transportation of natural gas and sale for resale in interstate commerce."[192] In this "exclusively federal domain," states may not regulate.[193]

The Supreme Court's fact-specific construal of Section 401(d) to allow states and tribes to regulate "the activity as a whole" cannot undo, and therefore must yield to, these larger statutorily mandated fields of preemption. Whatever additional leeway the Supreme Court may have provided certifying authorities in the *PUD No. 1* decision, it did not and cannot overcome Congress's express directive that certain decisions are exclusively committed to the federal government. Indeed, even before the 401 Certification Rule was enacted, many courts had already recognized the need to restrain the types of conditions states can impose through Section 401 to those necessary to protect water quality.[194] In recent years, FERC has also confirmed that conditions not directly related to the licensee's "activity" are improper under Section 401. In fact, although

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[189] *PUD No. 1*, 511 U.S. 700, 712.
[190] *PUD No. 1*, 511 U.S. 700, 732-33.
[191] *Schneidewind* at 305.
[192] *Schneidewind* at 308.
[193] *Schneidewind* at 305; *See, e.g., N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 819–20, 822–24 (8th Cir. 2004) (NGA preempted state-law environmental provisions); *E. End Prop. Co. No. 1, LLC* v. *Kessel*, 851 N.Y.S.2d 565, 571 (N.Y. App. Div. 2007) (similar); *No Tanks Inc.* v. *Pub. Utils. Comm'n*, 697 A.2d 1313, 1315 (Me. 1997) (similar).
[194] *Am. Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."); *e.g., Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) (upholding certification conditions when they "deal[t] with project-related activities"); *Miners Advocacy Council, Inc. v. State, Dep't of Envtl. Conserv.*, 778 P.2d 1126, 1138 (Alaska 1989); *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 745 S.E.2d 385, 389 (S.C. Ct. App. 2013) (upholding conditions that address "impacts to adjacent water bodies or wetlands resulting from the activity"); *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 681 (Wash. 2004) (invalidating section 401 certification conditions that did not did not relate to the licensee's activity).

FERC interprets its governing statutes as compelling it to incorporate all state conditions into federal licenses, FERC has often noted its opinion that conditions "unrelated" to a project's activities are not proper Section 401 limitations.[195]

In addition to the above-referenced statutory and jurisprudential limits on the scope of states' Section 401 review and conditioning authority, we urge the Agency to consider the practical consequences of eliminating such limits. As noted throughout these comments, a handful of states have attempted to expand their Section 401 authority to block or constrain projects for reasons that have nothing to do with the protection of water quality. By broadly construing the scope of their Section 401 authority beyond what the CWA provides, some states demand project proponents develop and/or submit documentation wholly unrelated to water quality, such as environmental assessments of impacts to other environmental media, demonstrations of the need for the project, alternative route analyses, and analyses of air impacts, traffic impacts, and other reviews already undertaken by FERC or other federal agencies pursuant to the NEPA, the ESA, the NGA, and other statutes.[196] Indeed, the State of New York has routinely denied water quality certifications on grounds outside of water quality, expressing concern for the potential climate change impacts of projects and purported lack of assessment of such impacts.[197]

This implausibly broad construction of the scope of state review is perhaps most clearly exemplified in the Millennium Bulk Terminals – Longview LLC project in Washington State.[198] In the course of Washington State's 5-year review of the project, the state compiled an EIS that expressly concluded that the terminal would not result in significant adverse effects on water quality, aquatic life, or designated uses; and that any potential water quality impacts could be fully mitigated. And yet, even after concluding that the project would not adversely impact water quality, Washington State denied the certification request based on concerns about capacity of the interstate rail system, the impact of trains operating anywhere in that system, and impacts of the project on the overall capacity of the Federal Columbia River Navigation Channel to accommodate additional vessels at state ports.

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[195] *See, e.g.*, Order Issuing New License, Portland Gen. Elec. Co., Project No. 2195- 011, 133 FERC 62281, at 64620 57, 2010 WL 11404139 (FERC Dec. 21, 2010); Order Issuing New License, Pub. Utility Dist. No. 1 of Snohomish Cty., Wash., Project No. 2157-188, 136 FERC 62188, at 64488 92, 2011 WL 13045891 (FERC Sept. 2, 2011); Order Issuing New License, Pub. Utility Dist. No. 1 of Douglas Cty., Wash., Project No. 2149-152, 141 FERC 62104, at 64270 53, 2012 WL 12372998 (FERC Nov. 9, 2012); *See also Mitchell Cty. Conservation Bd.*, Project No. 11530-000—Iowa, 77 FERC 6202, 64458 n.4 (FERC Dec. 27, 1996) (refusing to require a hydropower licensee to spend project revenues on improvements at county parks "unrelated to the project").

[196] *Hoopa Valley*, 913 F.3d 1099, 1103-04; *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017).

[197] https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14670874.

[198] WDEC, In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals-Longview, LLC, Order # 15417 (Sept. 26, 2017); *See also Montana v. Washington*, No 22o152, (Montana motion for leave to file the bills of complaint are denied June 28, 20921. Justice Thomas and Justice Alito indicated they would grant the motion).

To state the obvious, no aspect of the CWA's text, structure, or purpose can be construed to suggest that Congress envisioned Section 401 to authorize state certifications based on impacts wholly unrelated to water quality. In many cases, Congress required that these impacts be assessed under different statutes.[199] Further, while Section 401 provided states a limited role in reviewing the prospective impacts of proposed federally licensed or permitted projects, states may have other authority to regulate the operation of those projects. As previously noted, states can, and often are, delegated permitting and enforcement authority under CWA Section 402 and 404, under the Clean Air Act, and through other federal statutes as well. The more limited role for states under Section 401 does not diminish states' jurisdiction under these statutory provisions. To the contrary, these other statutory provisions demonstrate that certification reviews are not the proper mechanism for addressing the potential environmental impacts that some states have misconstrued Section 401 to encompass.

5. Certification actions and federal agency review

EPA's Section 401 implementing regulations can reasonably require certifying authorities to include certain minimal information when they deny a certification request or request specific conditions as a prerequisite to certification. Indeed, the very basic documentation that certifying authorities are required to provide under the 401 Certification Rule cannot credibly be viewed as burdensome or an intrusion on a state or tribe's authority under Section 401.

For instance, it is hardly unreasonable to require a certifying authority to identify the basis for denying a certification request. The 401 Certification Rule merely requires the certifying authority to identify and cite to the water quality requirements that the proposed project will violate, and explain why the certifying authority believes that this violation will occur.[200] A certifying authority that has denied a certification request will surely have this information readily available, and the most minimal standards of governance and administrative procedure affirms that when the government makes such a decision, it should provide some reasoned explanation of why it made that decision.

Similarly, if the certifying authority denies a certification request because the applicant failed to include information that the certifying authority deemed important, the 401 Certification Rule requires the certifying authority to merely identify what necessary information was omitted.[201] Unless the certifying authority's denial is based on the applicant's failure to provide information

[199] For example, NEPA requires review of multi-media effects, while other statures address impacts to air (Clean Air Act), land (Resource Conservation and Recovery Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act).
[200] 40 C.F.R. § 121.7.
[201] 40 C.F.R. § 121.7(e)(1)(iii); 40 C.F.R. § 121.7(e)(2)(iii).

wholly unrelated to the proposed project's discharge or potential impacts to water quality requirements,[202] this documentation requirement presents no burden at all.

The 401 Certification Rule's nominal documentation standards for certification conditions are quite reasonable as well. Certifying authorities that impose conditions on certification need only explain why the conditions are necessary to assure that discharges from the project comply with an identified federal, state, or local requirement.[203] The Associations cannot envision an instance wherein a certifying authority required adherence to a certification condition within the scope of Section 401 review, but was unable to readily articulate a rationale for that condition. Here again, to the extent this basic documentation requirement is burdensome at all, it is only in relation to those certifying authorities that misuse their Section 401 certification authority to impose conditions wholly unrelated to discharges or water quality requirements.[204]

The instances of certifying authorities' misuse of Section 401 certification and conditioning authority cited above throughout these comments illustrates why federal licensing and permitting agencies must conduct a facial review of the validity of certifications and conditions.[205] Such review is authorized under Section 401(a)(1), which makes clear that a federal agency must withhold the issuance of a federal license or permit until the applicant obtains the applicable water quality certifications and that, upon denial, a federal agency may not grant the license or permit.[206]

Federal agency review is also consistent with court decisions that have held that federal licensing and permitting agencies not only have the *authority* to determine whether certifying agencies have complied with Section 401 requirements, they have the *obligation* to make these determinations.[207] For instance, in *City of Tacoma, Washington* v. *FERC*, the D.C. Circuit explained that "[i]f the question regarding the state's section 401 certification is not the application of state water quality standards, but compliance with the terms of section 401, then [the federal agency] must address it. This conclusion is evident from the plain language of section 401: 'No license or permit shall be granted until the certification required by this section has been obtained or has been waived.'"[208]

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[202] *See e.g., .N. Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455-56 (2nd Cir. 2018).
[203] 40 C.F.R. § 121.7(d)(1); 40 C.F.R. § 121.7(d)(2).
[204] *See e.g., Exelon Generation Co. v. Grumbles*, 380 F. Supp. 3.d 1 (D.D.C. 2019).
[205] *See* 40 C.F.R. § 121.7; 40 C.F.R. § 121.9.
[206] *See* 33 U.S.C. § 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been *obtained* or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.") (emphasis added).
[207] *See City of Tacoma v. FERC*, 460 F.3d 53, 67–68 (D.C. Cir. 2006); *Keating v. FERC*, 927 F.2d 616, 622–623, 625 (D.C. Cir. 1991); *See also Hoopa Valley*, 913 F.3d at 1105 ("had FERC properly interpreted Section 401 and found waiver when it first manifested more than a decade ago, decommissioning of the Project might very well be underway''); *See also Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207, 1217 (W.D. Wash. 2003) (holding that the Army Corps had discretion not to incorporate untimely certification conditions).
[208] *City of Tacoma v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006) (citing 33 U.S.C. § 1341(a)(1)).

The court went on to explain that even though the federal licensing or permitting agency did not need to "inquire into every nuance of the state law proceeding . . . it [did] require [the federal agency] to at least confirm that the state has facially satisfied the express requirements of section 401."[209]

The 401 Certification Rule strikes the proper balance between federal agencies' obligation to facially evaluate the basic validity of Section 401 certifications/conditions and the need to refrain from delving into the nuances of state or tribal law, or second-guessing the imposition of each condition.[210] Under the 401 Certification Rule, federal licensing and permitting agencies are obligated to make a facial determination of the certifying authorities' observance of minimal procedural requirements, but are not permitted to delve into the substance and nuance of certification decisions or conditions.

Federal licensing and permitting agencies should communicate and coordinate with certifying agencies to avoid inadvertent waivers and any other procedural issues that could invalidate a certifying authorities' certification or conditions. We also believe that federal agencies should, to the fullest extent of their authority, allow certifying authorities to correct easily addressed procedural violations. We note, however, that Section 401 provides federal agencies no discretion to interpret Section 401 as allowing certifying authorities any amount of time in excess of one year.[211] As such, no matter how minor or trivial, certifying authorities cannot make corrections after one year has elapsed.

6. Enforcement

Federal licensing and permitting agencies have exclusive jurisdiction to enforce certification conditions under Section 401. Section 401(a)(1) prescribes a temporally limited review role for states. Once the state certification review process has been completed or been waived, exclusive jurisdiction reverts back to the federal licensing and permitting agencies. If EPA were to implement Section 401 otherwise and promulgate a rule authorizing ongoing state oversight/enforcement of certification conditions, that rule would be in direct contravention of the statutorily mandated time limits Congress prescribed in Section 401.

Section 401(a)(4) also prohibits state enforcement of certification conditions. Section 401(a)(4) instructs that "[p]rior to the initial operation of any federally licensed or permitted facility or activity" certifying authorities are authorized to ''review the manner in which the facility or activity shall be operated . . . '' for purposes of assuring that water quality requirements will not

[209] *City of Tacoma v. FERC*, 460 F.3d at 68.
[210] *See Am. Rivers, Inc. v. FERC*, 129 F. 3d 99, 107 (2d Cir. 1997).
[211] Consistent with our comments in Sections III.(e) and (f), the Associations believe that Congress's establishment of one-year as the outermost limit for Section 401 certifications reveals that Congress understood and expected Section 401 reviews to be narrowly focused on discharges from the federal project, rather than broader or more tangentially related impacts.

be violated.[212] If the certifying authority finds that "such federally licensed or permitted facility or activity will violate . . . water quality requirements such Federal agency may, after public hearing, suspend such license or permit."[213]

Section 401(a)(4) thus describes the full extent of a state's post-certification authority. States have a time-limited opportunity to conduct a pre-operational inspection of facilities for purposes of ascertaining compliance with water quality requirements. Far from opening the door to state enforcement of certification conditions, Section 401(a)(4) only allows the state to notify the permitting or licensing agency. Section 401(a)(4) then expressly describes the federal agencies' discretion to determine whether to bring an enforcement action pursuant to the state recommendation.

Similarly, Section 401 does not allow citizen suits to enforce certification conditions because EPA itself lacks authority to enforce certification conditions under Section 401. EPA enforcement authority under the CWA comes from Section 309, which extends the Agency authority to bring actions for violations of Sections 301, 302, 306, 307, 308, 318, and 405, but not Section 401.[214] The CWA also allows for citizen suits, but only when the Agency fails or refuses to act.[215] Indeed, the Associations believe it is implausible that Congress would grant private citizens greater enforcement authority than EPA. Rather, citizen suit authority under the Act is "meant to supplement rather than supplant governmental action."[216] Thus, EPA's lack of jurisdiction to enforce certification conditions means private citizens lack this authority as well.

7. Modification

Section 401 of the CWA does not allow certifying authorities to modify previously issued certifications or to include "reopeners" in certification conditions. As the Section 401 certification process is only part of a more comprehensive and protracted federal licensing or permitting process, timely issuance of certifications can be integral to the overall viability of essential energy and infrastructure projects. Depending on the extent of a delay in obtaining the requisite certifications and authorizations or the level of uncertainty about the schedule or outcome for those processes, many important projects can be cancelled altogether.

Congress clearly understood the significant adverse impacts that delay and uncertainty could have on nationally important energy and infrastructure projects, such that it required states' exercise of Section 401 certification authority to be highly circumscribed and completed within "a reasonable

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[212] 33 U.S.C. §1341(a)(4).
[213] 33 U.S.C. §1341(a)(4).
[214] 33 U.S.C. § 1319(a)(3)
[215] *See Askins v. Ohio Dep't of Agric.*, 809 F.3d 868, 873 (6th Cir. 2016) (suggesting citizens are "backup" to the EPA and states, which are the primary enforcers); *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) (citizens may sue "when the responsible agencies fail or refuse to do so").
[216] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987).

period of time (which shall not exceed one year) . . ."[217] Thus, although Congress afforded states an opportunity to review the potential water quality impacts of federally licensed and permitted projects, it crafted Section 401 to ensure that this carve-out from areas otherwise exclusively committed to the federal government was well-defined and precisely time-limited.

Allowing a certifying authority to revisit and modify an existing certification or to include "reopener" conditions that resurrect the certifying authority's Section 401 project review authority would render meaningless the express time limits Congress imposed in Section 401(a)(1). Only Congress can change the time limits in Section 401(a)(1). EPA has no discretion to extend these limits in any way, and neither do federal licensing and permitting agencies or certifying authorities. In this respect, Congress was explicit and clear – state certification review processes cannot extend beyond one year.

Certifying authorities that wish to engage on a federally licensed or permitted project outside of the Section 401 review period likely have many other opportunities. Indeed, the Section 401 review process is often only one small part of a larger and more comprehensive framework for reviewing the need for, and impacts of, federally authorized projects.

8. Neighboring jurisdictions

The 401 Certification Rule provided a necessary update to EPA's regulations implementing Section 401(a)(2). Overall, these updates helped to increase the clarity and predictability of the procedural requirements Congress set forth in Section 401(a)(2).

The Associations' members have not reported any issues or concerns regarding the Agency's procedures for determining whether a federally licensed or permitted activity has the potential to result in a discharge that "may affect" water quality in neighboring jurisdictions. The Associations also did not view the 401 Certification Rule's changes to 40 C.F.R. § 121.12(b) as rendering EPA's role "wholly discretionary."[218] Instead, we viewed this citation to agency discretion as reflecting Section 401(a)(2)'s requirement that the effect of a discharge on a downstream jurisdiction's water quality be "determined by the Administrator."[219]

EPA's determination of whether a discharge "may affect" the water quality of another jurisdiction involves some discretion, but the Agency's discretion is not unbounded.[220] Section 401 provides a "meaningful standard against which to judge the agency's exercise of discretion."[221] Under Section 401(a)(2), EPA renders a determination about the likelihood that a potential upstream discharge will violate a water quality standard in a downstream jurisdiction. When making that

[217] 33 U.S.C. § 1341(a)(1).
[218] 86 Fed. Reg. at 29,543.
[219] 33 U.S.C. § 1341(a)(2).
[220] *See Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.("Weyerhaeuser")*, 139 S. Ct. 361, (2018).
[221] *Weyerhaeuser Co.*, 139 S. Ct. at 370 (citation and quotation marks omitted).

determination, the Agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[222] And courts can invalidate EPA's determination if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[223]

Although Section 401 provides judicially manageable standards that prescribe the considerations that must inform the Agency's "may affect" determination, if EPA proceeds with revising the 401 Certification Rule, it makes sense to include those considerations in the regulations.

If the Agency proposes such regulations, EPA's "may affect" determination considerations should be drawn directly from the text, structure, and history of Section 401. As such, the Agency's rules should explain that the potential "discharge" under Section 401(a)(2) refers to effluent flowing or issuing from a point source to a WOTUS. Additionally, the phrase "the quality of the waters of any other State"[224] must be interpreted consistent with the 401 Certification Rule's definition of "water quality requirements" so that the Agency's "may affect" determination is based on the likelihood that a discharge will cause a downstream violation of a federal, state, or tribal requirements adopted pursuant to authority under Sections 301, 302, 303, 306, and 307. Further, because Congress's authority to enact the CWA, and Section 4(b)(2) in particular, derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause,[225] the downstream "waters" that EPA must analyze must be limited to WOTUS, properly construed.

EPA's regulations should also include additional considerations that reflect the multi-jurisdictional nature of the Section 401(a)(2) "may affect" determination. For instance, the Agency's regulations should reflect enhanced considerations of the volumes of effluent, the size, flow, and current water quality of the WOTUS, the distance between the potential discharge and the neighboring jurisdiction, and the impacts of other existing and anticipated discharges to the WOTUS. These

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[222] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, (1962)).

[223] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[224] 33 U.S.C. § 1341(a)(2).

[225] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *See also United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (describing the ''channels of interstate commerce'' as one of three areas of congressional authority under the Commerce Clause); *See also Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001). (term ''navigable'' indicates ''what Congress had in mind as its authority for enacting the Clean Water Act: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' Nothing in the legislative history of the Act provides any indication that ''Congress intended to exert anything more than its commerce power over navigation.'' (*Id.* at 168 n.3)).

additional considerations will help avoid triggering the Section 401(b)(2) notification and coordination procedures based on more speculative assertions of downstream impacts.

9. Data and other information

As the 401 Certification Rule took effect less than a year ago,[226] there has not been enough time to reasonably ascertain its impacts; particularly given that the short time since enactment occurred during a global pandemic, unprecedented lockdown orders, and social distancing requirements. For instance, assessing whether the 401 Certification Rule has made an aspect of the 401 certification process more or less efficient is greatly complicated by the fact that COVID protocols have also significantly impacted the efficiency of these processes during the same time period. As such, the Associations question whether any useful insights or reasonable conclusions about the performance of the 401 Certification Rule can be drawn from less than ten months of implementation during a pandemic.

Looking forward, however, we believe the regulatory reforms in the 401 Certification Rule will prove useful and necessary. EPA's notice of intent to reconsider and revise the 401 Certification Rule arises in the context of a changing energy market in which the United States has become a net exporter of natural gas,[227] and the resilience of the country's electric grid remains under review.[228] FERC has long recognized the importance of natural gas in bolstering the reliability of the electric grid.[229] This topic is increasingly important in light of recent extreme weather events and FERC's continued examination of the reliability and resilience of the bulk power system.[230] Further, the U.S. Energy Information Administration's 2021 Annual Report demonstrates that natural gas will remain an important part of the U.S. energy mix over the next 30 years, even with a significant increase in renewable resources.[231]

The United States also remains poised to serve the growing global need for natural gas and to provide important optionality in the market through U.S. LNG exports.[232] Since 2018, four U.S. LNG export facilities in the lower 48 states have entered service, bringing the total number

[226] *See* 85 Fed. Reg. at 42,210 (Effective date of Sept. 11, 2020).

[227] Dean Foreman, *As We Said – U.S. A Net Exporter of Total Energy*, API (Dec. 12, 2019), https://www.api.org/newspolicy-and-issues/blog/2019/12/12/as-we-said-us-a-net-exporter-of-total-energy. *See also* NERA Economic Consulting, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (June 7, 2018).

[228] *See, e.g.*, *Technical Conference to Discuss Climate Change, Extreme Weather, & Electric System Reliability*, FERC (last updated Apr. 22, 2021), https://ferc.gov/news-events/events/technical-conference-discuss-climate-changeextreme-weather-electric-system.

[229] *1999 Certificate Policy Statement* at 25.

[230] *See supra* note 7.

[231] U.S. Energy Info. Admin., *Annual Energy Outlook 2021 with projections to 2050* at 7 (Feb. 2021).

[232] As the economic response to the pandemic has stabilized, so has global demand for natural gas. *See, e.g.*, Jeremiah Shelor, EIA's *Natural Gas Price Forecast Ticks Up to $3.05 on Exports, U.S. Demand*, Nat. Gas Intel. (May 11, 2021), https://www.naturalgasintel.com/eias-natural-gas-price-forecast-ticks-up-to-3-05-on-exports-u-s-demand/.

currently in operation to six, and several more are under construction or proposed and approved. This is relevant to EPA's reconsideration and potential revision to the 401 Certification Rule because many LNG export projects include interstate natural gas pipeline components that may be subject to any new certification regulations EPA adopts. New LNG export projects will very likely also require additional interstate pipeline facilities, whether compressor stations or new laterals, to transport sufficient quantities of natural gas to their facilities.

Additionally, President Biden recently announced his support for a Bipartisan Infrastructure Framework that the White House anticipates will fund "transformational and historic investments in clean transportation infrastructure, clean water infrastructure, universal broadband infrastructure, clean power infrastructure, remediation of legacy pollution, and resilience to the changing climate."[233] Projects such as these will require dredge-and-fill activities in WOTUS that require CWA Section 404 permits from the Army Corps; Army Corps permits issued under Sections 9 and 10 of the Rivers and Harbors Act ("RHA"); and U.S. Coast Guard permits for bridges and causeways under Section 9 of the RHA. All of the actions are likely to trigger Section 401 certification requirements.

Moreover, on June 30, 2021, the White House Council for Environmental Quality ("CEQ") submitted a report to Congress on carbon capture, utilization, and sequestration ("CCUS Report").[234] The CCUS Report noted that expanded use and deployment of CCUS technology will require an unprecedented buildout of CO_2 pipeline infrastructure, the Section 404 permitting for which CEQ recognized would trigger a potentially large number of state and tribal Section 401 certification reviews.[235]

10. Implementation Coordination

The 401 Certification Rule took effect less than a year ago.[236] Consequently, to the extent the 401 Certification Rule required any states and other certifying authorities to update their laws or regulations, those proceedings have either recently concluded or are still ongoing. As the Agency considers whether and to what extent it will revise the 401 Certification Rule, we urge EPA to consider the recency of these changes and the burden and uncertainty associated with triggering another round of regulatory overhauls.

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[233] *See* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-president-biden-announces-support-for-the-bipartisan-infrastructure-framework/.

[234] *See* https://www.whitehouse.gov/ceq/news-updates/2021/06/30/council-on-environmental-quality-delivers-report-to-congress-on-steps-to-advance-responsible-orderly-and-efficient-development-of-carbon-capture-utilization-and-sequestration/.

[235] *See* CCUS Report at 26, 61.

[236] *See* 85 Fed. Reg. at 42,210 (Effective date of Sept. 11, 2020).

The Associations also urge EPA to refrain from proposing changes to the 401 Certification Rule until the various challenges to the rule have been resolved.[237] We believe that proposing revisions to the 401 Certification Rule prior to resolution of these challenges will create additional uncertainty and confusion, and may cause states and tribes to prematurely initiate proceedings to integrate new requirements.

For similar reasons, the Associations further recommend that EPA coordinate any proposed revisions to the 401 Certification Rule with other Administration efforts to revise federal project review requirements, such as CEQ's potential revisions to its regulations implementing NEPA or the Fish and Wildlife Service's potential revision of regulations implementing Section 7 of the Endangered Species Act ("ESA"). NEPA, Section 7 of the ESA, and Section 401 of the CWA are all part of the comprehensive federal project review framework. And in fact, the project review provisions of these other statutes may provide the review and engagement opportunities that states sometimes misuse the Section 401 certification process to obtain. As such, if EPA ultimately proceeds with proposing revisions to the 401 Certification Rule, we recommend that EPA sequence any potential revisions to the 401 Certification Rule so that they follow any changes to federal project review requirements in other statutes. Doing so can avoid regulatory redundancy and better ensure complementary federal project review requirements are developed in a cohesive and consistent fashion.

V. CONCLUSION

The Associations appreciate the opportunity to provide comments on EPA's notice of intent to revise the 401 Certification Rule. We supported the 401 Certification Rule as proposed and continue to support the rule because it provides needed clarity and certainty regarding the role of states and other certifying authorities under Section 401. The reforms and regulatory updates promulgated through the 401 Certification Rule were long overdue, and given the misuse of Section 401 certification procedures by some states, were necessary.

The 401 Certification Rule is appropriately tailored to address those aspects of Section 401 that are most often misconstrued and/or misused by states and other certification authorities while respectfully adhering to the principles of cooperative federalism that Congress required in the CWA and other statutes. The Associations therefore urge EPA to refrain from rescinding or substantially revising the 401 Certification Rule.

Should the Agency proceed to revise the 401 Certification Rule, the Associations urge EPA to do so in a way that meaningfully considers the detailed interpretive guidelines that we provided in Section III of these comments, and our specific responses to the Agency's enumerated "questions

[237] *See In re Clean Water Act Rulemaking*, Case 3:20-cv-04636-WHA (N.D. CA 2020) (*See* EPA's Motion for Remand without Vacatur (Doc. 143, filed July 1, 2021).

for consideration" in Section IV. As noted therein, EPA is obliged to implement the Act in accordance with its text and structure, as well as the discernable intent of Congress.

Congress, through Section 401, expressly assigned an important project review role for states and tribes, but it did so in the context of multiple statutes unambiguously preserving exclusive federal jurisdiction over certain projects and multiple other statutes subjecting those projects to environmental reviews beyond the limited scope of Section 401. Therefore, as the agency tasked with implementing the CWA, EPA must ensure that any potential revisions to the 401 Certification Rule perpetuate Section 401's important but highly circumscribed role for states, while prohibiting states from arrogating authority Congress exclusively entrusted to the federal government.

Thank you for your consideration of our comments. Please do not hesitate to reach out to us if we can be of further assistance on this important issue.

Robert Benedict
Vice President, Petrochemicals & Midstream
American Fuel & Petrochemical Manufacturers

Wendy Kirchoff
Vice President, Regulatory Policy
American Exploration & Production Council

Robin Rorick Vice President, Midstream
American Petroleum Institute

Dan Naatz
Senior Vice President of Government Relations and Political Affairs
Independent Petroleum Association of America

EXHIBIT 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re CLEAN WATER ACT RULEMAKING.

No. 3:20-cv-4636-WHA

CONSOLIDATED (APPLIES TO ALL ACTIONS)

DECLARATION OF DAVID M.S. DEWHIRST

1. I am the Solicitor General of Montana. This declaration is based on my personal knowledge and experience, and I could competently testify to its contents if called to do so.

2. In my role as Solicitor General, my responsibilities include overseeing all litigation involving the State of Montana. I was involved in the Millennium Bulk Terminal Project litigation and represented the State of Montana's interests before the United States Supreme Court.

3. I am informed the Court is contemplating vacating the Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020) ("Certification Rule").

4. Montana is a landlocked state. A large portion of Montana's economy depends on its ability to export energy products to markets that demand them, particularly markets overseas in Asia. Indeed, according to the U.S. Energy Information Administration, Montana has the largest estimated recoverable coal reserves among the states, accounting for about 30% of the U.S. total.

5. I am aware of at least one occasion (the proposed Millennium Bulk Terminal Project) in which a coastal state through which Montana must export its products used the 401 Certification process to block the development of port facilities based on economic protectionism and political hostility to the product Montana sought to export, *i.e.*, Washington used the 401 Certification process to block a project for non-Clean Water Act reasons.

6. The Millennium Bulk Terminal Project was proposed in 2012. Apparently unable to maintain the project's viability while engaged in lengthy state and federal litigations over Washington's actions, Millennium filed for bankruptcy in December 2020.

7. I believe the Certification Rule significantly reduces abuses—such as Washington's denial of a 401 certification for the Millennium Bulk Terminal Project—that harm Montana's economy and restrict its activities in the federal system. I believe there is a serious risk that such abuses will again occur if the Certification Rule is vacated. I also believe that uncertainty in the pre-Certification Rule 401 certification process and the possibility of such abuses deters (or increases the cost of) large capital investments that benefit Montana's economy.

8. Montana could also suffer substantial disruption from general whipsawing of its regulators and regulated entities.

9. Large, capital-intensive projects necessary for Montana's economic development depend on a high degree of certainty in timing and regulatory burden. Vacatur of the Certification Rule would undermine that certainty. I believe Montana would suffer economically as a result.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA AND THE STATE OF MONTANA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed in Helena, Montana, this 4th day of October 2021.

Dated: 10/4/21

David M.S. Dewhirst
Solicitor General

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

INTRODUCTION

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

STATEMENT

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

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

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

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

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

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

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

> exercise of his authority under this chapter.

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

ANALYSIS

1. THE APPLICABLE STANDARDS FOR REMAND AND VACATUR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. THE CERTIFICATION RULE'S DEFICIENCIES.

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

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

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

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

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

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

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

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

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

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

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

B. THE DISRUPTIVE CONSEQUENCES OF VACATUR.

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

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

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

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

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

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

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

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

CONCLUSION

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

Intervenor defendants' motion to strike (Dkt. No. 148) is **DENIED**. Being unnecessary for the resolution of this motion, EPA's request for judicial notice (Dkt. No. 157) is **DENIED AS MOOT**.

IT IS SO ORDERED.

Dated: October 21, 2021.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re CLEAN WATER ACT RULEMAKING.	No. C 20-04636 WHA No. C 20-04869 WHA No. C 20-06137 WHA
This Document Relates to: ALL ACTIONS.	(Consolidated) **FINAL JUDGMENT**

For the reasons stated in the order granting remand with vacatur, Dkt. No. 173, and to ensure appealability, final judgment is hereby entered in favor of plaintiffs and against defendants, intervenors, and intervenor defendants. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: November 17, 2021.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: Clean Water Act Rulemaking

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

Related Case Nos.
3:20-CV-04636-WHA
3:20-CV-06137-WHA

INTERVENOR DEFENDANTS' MOTION FOR STAY PENDING APPEAL

Date: December 2, 2021
Time: 8:00 A.M.
Courtroom: 12, 19th Floor
Judge: Hon. William H. Alsup

TABLE OF CONTENTS

I. INTRODUCTION 2

II. BACKGROUND 3

A. Clean Water Act 3

B. Certain States abused their Section 401 certification authority. 4

C. EPA adopts the Section 401 Certification Rule. 6

D. This lawsuit and the Order vacating the Rule 7

III. ARGUMENT 9

A. Intervenor Defendants are likely to succeed on the merits. 9

1. The APA requires a complete administrative record and full briefing on the merits before a reviewing court may set aside agency action. 10

2. The Court's application of the Allied-Signal factors was erroneous. 13

B. Intervenor Defendants will be irreparably harmed absent a stay. 19

1. Industry Intervenors' members are experiencing economic harm. 19

2. Intervenor Defendants are being irreparably harmed by deprivation of statutory rights under the APA 21

3. Vacatur reimposes harms of constitutional magnitude. 22

C. Plaintiffs will not be substantially injured by a stay, which would serve the public interest. 23

IV. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

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

Alcoa Power Generating Inc. v. FERC,
643 F.3d 963 (D.C. Cir. 2011) 6, 17

Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n,
988 F.2d 146 (D.C. Cir. 1993) ..... *passim*

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 15

Block v. North Dakota,
461 U.S. 273 (1983) 10

California v. Regan,
No. 20-cv-03005-RS, 2021 WL 4221583 (N.D. Cal. Sept. 16, 2021) 14, 17

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

Carpenters Indus. Council v. Salazar,
734 F. Supp. 2d 126 (D.D.C. 2010) 11

Center for Native Ecosystems v. Salazar,
795 F. Supp. 2d 1236 (D. Colo. 2011) 11, 12

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 3

Community for Creative Non-Violence v. Turner,
893 F.2d 1387 (D.C. Cir. 1990) 17

Consumer Energy Council of Am. v. FERC,
673 F.2d 425 (D.C. Cir. 1982) 21

Croew & Dunlevy, P.C. v. Stidham,
640 F.3d 1140 (10th Cir. 2011) 20

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

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

Fund For Animals v. Norton,
281 F. Supp. 2d 209 (D.D.C. 2003) 22

Great Atl. & Pac. Tea Co. v. Cottrell,
424 U.S. 366 (1976) 22

Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund,
527 U.S. 308 (1999) 12

Hoopa Valley Tribe v. FERC,
913 F.3d 1099 (D.C. Cir. 2019) 6

Idaho v. Coeur d'Alene Tribe,
794 F.3d 1039 (9th Cir. 2015) 20

Invenergy Renewables LLC v. United States,
476 F. Supp. 3d 1323 (Ct. Int'l Trade 2020) 21

K2 Am. Corp. v. Roland Oil & Gas, LLC,
653 F.3d 1024 (9th Cir. 2011) 10

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

Lane v. Pena,
518 U.S. 187 (1996) 10

Maine v. Wheeler,
No. 1:14-cv-00264-JDL, 2018 WL 6304402 (D. Me. Dec. 3, 2018) 14

Michelin Tire Corp. v. Wages,
423 U.S. 276 (1976) 22

N. Mariana Islands v. United States,
686 F. Supp. 2d 7 (D.D.C. 2009) 21

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

Nat. Res. Def. Council v. Wheeler,
955 F.3d 68 (D.C. Cir. 2020) 15

Nat'l Cable & Telecomm'cns Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 15

Nat'l Parks Conservation Ass'n v. Salazar,
660 F. Supp. 2d 3 (D.D.C. 2009) 11, 14

Nken v. Holder,
556 U.S. 418 (2009) 9

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 22

Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ),
632 F.3d 1111 (9th Cir. 2011) 12, 13

Phillip Morris USA Inc. v Scott,
561 U.S. 1301 (2010) (Scalia, J., in chambers) 20

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

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 12

PUD No. 1 of Jefferson County v. Washington Department of Ecology,
511 U.S. 700 (1994) 15

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

Rural Cellular Ass'n v. FCC,
588 F.3d 1095 (D.C. Cir. 2009) 13

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 16

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

State Dep't of Envtl. Conservation v. FERC,
884 F.3d 450 (2d Cir. 2018) 6, 17

Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.,
988 F.3d 1170 (9th Cir. 2021) 21

Trump v. Sierra Club,
140 S. Ct. 1 (2019) 9

United States v. Orr Water Ditch Co.,
391 F.3d 1077 (9th Cir. 2004) 9

Valentine v. Collier,
956 F.3d 797 (5th Cir. 2020) 22

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 12

Statutes

5 U.S.C. § 551(5) 21

5 U.S.C. § 553(b), (c) 21

5 U.S.C. § 706 12

5 U.S.C. § 706(2) 10, 11

28 U.S.C. § 1291 8

28 U.S.C. § 1292(a)(1) 9

33 U.S.C. 1251(b) 3

Administrative Procedures Act ..... *passim*

Clean Water Act ..... *passim*

EPA's 2020 Clean Water Act Section 401 ..... *passim*

Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U. S.C. § 1341) 3, 4

Judiciary Act, 1789 (1 Stat. 73) 12

Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law,* 53 Duke L.J. 291, 291-292 (2003) 12

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

Other Authorities

40 C.F.R. § 121.1 6

40 C.F.R. §§ 121.2–121.11 16

40 C.F.R. § 121.3 7

40 C.F.R. § 121.4 7

40 C.F.R. §§ 121.5–9 7

40 C.F.R. § 121.7 7

40 C.F.R. §§ 121.8–9 7

40 C.F.R. § 121.11 7

40 C.F.R. § 121.11 17

40 C.F.R. § 121.12 7

40 C.F.R. §§ 121.13–16 7

44 Fed. Reg. 32,854, 32,856 (June 7, 1979) 4, 17

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

86 Fed. Reg. 16,298 (Mar. 29, 2021) 18

86 Fed. Reg. 29,541 (June 2, 2021) 8

EO 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021) 8

Fact Sheet: List of Agency Actions for Review, White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-listofagency-actions-for-review/ 8

Federal Rule of Appellate Procedure 8(a)(1)(A) 1

Federal Rule of Civil Procedure 62 1

Joint EPA Army Memorandum on 401 Implementation (Aug. 19, 2021), available at https://www.epa.gov/cwa-401/2020-rule-implementation-materials 23

NOTICE OF MOTION AND MOTION
FOR STAY PENDING APPEAL

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Thursday December 2, 2021, at 8:00 a.m., before the Honorable William H. Alsup of the United States District Court for the Northern District of California, in Courtroom 12 on the 19th Floor of the Philip E. Burton Courthouse and Federal Building, 450 Golden Gate Avenue, San Francisco, California, Intervenor Defendants the States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming (collectively the "State Defendants"), American Petroleum Institute (API), Interstate Natural Gas Association of America (INGAA), and National Hydropower Association (NHA)[1] will and hereby do move this Court for an Order staying its Order dated October 21, 2021 ("Order") (ECF No. 173) and Final Judgment (ECF No. 176) pending their appeal of the Order and Final Judgment to the United States Court of Appeals for the Ninth Circuit.

This motion is made pursuant to Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8(a)(1)(A), which authorize the District Court to stay an action, order, or judgment, pending resolution of an appeal. The motion is based on this notice of motion; the accompanying memorandum and proposed order; all pleadings and filings in these matters; and such oral argument as the Court deems necessary. Intervenor Defendants are concurrently filing their notices of appeal. Intervenor Defendants have conferred with the other parties and have been advised that Plaintiffs oppose the Motion and Defendants reserve their position pending review of the Motion.

[1] This filing represents the views of the NHA, a nonprofit national association dedicated exclusively to preserving and expanding clean, renewable, affordable hydropower and marine energy resources. With over 250 member companies, this filing does not necessarily represent the views of any individual member.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Intervenor Defendants[2] joined this litigation so they could defend EPA's 2020 Clean Water Act Section 401 Certification Rule[3] if, after a change in administration, EPA chose not to do so. They advocated strongly for EPA to fill a nearly 50-year void in the Clean Water Act regulatory landscape—rules for implementing Section 401. The Rule reflects the outcome of that administrative process. It clarifies basic aspects of the Section 401 process, such as how time limits will be calculated and the scope of permissible State review. Intervenor Defendants favor the Rule and the policy choices it implements.

Plaintiffs in these consolidated cases do not favor the Rule and want it vacated judicially. The new federal administration wants to revisit the Rule and revise it administratively to implement different policy choices. The Administrative Procedures Act (APA) provides the rules for how Plaintiffs and the new EPA can attempt to achieve their aims. To secure judicial vacatur, Plaintiffs must show the Rule was unlawful under the APA's deferential standard of review. The new EPA must go through the APA's notice-and-comment rulemaking process to change the Rule administratively. In these ways, the APA prevents sweeping changes in federal law based merely on judicial or administrative fiat and gives all stakeholders, like Intervenor Defendants here, the opportunity to be heard.

The Court's decision to vacate the Rule without adjudicating the merits subverts the core purpose of the APA. As the Court has acknowledged, even when a federal agency confesses error, most courts have refused to allow Plaintiffs and newly-installed federal administrators to bypass the APA's clear requirements. Yet, the Court found persuasive the reasoning of a single district judge who concluded that residual equitable powers authorize courts to facilitate an end run around

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[2] The States of Arkansas, Louisiana, Mississippi, Missouri, Montana, Texas, West Virginia, and Wyoming (collectively the "State Intervenors"), American Petroleum Institute (API), Interstate Natural Gas Association of America (INGAA) and National Hydropower Association (NHA).

[3] 85 Fed. Reg. 42,210 (July 13, 2020) (the "Rule").

the APA. As explained below, that court's reasoning is badly flawed. This Court should not have relied on it.

Intervenor Defendants will appeal and ask the Ninth Circuit to address the question. The Court should stay its Order (ECF No. 173) until that appeal is resolved. As explained below, Intervenor Defendants have identified a strong basis for success on the merits. And they already are experiencing harm due to the Court's Order. The U.S. Army Corps of Engineers has paused permit authorizations, delaying critical infrastructure and vital maintenance and repair projects. That disruption is not in the public interest.

II. BACKGROUND

A. Clean Water Act

Since 1970, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91, 108 (Apr. 3, 1970). In 1972, Congress enacted the Clean Water Act (CWA), a "total restructuring" and "complete rewriting" of the nation's water pollution control laws, including the provision requiring certification. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U. S.C. § 1341). Of particular relevance here, Congress narrowed the certification requirement from "*activity* [that] will be conducted in a manner which will not violate applicable *water quality standards*," 84 Stat. at 108 (emphases added), to a certification only "that any such *discharge* will comply with Act," 86 Stat. at 877 (emphases added). Congress also created a prominent role for States and Tribes in implementing the new regulatory program. 33 U.S.C. 1251(b).

The CWA uses a "cooperative federalism" approach to achieve its aims. It carves out complementary roles for federal agencies, on the one hand, and States and Tribes, on the other. CWA Section 401 gives each State and Tribe an important but limited say in the licensing of federal projects that could affect water quality. Specifically, federal agencies cannot license activities that

may result in a discharge into waters of the United States until the State or authorized Tribe where the discharge would originate certifies that the discharge will comply with applicable water quality requirements or waives the Section 401 requirement, either affirmatively or through inaction. 33 U.S.C. § 1341. Section 401 authority is powerful—when triggered, State/Tribal certification or waiver is an essential requirement for the federally-licensed activity to proceed. But to preserve the CWA's federal-State balance, that authority is also limited—Section 401 only authorizes States and Tribes to address water quality, and only within reasonable time limits that can never exceed one year.

B. Certain States abused their Section 401 certification authority.

Despite the statutory change in 1972, EPA failed to revise its prior regulations, promulgated in 1971, that governed the certification process. As a result, EPA's regulations were incongruent with the new statutory language. *Cf.* NPDES; Revision of Regulations, 44 Fed. Reg. 32,854, 32,856 (June 7, 1979) (indicating need for updated certification rules).

Certain States began using the disconnect between the text of the CWA and EPA's prior regulations to effectively veto projects based on non-water quality considerations, such as energy policy, which infringes on the federal government's exclusive authority. A particularly egregious example is Washington State's treatment of the Millennium Bulk Terminals – Longview LLC project. In the course of a five-year review of the project, the State Environmental Impact Statement expressly concluded that the terminal would not result in significant adverse effects on water quality, aquatic life, or designated uses; and that any potential water quality impacts could be fully mitigated. *See* ECF No. 172-1. And yet, the State denied the certification request based on concerns about capacity of the interstate rail system, the impact of trains anywhere in that system, and impacts on the overall capacity of the Federal Columbia River Navigation Channel to accommodate additional vessels at State ports. *Id.*

Other examples abound in the administrative record. In December 2017, Virginia approved a water quality certification for the Atlantic Coast Pipeline, a $5.1 billion pipeline project that would transport gas produced in the Marcellus Shale region to the Mid-Atlantic region of the United States. *See* ECF No. 56-2 at ¶ 13. Virginia then included conditions regulating activities in upland

areas that may indirectly affect State waters beyond the scope of federal CWA jurisdiction and the project's direct discharges to navigable waters. *Id.* According to Virginia, "*all* proposed upland activities associated with the construction, operation, maintenance, and repair of the pipeline, any components thereof or appurtenances thereto, and related access roads and rights-of-way," are subject to the stringent conditions of the certification. *Id.* (emphasis added). Another example took place in August 2020, when North Carolina denied water quality certification for Mountain Valley Pipeline Southgate, one of INGAA's members, for reasons outside of water quality. *Id.* ¶ 14. The State determined that the purpose of the project was "unachievable" due to the "uncertainty" of completing a different pipeline project even though FERC had determined that the public convenience and necessity required approval of the $468 million, 75-mile natural gas pipeline project. *Id.*

States also have unlawfully exploited the regulatory ambiguity to extend the amount of time they have to act on a certification request, which can effectively kill a project. One example is the Constitution Pipeline, a $683 million, 124-mile natural gas pipeline designed to connect natural gas production in Pennsylvania to demand in northeastern markets. ECF No. 84-1 ¶ 12. The New York State Department of Environmental Conservation (NYSDEC) requested additional information and deemed the request complete in December 2014. *Id.* In April 2015, NYSDEC requested that the pipeline withdraw and resubmit its request in order to restart the statutory period of time that NYSDEC had to act on the request. *Id.* In April 2016, nearly three years after the project's initial request for certification, NYSDEC denied water quality certification. Following litigation over NYSDEC's determination, the Federal Energy Regulatory Commission (FERC) determined in August 2019 that NYSDEC had waived the Section 401 certification requirement. *Id.* Nevertheless, after years of delay, the project's sponsor halted investment in the pipeline and cancelled the project in February 2020. *Id.*

The Millennium Pipeline Company faced a similar roadblock when it submitted a certification request to NYSDEC for the Millennium Valley Lateral project, a 7.8-mile pipeline connecting a natural gas mainline to a new natural gas-fueled combined cycle electric generation facility in New York. *Id.* ¶ 13. Nearly two years after the project's initial request for certification,

NYSDEC denied certification on the grounds that FERC's environmental review of the project lacked an adequate analysis of the potential downstream greenhouse gas emissions, not water quality concerns. *Id.* In September 2017, FERC concluded that NYSDEC's twenty-one-month delay constituted waiver of the certification requirement, and the Second Circuit agreed. *See State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018).

A number of courts have recognized that allowing States to delay the start of the period of review violates the CWA's plain text. The Second Circuit concluded that the CWA creates a "bright-line rule" that the "receipt" of a Section 401 request is the beginning of the State's one-year period for review. *Id.* at 455. As the D.C. Circuit explained, "the purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). The D.C. Circuit thereafter invalidated the process of withdrawing and refiling the same Section 401 request in order to restart the review period. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

C. EPA adopts the Section 401 Certification Rule.

An update to the 1971 regulations was necessary to conform the regulations to the 1972 CWA amendments and to provide necessary clarity and transparency that would also remedy the abuses described above. 85 Fed. Reg. 42,210 (July 13, 2020). EPA explained that "[t]he Agency's longstanding failure to update its regulations created the confusion and regulatory uncertainty that were ultimately the cause of those controversial section 401 certification actions and the resulting litigation." *Id.* at 42,227. EPA also cited the D.C. Circuit and Second Circuit decisions discussed above as recognizing that allowing States to extend their review beyond one year is contrary to the CWA. *Id.*

The Rule fixes these problems. The Rule begins by defining fourteen key terms, most of which are not defined in the CWA. 40 C.F.R. § 121.1; *see also* 85 Fed. Reg. at 42,237 (describing the need for definitional clarity achieved through EPA's rulemaking process). The Rule then reaffirms EPA's longstanding interpretation of when a water quality certification is required under CWA Section 401. 40 C.F.R. § 121.2; 85 Fed. Reg. at 42,237 ("Section 121.2 of the final rule is

consistent with the Agency's longstanding interpretation and is not intended to alter the scope of applicability established in the CWA."). The Rule sets out the permissible scope of certification, as developed through the rulemaking process. 40 C.F.R. § 121.3. The Rule provides a procedure to ensure meaningful coordination occurs between project proponents and State and Tribal certifying authorities before the certification process even begins. 40 C.F.R. § 121.4 (Pre-filing meeting request). The Rule lays out a uniform procedure for establishing the reasonable period of time for States and Tribes to act on a certification request, clear rules for when that period of time begins and ends, and a procedure for communicating to all parties when the period of time begins and ends. 40 C.F.R. §§ 121.5–9. The Rule requires an action on a certification request, whether it is a grant, grant with conditions, or a denial of certification, to be in writing and to contain certain information that explains the State or Tribe's action or else certification is waived. 40 C.F.R. § 121.7; 85 Fed. Reg. 42,256 (explaining that such requirements are intended to promote the development of comprehensive administrative records for certification actions and to increase transparency). The Rule describes the effect of certain actions and explains how waiver of the certification requirement can occur proactively or by operation of law. 40 C.F.R. §§ 121.8–9. The Rule also provides a procedure for neighboring jurisdictions to participate in the certification process, as required by the CWA, 40 C.F.R. § 121.12; describes how certification conditions are to be enforced, 40 C.F.R. § 121.11; and describes EPA's role as a certifying authority and advisor, 40 C.F.R. §§ 121.13–16.

D. This lawsuit and the Order vacating the Rule

Plaintiffs are three groups who filed complaints in this Court: Idaho Rivers United, American Rivers, California Trout, and American Whitewater (collectively "Plaintiff American Rivers"), ECF No. 75; twenty States and the District of Columbia (collectively "Plaintiff States"), ECF No. 96; and Columbia Riverkeeper, Sierra Club, Suquamish Tribe, Pyramid Lake Paiute Tribe, Orutsaramiut Native Council (collectively "Plaintiff Tribes"), ECF No. 98. Intervenor Defendants moved to intervene to defend the Rule, ECF No. 27, and this Court granted their motions, ECF No. 62.

On January 20, 2021, President Biden directed "all executive departments and 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" the new Administration's objectives. EO 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021). In a press statement the same day, the Administration identified the Rule as among those that would be reviewed under President Biden's Executive Order.[4]

On June 2, 2021, EPA pointed to the Executive Order and announced it intended to reconsider and revise the Certification Rule. 86 Fed. Reg. 29,541 (June 2, 2021). EPA then moved for remand *without* vacatur in this case, ECF No. 143 at 2, among others. Although EPA noted "substantial concerns" with some portions of the Rule, EPA made clear that it was not confessing error. *Id.* at 13. Without filing a motion of their own, Plaintiffs argued for vacatur in their oppositions, while failing to meaningfully discuss most aspects of the Rule. *See generally* ECF Nos. 145–47. Intervenor Defendants filed a motion to strike the oppositions to the extent that they requested remand with vacatur, a request that must be presented in a motion. ECF No. 148. On September 30, 2021, this Court held a hearing on EPA's motion to remand without vacatur and Intervenor Defendants' motion to strike. ECF No. 170. Recognizing that granting vacatur without giving Intervenor Defendants any opportunity to respond to such request would be improper, this Court gave Intervenor Defendants the opportunity to file a supplemental brief on the *Allied-Signal* analysis regarding vacatur of the Rule. ECF No. 170. Intervenor Defendants filed their supplemental brief on October 4, 2021. ECF No. 172.

On October 21, 2021, this Court vacated and remanded the Rule to EPA. ECF No. 173 ("Order"). The Order constitutes the final decision of the Court in this action within the meaning of 28 U.S.C. § 1291. By vacating the Rule in its entirety, the Order disposes of all substantive claims in the case, and the Court has now issued Final Judgment (ECF No. 176). In the Order, the Court issued a definitive ruling, over Intervenor Defendants' objections, that it was authorized to

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

vacate federal agency action without first finding the action unlawful based on a review of the administrative record. Intervenor Defendants' position, which this Court definitively ruled against, is that federal district courts lack the authority to vacate agency action without making the record-based findings the APA commands. That position has no relevance to EPA's action on remand, and EPA has no authority to address the legality of this Court's decision in those proceedings. Consequently, an appeal is the only way Intervenor Defendants' position can be considered and vindicated. *See Crow Indian Tribe v. United States*, 965 F.3d 662, 676 (9th Cir. 2020). In addition, the Order has the substantial effect of an injunction with respect to the State Intervenors and is thus appealable under 28 U.S.C. § 1292(a)(1). *See United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081 (9th Cir. 2004). By eliminating the Rule, the Court's Order necessarily directs States to abandon procedures implemented under the 2020 Rule in favor of procedures compliant with the regulations the Rule replaced.

III. ARGUMENT

In deciding whether to grant a stay, a court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). In the Ninth Circuit, a "sliding scale" approach is used. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020). Under this approach, "the elements . . . are balanced so that a stronger showing of one element may offset a weaker showing of another." *Id.* The first two stay factors are "the most critical." *Lair*, 697 F.3d at 1204. Indeed, a sufficient showing of a fatal legal defect heavily favors a stay. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019). Applying these factors, the Order is an extraordinary overreach that should be stayed pending appeal.

A. Intervenor Defendants are likely to succeed on the merits.

Intervenor Defendants are likely to succeed on the merits of their appeal for two reasons: (1) this Court erred in applying the *Allied-Signal* analysis without addressing the merits of Plaintiffs claims; and (2) this Court misapplied the *Allied-Signal* analysis, even if it is applicable.

1. The APA requires a complete administrative record and full briefing on the merits before a reviewing court may set aside agency action.

"Federal district courts are 'courts of limited jurisdiction.'" *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1027 (9th Cir. 2011). They only have that jurisdiction that Congress has granted them. In the APA, Congress gave federal district courts original jurisdiction to review the final actions of federal agencies. In that grant of jurisdiction, Congress authorized federal courts to set aside a final agency action, if the action is "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). The statute further requires that "[i]n making [those] determinations, the court *shall* review the whole record or parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." *Id.* (emphasis added).

Nothing in the statute authorizes a court to set aside federal agency action without making the predicate finding that the action was unlawful, and that decision must be based on a review of the agency's record. That omission indicates that Congress did not intend for Courts to set aside agency action absent that finding. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) ("The doctrine of *expressio unius est exclusio alterius* as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions."). Indeed, because the APA is a waiver of sovereign immunity, the *expressio unius* canon applies with particular force. The waiver of sovereign immunity in the APA "must be strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). And where "Congress attaches conditions to legislation waiving the sovereign immunity of the United States"—here, conditioning the setting aside of a final agency action to the existence of specific findings, after a review of the record, and with due consideration to prejudicial error—"the conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). The

Court's decision to vacate the Rule without finding that the Rule was unlawful violates the plain text of the statute.

The Court, in its Order, nonetheless found a basis to bypass the statutory text in its residual authority to exercise equitable jurisdiction. The Court relied chiefly on the reasoning in *Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241-42 (D. Colo. 2011), where the court held that "because vacatur is an equitable remedy, and because the APA does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of vacatur without a decision on the merits.'" Order at 8.

But *Native Ecosystems* differed in material respect from the situation presented here, and its reasoning is flawed in any event. The Court should not have relied on it. To begin, the federal agency in *Native Ecosystems* confessed error. EPA here has not. That factual difference is meaningful—the confession of error might be considered an admission that the action was unlawful, thus providing the legal predicate for a court to exercise the remedy the APA authorizes. But even with confession of error, courts have concluded that the text of the APA precludes vacatur absent a judicial finding that the agency action was unlawful. *See, e.g., Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135-36 (D.D.C. 2010). Otherwise, the agency could "do what [it] cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits." *Id.* at 136 (quoting *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009)). This Court acknowledged none of these points, but instead noted without elaboration its agreement with *Native Ecosystems*.

Native Ecosystems is wrong in any event. The court there cites only a law review article for the proposition that "the language of § 706(2) is mandatory, but not exclusive," and "[i]t does not expressly limit a reviewing court's authority to set-aside an agency's action." 795 F. Supp. 2d at 1241. The *Native Ecosystems* court then held that "[b]ecause there is no express jurisdictional limitation in the APA," a district court retains its equitable discretion, and "vacation of an agency action without an express determination on the merits is well within the bounds of traditional equity jurisdiction." *Id.* This reasoning is flawed for at least three reasons.

First, the law review article cited in *Native Ecosystems* addressed whether vacatur was the

exclusive remedy *after* a judicial finding of legal error.[5] That difference is significant. Unlike pre-merits-adjudication vacatur, which circumvents plain limits Congress imposed in the statutory text, post-adjudication discretion to fashion a remedy finds support in the statute's direction to give "due account of prejudicial error." 5 U.S.C. § 706.

Second, *Native Ecosystems* does not address the question of whether authority to vacate agency actions in final orders without finding them unlawful was *ever* a recognized equitable remedy. It is true that Federal courts "retain traditional equitable discretion," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982), but that discretion is limited to "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)," which "did not include the power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund*, 527 U.S. 308, 318, 332 (1999). The *Native Ecosystems* court did not even address the critical question of whether pre-adjudication vacatur has any analog in the precedent of the English High Court of Chancery.

Third, the *Native Ecosystems* court did not confront the settled principle that equity cannot be invoked to evade limits imposed by law. The court acknowledged that express statutory foreclosure of an equitable remedy could limit the courts traditional equitable discretion. *Native Ecosystems*, 795 F. Supp. 2d at 1241. But what it ignores is that "[u]nless 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 v. Warner Holding Co.*, 328 U.S. 395, 397–98 (1946) (emphasis added). So it is not as difficult for Congress to alter the court's equitable remedies as the *Native Ecosystems* court makes it seem. As the Supreme Court said, "[o]f course, Congress may intervene and guide or control the exercise of the courts' discretion." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The Ninth Circuit has applied that principle to a statute materially similar to the APA. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 632 F.3d 1111, 1121 (9th Cir. 2011). The court found a statute that "list[ed]

[5] Ronald M. Levin, "*Vacation* " *at Sea: Judicial Remedies and Equitable Discretion in Administrative Law,* 53 Duke L.J. 291, 291–92 (2003).

only injunctive relief to the exclusion of other equitable remedies" foreclosed restitution and disgorgement by providing "a different scheme of enforcement." *Id.* As the court explained, "it 'is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Id.* The same principle applies here. The APA expressly provides for vacatur of rules found to be unlawful and so necessarily forecloses vacatur without such a finding.

The Order by its terms does not find the Rule unlawful. *See* Order at 15 (finding the first Allied-Signal factor satisfied because "significant doubt exists that EPA correctly promulgated the rule"). For that determination, the Order relies largely on EPA's decision to reconsider the Rule. Order at 13–15. But EPA did not concede that the Rule is unlawful. In fact, EPA unequivocally denied that it was making any such concession. Sept. 30, 2021 Hr'g. Nor did EPA concede that it would rescind the entire Rule. EPA merely stated that it "will undertake a new rulemaking effort to propose revisions due to substantial concerns with the existing Rule." ECF No. 143 at 2; *see id.* at 7, 8; *see* ECF No. 155 at 2–3. Indeed, EPA could not in fact concede the legality of the Rule or commit to rescinding the entire rule without violating the APA because it is in the middle of a rulemaking process, ECF No. 153 at 3; *see* ECF No. 155 at 3, during which it must keep an open mind on all issues including whether to retain the entire Rule, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); ECF No. 155 at 2–3. In any event, a concession would be legally insufficient to justify vacatur of the Rule because Intervenor Defendants are parties to the litigation and defend fully every aspect of the Rule.

2. The Court's application of the *Allied-Signal* factors was erroneous.

The same result follows if the question is analyzed under the *Allied-Signal* factors. The first *Allied-Signal* factor asks how "serious[ ]" the agency's errors are. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). This assessment of error can only logically occur after a court has concluded that a legal error has occurred. *See id.* (applying

the two-factor test after determining that the agency acted without "reasoned decision-making"); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (same). There is good reason for that well-established approach. Vacating a rule before adjudicating the merits affords plaintiffs complete relief without ever proving the merits of their case, while also circumventing the APA's notice-and-comment requirements for repeal of a rule. *See Nat'l Parks Conservation Ass'n*, 660 F. Supp. at 5 ("[G]ranting vacatur here would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits."); *accord Maine v. Wheeler,* No. 1:14-cv-00264-JDL, 2018 WL 6304402, at *3 (D. Me. Dec. 3, 2018); *California v. Regan*, No. 20-cv-03005-RS, 2021 WL 4221583, at *1 (N.D. Cal. Sept. 16, 2021) ("[T]here has been no evaluation of the merits—or concession by defendants—that would support a finding that the rule should be vacated").[6]

Here, a merits analysis is not even possible on the record Plaintiffs created. Plaintiffs failed to present to the district court anything resembling a developed argument as to why any aspect of the Rule fails on the first *Allied-Signal* factor. The State Plaintiffs did not develop any argument that any aspect of the Rule is unlawful, instead claiming that EPA, as a general matter, admitted the Rule's illegality in various statements. *See* ECF No. 146 at 20–21. The Tribes Plaintiffs, in turn, also failed to develop any argument that the Rule is unlawful, merely listing three general considerations—"(1) the agency failed to provide sufficient justification for departing from a half century of practice and policy related to the interpretation and implementation of Section 401; (2) it based its decision to do so on an [Executive Order] aimed at promoting fossil fuel infrastructure, not clean water; and (3) EPA did not present any explanation for how the [ ] Rule would be more protective of water quality," ECF No. 145 at 12—and then parroted the Plaintiff States' claim that EPA somehow admitted these errors, ECF No. 145, at 12–13. The American Rivers Plaintiffs did make a few brief arguments on a couple of aspects of the Rule, ECF No. 147 at 4–10, while pointing to the same claimed concession by EPA, *see* ECF No. 147 at 9, 10, but such perfunctory analysis

[6] This case is thus distinguishable from cases in which there is no longer a live controversy regarding the legality of the Rule; Intervenor Defendants are vigorously defending every aspect of the Rule from legal challenge.

was nowhere near developed enough for the district to make any judgment as to the Rule's legality.

Moreover, the few merits arguments that Plaintiffs briefly mention are mismatched entirely with the full vacatur remedy that they sought. The Rule is complex and multifaceted, with many operative provisions that cover numerous topics. Plaintiffs asserted that the errors in the Rule are significant, but their arguments only touch on a few discrete sections, which Plaintiffs discussed out of context, ECF No. 146 at 20–21, or only offered passing speculative harms, rather than citing to actual alleged legal errors in the Rule, ECF No. 146 at 4–14. At most, Plaintiffs addressed a fraction of the Rule's provisions, cherry-picking from EPA's statements in its briefing rather than the Rule itself, *see* ECF No. 146 at 20–21, and vaguely alluding to "other detrimental provisions" without any elaboration, *see, e.g.*, ECF No. 146 at 7. Plaintiffs also failed to provide any severability analysis, which would be mandatory if Plaintiffs want this Court to vacate the entire Rule. *See Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 351–52 (D.C. Cir. 2019). For example, Plaintiffs did not even attempt to argue that EPA "would [not] have adopted" the various aspects of the Section 401 Rule if some other aspects were declared invalid. *Id.* Courts, after all, must ordinarily "limit the solution to the problem" that the plaintiff has demonstrated. *See Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 82 (D.C. Cir. 2020) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006)).

The Court attempted to side-step those problems. It primarily focused on the scope of certification provision, held that the new rule is "antithetical" to *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 710 (1994), then held EPA did not "reasonably explain[] the change." Order at 13. The Court began by chastising EPA for "depart[ing] from what the Supreme Court dubbed the most reasonable interpretation of the statute." *Id.* The Supreme Court's holding that EPA's then-applicable construction of Section 401 was "a reasonable interpretation" or even that the statute was "most reasonably read" that way does not mean it was the *only* reasonable interpretation. EPA was entitled to change its position, a point that this Court did not grapple with. *See Nat'l Cable & Telecomm'cns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). This change does not "compel[] the conclusion that the current rule is unreasonable." Order at 13.

In explaining its change in position, EPA pointed to changes in the text of the statute in 1972, including Congress's changing the word "activity" to discharge;" and further explained that it "is entirely appropriate, and necessary, for the EPA to conform to the 1972 CWA amendments when updating its" pre-amendment certification regulations. 85 Fed. Reg. at 42,227. EPA elaborated, *inter alia*, that the Clean Water Act does not provide "a single, clear, and unambiguous definition of the appropriate scope of section 401" and Section 401 does not define the terms "discharge" or "water quality requirements," eliminating any possible direct inconsistencies. *Id.* at 42,250. Moreover, the Rule's scope of certification and related definitions were drafted to "reasonably resolve any ambiguity" in the statute, after taking into consideration "the text and structure of the Act, as well as the history of modifications between the 1970 version and the 1972 amendments." *Id.* The Rule was developed after consideration of all public comments, including "varying interpretations" described in the preamble. *Id.* at 42,256. EPA fully and correctly engaged with the text and history of the Act with regard to the Section 401 certification process. *See id.* at 42,229–30 (describing the scope of certification under the Rule in the context of the CWA's text and history), *id.* at 42,230–36 (engaging in a plain text analysis of the statute and showing how the definitional clarifications in the Rule are supported by the ordinary meaning of the text); *see also* 40 C.F.R. §§ 121.2–121.11 (laying out the uniform set of certification procedures).

The Court sought to bolster its analysis that EPA's analysis was insufficient by pointing to a post-rule declaration that EPA has changed its mind yet again in response to pressure from the new administration. Such a post-action statement is irrelevant to the Rule's compliance with the APA, and it was error for the district court to consider it. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."). Likewise the Court's consideration of EPA's brief as "signal[ing] it will not or could not adopt the same rule upon remand," Order at 14, was erroneous.

Even if the scope of certification provision was defective, it would provide no basis for vacating the entire Rule. Portions of the Rule were not even challenged in the vacatur briefing.

See, e.g., 40 C.F.R. 121.11 – 121.16. Several of the procedural portions of the rule merely codify what federal courts have held the Clean Water Act requires. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018); *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). And even where not required by case law, those requirements address real and substantive problems and act independent of the scope of certification. There is no basis for believing the agency would not have adopted those provisions without the scope of certification rule. That the scope of certification provision may have been a "foundation" for other parts of the rule does not mean those parts are not severable. *See Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) ("[A] court should refrain from invalidating more of the statute than is necessary."); *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 351-52 (D.C. Cir. 2019) (applying severability analysis to administrative regulation); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990) (citing *Regan* and applying severability analysis to administrative regulation). The Court's failure to conduct a severability analysis was error, was inconsistent with Supreme Court precedent, and will generate a circuit split if affirmed.[7]

This Court also erred in its consideration of the second *Allied-Signal* factor by giving short shrift to the substantial and predictable disruptions the immediate vacatur of a (not-unlawful) Rule has caused. As Intervenor Defendants explained, vacating the Rule will cause significant disruption to pending Section 401 reviews. It returns to the regime that was in place before the Rule under which some States used the outdated rules to exert control over activities in other States and to protect their own industries. *See, e.g.*, ECF No. 27-7 at 1-4. Before the Rule, States imposed uncertainty, never-ending demands for information, interminable delays, and conditions unrelated to the discharges actually regulated by the CWA. The result was to increase the cost of some interstate projects and fully defeat others, with attendant harms to other states' economies and ability to develop their natural resources. *See* ECF No. Dkt. 56-1, 56-2. These abuses will return if this Court's decision to vacate the Rule is not stayed. Further, vacatur would upend the

[7] The upshot to the Court's vacatur is that—in reliance on the Court's divinations based on EPA's post-action statements—the Court apparently reinstated a rule EPA long-ago suggested was inconsistent with the 1972 amendments to the Clean Water Act. *See* NPDES; Revision of Regulations, 44 Fed. Reg. 32,854, 32,856 (June 7, 1979).

substantial progress States and federal agencies have made to improve the section 401 process and make it more transparent. Such uncertainty and risk of delay deters large capital projects. ECF No. 172-2 ¶¶ 7-9. Vacatur of the Rule harms the businesses that need section 401 certifications for critical infrastructure projects. *See* ECF No. 56-2 ¶¶ 21, 23. Vacatur of the Rule—especially without any actual finding that the Rule or any portion of it is unlawful—casts substantial uncertainty over all of those pending authorizations.

The Order nevertheless found there would not be significant disruptive consequences from vacatur because the Rule had only been in effect for thirteen months and thus there was not enough time for sufficient reliance to build up around the Rule. Order at 15. That was error. Since 2020, EPA has issued a number of implementation documents, including recommended best practices and template certifications that can be used by States and Tribes in different circumstances. EPA, 2020 Rule Implementation Materials.[8] FERC also completed its own notice-and-comment rulemaking in March 2021 to set a uniform one-year deadline for States to complete certification actions on FERC authorizations based on the Rule. *See* 86 Fed. Reg. 16,298 (Mar. 29, 2021).

The Order also ascribes the whipsawing effect of vacatur to EPA's decision to promulgate "a revised certification rule that dramatically broke with fifty years of precedent" and its most recent decision to reverse course. Order at 15. As an initial matter, EPA sought to correct an outdated rule that had caused numerous problems. Further, EPA's decision to revise the Rule cannot cause the whipsawing that vacatur does because implementation of that decision requires a thorough notice-and-comment rulemaking process that allows States and regulated entities to examine EPA's proposed rule, provide comments, and prepare for a new rule. In contrast, the immediate vacatur of the Rule—especially without a merits determination—creates substantial uncertainty regarding pending section 401 certifications. It raises numerous unanswered questions about what regulations apply, what effect would the Rule have on the Section 401 rulemakings of other agencies, would pending certification requests need to be resubmitted, and would States be free to engage in the same scope and timing abuses that plagued the old regime.

[8] Available at https://www.epa.gov/cwa-401/2020-rule-implementation-materials.

B. Intervenor Defendants will be irreparably harmed absent a stay.

1. Industry Intervenors' members are experiencing economic harm.

Intervenor Defendants will be irreparably harmed if the Order vacating the Rule is not stayed. Reinstating the prior rule will result in substantial disruption from general whipsawing of both regulators and regulated entities. ECF No. 172-2 ¶ 8. Vacatur of the Rule, especially without a finding that the Rule is unlawful, casts substantial uncertainty and raises questions with no clear answers, such as what rules apply and whether pending certification requests need to be resubmitted. These questions will cause substantial delay in completing pending Section 401 reviews. ECF No. 172-3 at ¶ 11; ECF No. 56-2 ¶¶ 21, 23, 24. Such uncertainty and the attendant risk of delay deters large capital projects that benefit the Intervenor Defendant States economically and, indeed, which are necessary for the development of their natural resources. *Id.* ¶¶ 7-9. The Rule has been applied to potentially thousands of pending requests for Section 401 certification. *See* Moyer Decl. ¶ 14, *N. Plains Resource Council v. U.S. Army Corps of Eng'rs*, No. 4:19-cv-44 (D. Mont. Apr. 27, 2020), ECF No. 131-1 (explaining that "[o]n average, the Corps receives 3,000 standard individual permit applications annually."). INGAA members alone had numerous certification requests pending for projects that involve billions of dollars in capital investment at this time of its intervention in these actions. *See, e.g.*, ECF No. 56-2 ¶¶ 14, 22, 24. NHA members file license applications for renewable hydroelectricity that require section 401 certifications and expect another 54 projects will be required to submit licensing applications before October 1, 2022. ECF No. 172-3 ¶ 10. And that is just a thin sliver of the potential harm to the regulated community. Section 401 certificates are required for all manner of infrastructure projects requiring federal licenses, the vast majority of which are not connected to natural gas, petroleum projects, or hydropower.

Even those certifications that have already been completed under the Rule are being affected by this Court's decision. The Corps already has notified permit applicants that, because the Order, it will issue no Section 404 permit authorizations—including nationwide permit (NWP) verifications—that rely on section 401 certifications issued under the Rule until further notice. Ex. 1, Declaration of Joan Dreskin at ¶¶ 14-18. This suspension already is having real, tangible harm

on INGAA members. For example, one INGAA member expected the Crops' Nashville District to authorize the use of a NWP to conduct necessary maintenance and repairs by November 8, 2021. *Id.* at ¶ 20. The relevant state had already issued the certification under Section 401, but as a result of the Court's vacatur of the 401 Rule, the Nashville District advised that it would not be able to authorize use of the NWP until Corps Headquarters provided further guidance. *Id.* This delay will require operation of the line at reduced pressure, interruption of service to customers, and higher costs to perform the work. *Id.* Another member has been told by its Corps district that due to the Court's Order, the Corps cannot issue the NWP verification for the member's proposed approximately $500,000 armoring and streambank stabilization project to ensure integrity for an interstate natural gas pipeline, threatening the member's plan to complete its critical integrity project before winter rains and flooding occur. *Id.* at ¶ 21. A third INGAA member is experiencing delays related to development of a new natural gas-fired generation plant that because it will replace a retiring coal generation plant, will substantially reduce greenhouse gas emissions. *Id.* ¶ 22. As a result of this Court's order, the Corps has called into question the validity of the Section 401 certification permit and indefinitely delayed issuance of the Section 404 permit, resulting in delay of the in-service date of the pipeline and new power plant and higher electricity costs and reliability issues for the non-profit electric cooperative building the plant. *Id.*

Such economic harm is irreparable. *See Phillip Morris USA Inc. v Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (granting stay: "If expenditures cannot be recouped, the resulting loss may be irreparable."); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (finding purely economic harms constituted irreparable harm because plaintiff would be barred from recovering monetary damages from the defendant due to tribal sovereign immunity); *Croew & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (explaining that while economic loss is usually insufficient to constitute irreparable harm, "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

2. Intervenor Defendants are being irreparably harmed by deprivation of statutory rights under the APA.

The Order also has deprived Intervenor Defendants of their statutory and due process rights to participate in the statutorily prescribed process by which administrative law can be changed. The substantial and costly limbo industry Intervenors now confront was not the product of APA-prescribed judicial review or notice-and-comment rulemaking. It instead is due to the Court's decision to bypass those key features of the APA. Even if the Court's Order produced no immediate economic harm (and it most certainly has), the deprivation of Defendant Intervenors' statutory rights under the APA, which will persist unless the Order is stayed, is sufficient irreparable harm. *Invenergy Renewables LLC v. United States*, 476 F. Supp. 3d 1323, 1353 (Ct. Int'l Trade 2020) ("A procedural violation [of the APA] can give rise to irreparable harm justifying injunctive relief because lack of process cannot be remedied with monetary damages or post-hoc relief by a court"); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009) (finding irreparable harm based on violation of APA's notice-and-comment provisions because "the damage done by [the] violation of the APA cannot be fully cured by later remedial action.").

Intervenor Defendants enjoy the statutory right under the APA to participate in the administrative process. The APA requires EPA to provide public notice and opportunity to comment before enacting, amending, or repealing a rule. 5 U.S.C. §§ 553(b), (c), 551(5); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982) ("[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule."). Indeed, among "the most fundamental of the APA's procedural requirements" is the requirement that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments for the agency's consideration." *Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1180 (9th Cir. 2021). That most fundamental procedural protection was denied here. In short, the judicial and regulatory machinery were short-circuited, with the practical upshot of compelling States and regulated entities to comply with regulations imposed by

a single federal district judge, without notice and comment. That, too, is an irreparable harm. *Cf. Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (a state suffers irreparable injury whenever it is prevented from effectuating a statute enacted by representatives of its people). At minimum, when combined with the irreparable economic harm, it bolsters Intervenor Defendants' case. *See Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) (procedural harm combined with other irreparable harm bolsters the case for an injunction).

3. Vacatur reimposes harms of constitutional magnitude.

Intervenors advocated and supported the Rule based on harms to their interests, including constitutional rights, sovereign interests, and economic interests. The Court's vacatur discounted all of those interests as mere "negative economic effects" that it believed are outweighed by "environmental effects" if the Rule were left in place. But what the Court discounted as mere "negative economic effects" are of constitutional magnitude. As explained in Intervenors' brief, ECF No. 172 at 15 n.3, "[o]ne of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). A particular "source of dissatisfaction was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, [through] whose ports, their commerce was carried on." *Id.* (quoting Records of the Federal Convention of 1787 (M. Fan-and ed. 1966)). Accordingly, a State "may not use the threat of economic isolation" to control its sister states. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976). Certain States doing just that was one of the reasons Intervenors petitioned for the Rule. *See, e.g.* ECF No. 172-2 ¶¶ 4-7; *see also* ECF No. 27-7; ECF No. 56-1; ECF No. 56-2. For example, the State of Maryland attempted to extort billions of dollars from a permit applicant in lieu of impossible certification conditions. *Cf. Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). There is every reason to believe those constitutional harms will return without the Rule.

C. Plaintiffs will not be substantially injured by a stay, which would serve the public interest.

Plaintiffs, on the other hand, can seek redress for any prejudice they claim they would suffer if the Rule were left in place. EPA and the U.S. Army Corps of Engineers both have indicated their willingness to address concerns with the Rule raised by the Plaintiffs on remand.[9] Further, Plaintiffs can challenge any particular application of the Rule that causes the harm that they claim they will suffer. *See* Pls.' Opp'n EPA's Motion to Remand Without Vacatur at 9-11 (ECF No. 145).

The public interest also supports a stay. The Rule fills a gaping regulatory void. It sets basic rules for the Section 401 process, including a common rule for defining when the clock starts on a state's reasonable period of time to act on a certification request and procedures for establishing how much time is reasonable. And critically, it more clearly defines the scope of authority granted by Congress in Section 401, so that Section 401 cannot be used by states to make policy decisions squarely reserved to the federal government and thereby impair the interests of other states. Vacating the Rule eliminates these salutary improvements and returns to the dysfunction fostered by EPA's decades-long failure to set basic rules for the Section 401 process.

IV. CONCLUSION

For the foregoing reasons, Intervenor Defendants request that the Court stay the Order pending their appeal to the Ninth Circuit.

* * *

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

Respectfully submitted,

Dated: November 17, 2021

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* Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other Signatories. */s/ George P. Sibley, III*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

In re: Clean Water Act Rulemaking	Lead Case: No. 3:20-cv-04636-WHA Related Cases: No. 3:20-cv-04869-WHA No. 3:20-cv-06137-WHA **DECLARATION OF JOAN DRESKIN, FOR THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, IN SUPPORT OF DEFENDANT INTERVENORS' MOTION TO STAY PENDING APPEAL**

1. My name is Joan Dreskin. I am Senior Vice President and General Counsel of the Interstate Natural Gas Association of America (INGAA). My business address is 50 Massachusetts Avenue, NW, Suite 500N, Washington, DC 20001.

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

3. INGAA is a non-profit trade association representing interstate natural gas transmission pipelines ("interstate pipelines") operating in the United States. INGAA is comprised of 26 members, representing the vast majority of the interstate natural gas pipeline companies in the U.S. INGAA members operate approximately 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

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

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

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

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members unavoidably cross wetlands and other waters of the United States regulated by the Clean Water Act (CWA). Such crossings require authorization from the U.S. Army Corps of Engineers (Corps) under CWA Section 404. And for such crossings, CWA Section 401 requires the project applicant to provide the federal agency with the certification of the State that the discharges in the State comply with applicable water quality standards. If the State fails or refuses to act on the request for certification within a reasonable time not to exceed one year, the applicant's duty to provide the certification is waived. The federal agency (such as FERC or the Corps) is precluded from authorizing the activity resulting in the discharge unless the certification is provided or waived. 33 U.S.C. § 1341.

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

8. INGAA members use general permits, including NWPs, Regional permits, and SPGPs, for both large and small pipeline projects located across the country that will have minimal impacts on the environment. For example, INGAA members use NWP 12 for large pipeline expansions, where applicable, and also for smaller projects, such as pipeline replacement projects driven by highway replacements, ingress and egress to project workspace, and valve replacements. NWP 3 and NWP

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12 are also used extensively for maintenance, inspection, and repair activities to comply with pipeline integrity requirements mandated by the Pipeline & Hazardous Materials Safety Administration (PHMSA) pursuant to the Pipeline Safety Act. INGAA members often rely on NWP 3 and NWP 12 authorizations to inspect, maintain, and repair existing pipelines to ensure the continued safety and reliability of the pipelines.

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

10. INGAA's members schedule and design their projects and maintenance and repair activities to meet the terms and conditions of the NWPs, including NWP 12. NWPs provide an efficient permitting mechanism that helps streamline the review and approval process for pipeline projects without precluding or compromising the consideration of any necessary project-specific conditions. Construction and maintenance of natural gas pipelines typically occur on tight schedules designed to ensure the safety, security, and reliability of the natural gas pipeline network and to meet the growing demands of natural gas customers. Obtaining coverage under a NWP takes considerably less time than an individual CWA Section 404 permit, while still ensuring appropriate consideration of all applicable avoidance, minimization and mitigation measures through adherence to the applicable conditions listed therein.

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

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

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

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

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

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

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

18. The Corps has provided no indication as to how long this suspension will remain in effect.

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19. As a result, critical projects nationwide that would proceed under general or individual permits will be delayed, resulting in regulatory uncertainty, the potential for conflicting directives from other agencies, and substantial added costs to INGAA's members.

20. For example, one INGAA member expected the Corps' Nashville District to authorize the use of NWP 3 to conduct necessary maintenance repairs by November 8, 2021. The relevant State had already issued the member a certification under Section 401. As a result of the Court's vacatur of the 401 Rule, however, the Nashville District advised the member that it would not be able to authorize the use of NWP 3 until Corps Headquarters provided further guidance. The ongoing, indefinite delay of critical maintenance work will result in the following significant consequences: (i) operation of the line at reduced pressure until the work is complete, thereby reducing service to customers; (ii) interruption of service deliveries to customers during the heating season in order to perform the work; and (iii) increased costs to perform the work in the late fall and winter.

21. Another INGAA member proposed approximately $500,000 of armoring and streambank stabilization designed to ensure ongoing integrity of its 20-inch diameter interstate natural gas pipeline. The pipeline provides a critical linkage between a natural gas storage field and a mainline transmission pipeline, and the member intended to complete this important pipeline integrity project during the low flow periods of late summer/fall 2021 and prior to winter rains and flooding that might further adversely affect the pipeline. The member submitted its Pre-Construction Notification under its blanket certificate to the Corps' Tulsa District on June 10, 2021, but the Tulsa District recently informed the member that, due to this Court's vacatur of the 401 Rule, it cannot issue NWP 12 verification. The member inquired about use of an alternative NWP, such as NWP 3, but the Corps has been reluctant to proceed. The member's plan to complete its critical integrity project before winter rains and flooding occur is now in jeopardy.

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22. A third INGAA member is developing a pipeline in Alabama that will serve a new natural gas-fired generation plant. Because the new plant will replace a retiring coal generation plant, the plant and the pipeline that enables its operation will substantially reduce greenhouse gas emissions. The member company filed for a Section 404 individual permit from the Corps over one year ago. In July 2021, Alabama issued the member a Section 401 certifications containing water quality conditions no different from those that the state would have included prior to issuance of the 401 Rule. Due to this Court's vacatur of the 401 Rule, however, the Corps has called into question the validity of Alabama's Section 401 certification permit and indefinitely delayed issuance of the Section 404 permit. The Corps' suspension of permits will delay the in-service date of the pipeline and the new power plant, resulting in higher electricity costs and reliability issues for the hundreds of thousands of members of the non-profit electric cooperative building the plant.

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

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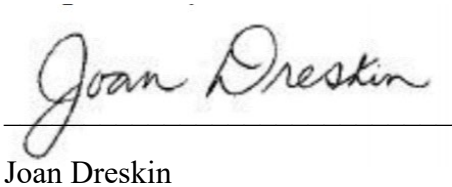
24. For example, an INGAA member intends to apply imminently for authorization to complete two integrity management projects under NWP 12. First, the member will seek authorization to install a launcher and receiver that will assess pipeline integrity and enable compliance with PHMSA regulations. Second, the member will seek authorization to complete a compression project that will mitigate gas migration issues at a storage field and allow for compliance with PHMSA storage regulations. Ongoing uncertainty over the Corps' permitting process likely will delay completion of this necessary integrity management work.

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

* * *

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

Executed on November 17, 2021.



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: Clean Water Act Rulemaking	Lead Case No. 3:20-CV-04636-WHA Related Case Nos. 3:20-CV-04869-WHA 3:20-CV-06137-WHA **[PROPOSED] ORDER GRANTING INTERVENOR DEFENDANTS' MOTION TO STAY PENDING APPEAL**

THIS MATTER came on for hearing before the undersigned on December 2, 2021, at 8:00 AM. For the reasons stated in the Intervenor Defendants' motion, and good cause appearing, this Court's Order dated October 21, 2021 (ECF No. 173) is hereby STAYED pending resolution of an appeal to the United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

Dated: _____

_____
The Honorable William H. Alsup
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

CLEAN WATER ACT RULEMAKING.

No. C 20-04636 WHA
No. C 20-04869 WHA
No. C 20-06137 WHA

This Document Relates to:

ALL ACTIONS.

(Consolidated)

ORDER DENYING MOTION FOR STAY PENDING APPEAL

INTRODUCTION

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

STATEMENT

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

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

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

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

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

1. SUCCESS ON THE MERITS.

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

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

A. VACATUR PRIOR TO FULL ADJUDICATION ON THE MERITS.

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

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

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

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

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

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

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

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

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

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

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

B. THE ALLIED-SIGNAL ANALYSIS.

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

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

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

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

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

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

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

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

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

2. IRREPARABLE HARM.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. THE APPEALABILITY OF THE VACATUR ORDER.

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

CONCLUSION

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

Dated: December 7, 2021.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No. 3:20-CV-04869-WHA
(Related Case No. 3:20-CV-04636-WHA)

PROPOSED INTERVENOR NATIONAL HYDROPOWER ASSOCIATION'S NOTICE OF MOTION & MOTION TO INTERVENE PURSUANT TO FED. R. CIV. P. 24(A)(2) AND (B)(1); MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF

Date: October 15, 2020
Time: 8:00 AM
Judge: Hon. William H. Alsup
Action Filed: July 21, 2020
Courtroom: Zoom

TROUTMAN PEPPER HAMILTON SANDERS LLP
THREE EMBARCADERO CENTER, SUITE 800
SAN FRANCISCO, CALIFORNIA 94111-4057

NOTICE OF MOTION AND MOTION TO INTERVENE

PLEASE TAKE NOTICE that, pursuant to Local Rule 7-1(b), on October 15, 2020, at 1:30 PM or as soon thereafter as counsel may be heard in the above-captioned court, via Zoom if so ordered by the Court, Proposed Intervenor National Hydropower Association ("NHA") will and hereby does move pursuant to Fed. R. Civ. P. 24(a)(2) to intervene as a defendant in the above-captioned action as of right. Alternatively, in the event that NHA is not allowed to intervene as of right, NHA will and hereby does move to intervene permissively pursuant to Fed. R. Civ. P. 24(b)(1)(B).

Pursuant to Fed. R. Civ. P. 24(a)(2), NHA seeks to intervene as of right because it "claims an interest relating to the property or transaction that is the subject of the action" and the "disposi[tion] of the action may as a practical matter impair or impede [NHA's] ability to protect its interest." In addition, the current Defendants do not adequately represent NHA's interests. Alternatively, NHA seeks to intervene permissively because it "has a claim . . . that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). NHA's intervention will not unduly delay or prejudice the adjudication of any parties' rights in this matter as the litigation is still in its early stages. As more fully set forth in the accompanying memorandum, this motion is based on the grounds that (1) the motion is timely; (2) NHA has significant protectable interests, both for itself and for its members who presently operate hydropower facilities subject to the rule and as advocates for the challenged rule; (3) the disposition of this action without NHA's involvement could impede NHA's and its members' ability to protect these interests; (4) the current parties do not adequately represent the specific interests of NHA; and (5) NHA's position in support of the revised regulations plainly involves common questions of law and fact with this action, and NHA's direct opposition to Plaintiffs' claims satisfies the "common question" requirement for permissive intervention.

This motion is supported by this notice and motion; the attached memorandum of points and authorities; the proposed order; the declaration of Dennis Cakert; all pleadings, papers, and records in this action; and upon such oral and documentary evidence or argument as may be presented at any hearing of this motion.

PLEASE TAKE FURTHER NOTICE that this Motion is accompanied by NHA's Proposed Answer, in accordance with Fed. R. Civ. P. 24(c).

Respectfully submitted,

Dated: September 4, 2020

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: */s/ Elizabeth Holt Andrews*
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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Proposed Intervenor National Hydropower Association ("NHA") respectfully seeks leave to intervene as a defendant in the above-captioned matter under Federal Rule of Civil Procedure 24,[1] to protect the interests of NHA and its members in the defense of the United States Environmental Protection Agency ("EPA")'s final rule entitled "Clean Water Act Section 401 Certification Rule." 85 Fed. Reg. 42,210 (July 13, 2020). Plaintiffs[2] have sought judgments declaring that (1) the EPA, in enacting the rule, acted arbitrarily and capriciously and not in accordance with the law, abused its discretion, and exceeded its authority, and (2) the rule is unlawful, justifying vacatur. Dkt. 1 at 27. As described below, NHA and its members have direct and substantial interests in the viability of the EPA's rule.

NHA is entitled to intervene in this action as a matter of right under Federal Rule of Civil Procedure 24(a). This motion is unarguably timely, filed before Defendants[3] have even answered. NHA represents public and private entities that own hydropower producing facilities, all of whom are directly affected by this rule, which protects them from state overreach and substantial expansion of the statutory scope of Clean Water Act Section 401. Many of NHA's members have been subject to practices employed by the states that abuse the framework established by Clean Water Act Section 401. If Plaintiffs' lawsuit were successful, this would allow these practices to continue, impeding NHA members' interests in the certainty provided by the EPA's rulemaking and undermining the cooperative federalism established by Section 401. Finally, Defendants do not adequately represent NHA's interests. The EPA is congressionally authorized to protect and maintain the chemical integrity of America's waterways. While NHA

[1] Undersigned counsel for NHA contacted counsel for the parties on September 2, 2020, seeking to obtain consent for this motion. Counsel for Proposed Intervenor States indicated they do not oppose. Counsel for Plaintiff States indicated they took no position and reserved the right to oppose. Counsel for Defendants indicated that they took no position.

[2] The State of California, through its Attorney General Xavier Becerra and the California Water Resources Control Board; the States of Washington, New York, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Wisconsin; the Commonwealths of Massachusetts and Virginia; and the District of Columbia.

[3] Andrew R. Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency.

generally supports such interests, it is principally interested in promoting the continued sustainability of hydropower as a renewable and reliable energy source.

Notwithstanding NHA's strong showing of its right to intervene, if this Court disagrees, it should still grant NHA permissive intervention. For permissive intervention, NHA need only show that its defense shares a common question of law or fact with the main action, and that intervention will not unduly prejudice the parties. Here, NHA intends to argue, directly contrary to Plaintiffs' allegations, that the EPA enacted its final rule consistent with the Administrative Procedure Act and all other statutory authority. Thus, NHA's defense undoubtedly shares with this action numerous common questions of law and fact. Finally, as noted above, this motion is timely and no parties would be prejudiced by NHA's intervention, especially given NHA's enthusiastic agreement to abide by all of this Court's scheduling orders.

II. INTEREST OF PROPOSED INTERVENOR

NHA is a nonprofit national association dedicated to promoting the growth of clean, affordable U.S. hydropower. Declaration of Dennis Cakert ("Cakert Dec.") ¶ 4. NHA seeks to secure hydropower's place as a climate-friendly, renewable, and reliable energy source that serves environmental, energy, and economic policy objectives. Cakert Dec. ¶ 4. NHA represents more than 200 hydropower-industry companies in North America, including public- and investor-owned utilities and independent power producers. Cakert Dec. ¶ 5. Its members are involved in projects throughout the United States, including both federal and non-federal hydroelectric facilities. *See* Cakert Dec. ¶ 6. In fact, NHA members own and operate the majority of the non-federal waterpower-generating facilities in the United States. *See* Cakert Dec. ¶ 6.

For over a century, hydropower has generated clean, affordable, and renewable energy. *See* Cakert Dec. ¶ 7. Today, hydropower provides energy to over 30 million American homes. In 2019, hydroelectricity "accounted for about 6.6% of total U.S. utility-scale electricity generation and 38% of total utility-scale renewable electricity generation." Cakert Dec. ¶ 8. Hydropower also enables other energy sources, such as wind and solar, greater integration into the power grid, remaining ready to produce power during periods of lower production. Cakert Dec. ¶ 11.

At present, hydropower developments face a complex web of regulatory regimes and a

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comprehensive regulatory approval process that involves the Federal Energy Regulatory Commission, federal and state resource agencies, and, most relevant here, water quality certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341, pursuant to the EPA regulations at issue in this case. Cakert Dec. ¶ 12. While such regimes and processes offer important safeguards, they can also contain redundancies and inefficiencies that unnecessarily slow the deployment of clean, renewable hydropower and delay the much-needed environmental enhancements and benefits that it brings. Cakert Dec. ¶ 13. For these reasons, NHA and its members—as the regulated community subject to the EPA's rule—have a substantial and direct financial interest in the EPA's rulemaking and interpretations of the Clean Water Act, especially insofar as the EPA curbs state overreach, ensuring that the requirements imposed by states are within the scope and follow the process established by Section 401. Cakert Dec. ¶¶ 14, 19.

III. ARGUMENT

A. NHA May Intervene As Of Right

A party is entitled to intervene as of right under Rule 24(a)(2) when it "(i) timely moves to intervene; (ii) has a significantly protectable interest related to the subject of the action; (iii) may have that interest impaired by the disposition of the action; and (iv) will not be adequately represented by existing parties." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020). Although NHA maintains the burden to show that it has met these intervention elements, the requirements are "construed broadly in favor of proposed intervenors," *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992), because "[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts," *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002). Here, NHA meets all of Rule 24(a)(2)'s mandatory intervention requirements.[4]

[4] Proposed intervenors are not required to satisfy the requirements for Article III standing to intervene on behalf of defendants. *See Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014) (intervenor that is not initiating action or appeal "need not meet Article III standing requirements"). Nevertheless, NHA satisfies all standing criteria, *see infra* at pp. 4–6, as Plaintiffs' lawsuit presents the direct threat of "an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (citations omitted).

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1. This Intervention Application Is Unarguably Timely

NHA's motion is timely. To decide if a motion to intervene is timely, the Court considers three factors: (1) the stage of the litigation at which an applicant seeks to intervene; (2) possible prejudice to other parties; and (3) the reason for, and length of, the delay. *Cal. Dep't. of Toxic Substances Control v. Commercial Realty Projects*, 309 F.3d 1113, 1119 (9th Cir. 2002). In terms of the stage of the litigation, Defendants have not yet filed their Answer, meaning that NHA seeks to intervene in this lawsuit at the earliest possible "stage of the proceeding." *Id.* Given the minimal litigation activity thus far, neither Plaintiffs nor Defendants would suffer any prejudice from NHA's intervention. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004). And there has been no delay in NHA filing this motion.

2. NHA Has A Direct And Significant Interest In The Continued Enforcement Of Defendants' Final Rule

A proposed intervenor also must "claim[ ] an interest relating to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2), which interest the Ninth Circuit has required to be "significantly protectable," *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1067 (9th Cir. 2018) (citation omitted). The "operative inquiry" for all cases is "whether the interest is protectable under some law, and whether there is a relationship between the legally protected interest and the claims at issue." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011) (en banc) (citation omitted). And the "relationship" requirement is "met if the resolution of the plaintiff's claims actually will affect the applicant." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (citation omitted). This is a practical inquiry, intended to "dispos[e] of lawsuits by involving *as many apparently concerned persons as is compatible with efficiency and due process*." *Id.* (emphasis added) (citation omitted). Of particular relevance here, persons who are "precisely those [the government] intended to protect" with a law or regulation satisfy the interest test. *Fresno Cty. v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

In enacting the final rule, the EPA expressly provided that "[t]his final rule modernizes and clarifies the EPA's regulations and will help States, Tribes, federal agencies, and project

proponents know what is required and what to expect during a section 401 certification process, thereby reducing regulatory uncertainty." 85 Fed. Reg. at 42,236. To that end, the rule clarifies that a Clean Water Act Section 401 certification "is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements," which requirements it defines as "applicable provisions of §§ 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States." *Id.* at 42,285 (quoting proposed rules 40 C.F.R. §§ 121.1(n) & 121.3). The rule also requires all conditional grants or denials of certification requests to include justification and direct citation to the water quality standard impacted by the project. *Id.* at 42,286 (quoting proposed rule 40 C.F.R. § 121.7). And the rule honors the statutory text by making clear that States cannot evade the statute's one-year maximum for acting on permit application under Section 401, *id*. at 42,235, 42,261, consistent with the D.C. Circuit's reasoning in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

NHA has a substantial interest in this litigation, for which intervention is necessary. In their Complaint, Plaintiffs specifically challenge the EPA's rule in multiple respects. Dkt. 1 at 6, 10–17. Plaintiffs seek to have this Court "set aside [the rulemaking] as arbitrary, capricious, and not in accordance with law." *Id.* at 24–26. Thus, Plaintiffs' success in this lawsuit would "direct[ly]" impede, *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981), NHA's and its members' interests in the protection and certainty provided by the rule. NHA's members who operate non-federal waterpower-generating facilities are subject to Clean Water Act Section 401 certification requirements, and are "precisely those [project proponents] [the EPA] intended to protect" with this rulemaking. *Andrus*, 622 F.2d at 438. As an association representing companies that are directly regulated under the Clean Water Act, NHA has a concrete interest in defending the EPA's regulations, and falls within the class of parties routinely granted intervention of right in cases reviewing agency actions. *Cf. Mil. Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998). Therefore, NHA has a "significantly protectable interest," *Allied Concrete & Supply Co.*, 904 F.3d at 1067 (citation omitted), that is "direct" and "non-contingent," *Dilks*, 642 F.2d at 1157, and which the outcome of this case, and the continued applicability of

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the rule, will affect. The "fact that California brought this lawsuit seeking to invalidate the [regulation], or restrict its sweep, is proof in itself of the efficacy of [the regulation] and its significance to" NHA. *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006).

3. NHA's Ability To Protect Its Interests, As A Practical Matter, May Be Impaired Or Impeded by Disposition of this Action

Having found that a party has a significant protectable interest, courts "have little difficulty concluding that the disposition of th[e] case may, as a practical matter, affect it." *Id.* "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citation omitted).

Here, there is no doubt that NHA's and its members' interests will be adversely affected by this lawsuit if Plaintiffs prevail. Plaintiffs seek to invalidate the EPA rule, which rule benefits NHA and its members by clarifying the scope and process for receiving Clean Water Act Section 401 certifications, thereby curbing state overreach. Dkt. 1 at 6, 10–17, 24–26. This rule "promote[s] consistent implementation of section 401 and streamline[s] federal license and permit processes," 85 Fed. Reg. at 42,220, and "eliminates the possibility of inconsistent interpretation and enforcement of the certification conditions in the federal license or permit," thereby "increasing the likelihood that project proponents will be able to comply with the certification conditions," *id.* at 42,276. NHA and its members, or "project proponents," are expressly among the entities that EPA intended this rule to "help." *Id.* at 42,236. If Plaintiffs are successful, then NHA and its members will face a more confusing and uncertain regulatory process for any new hydropower projects, without the "help" of the EPA's recent regulatory progress. *Id.* This would "substantially affect[ ]," *Lockyer*, 450 F.3d at 442, and gravely harm NHA and its members engaged in the hydropower industry. Therefore, this factor also supports mandatory intervention.

4. The Existing Parties Do Not Adequately Represent NHA's Interests

For the adequacy-of-representation element, the Court examines: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a

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proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect," with the comparison of interests being the "most important factor." *Citizens*, 647 F.3d at 898. The proposed-intervenor's burden on this is "minimal" and will be satisfied by "demonstrat[ing] that representation of its interests '*may be*' inadequate." *Id.* (emphasis added; citation omitted). When a private party seeks to intervene and join the defense with a government entity, the government's interests are not "identical to the individual parochial interest of a particular group just because both entities occupy the same posture in the litigation." *Id.* at 899; *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736–37 (D.C. Cir. 2003). At this early stage of the litigation, NHA is not required "to anticipate specific differences in trial strategy"; instead, NHA only must show a "difference in interests." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001).

No party to the dispute will adequately represent NHA's and its members' interests, and NHA has met this "minimal" burden. *Citizens*, 647 F.3d at 898 (citation omitted). Plaintiffs obviously cannot represent NHA's interests, because these two are diametrically opposed regarding the viability of the EPA's rulemaking. Nor can Defendants adequately represent NHA's interests. Defendant EPA Administrator is the federal official charged with administering the Clean Water Act and implementing Congressional objectives. 33 U.S.C. § 1251(d). Central to these Congressional objectives is his duty "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). NHA, on the other hand, is "dedicated to promoting the growth of clean, affordable U.S. hydropower." Cakert Dec. ¶ 4. While the *benefits* of hydropower include its status as a "climate-friendly, renewable, and reliable energy source that serves national environmental, energy, and economic policy objectives," Cakert Dec. ¶ 4, NHA's core interests are the promotion of hydropower as an industry. And NHA's members are regulated by the rule, while the EPA is regulator. Cakert Decl. ¶¶ 12, 14. This gives NHA an "individual parochial interest" not necessarily in line with the EPA's goals. *Citizens*, 647 F.3d at 899 (citation omitted).

That NHA and the EPA are likely to have the same *ultimate* goal—defending the EPA's rule—is insufficient to deny NHA intervention as of right. The EPA may well be focused to a

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greater extent than NHA on issues of administrative convenience and flexibility. On the other hand, NHA is likely to be focused to a greater degree than the EPA on the impact of the rule—and its potential vacatur—on the business of NHA's members and more broadly on the development of hydropower as an important renewable resource. As the Ninth Circuit has held, interests sufficiently diverge for purposes of intervention when a government entity's concerns are broader than the business motives of a proposed intervenor. *Berg*, 268 F.3d at 823–24; *see also Fund for Animals*, 322 F.3d at 736 ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors."). Therefore, the Court cannot assume that the EPA will "undoubtedly make all of [NHA]'s arguments." *Citizens*, 647 F.3d at 898 (citation omitted). And given this likely distinction between NHA and the EPA, "there is sufficient doubt about the adequacy of representation to warrant intervention." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972). Therefore, this element too supports NHA's motion for intervention of right.

* * *

For these reasons, NHA has met its burden on all four elements of intervention as of right, and the Court should grant this motion.

B. Alternatively, NHA Should Be Permitted To Intervene Under Rule 24(b)

Should the Court conclude that NHA is not entitled to intervene as a matter of right, the Court should nonetheless permit NHA to intervene under Rule 24(b). For a timely motion for permissive intervention as a defendant "to give 'defense' of the government's rulemaking," "[a]ll that is necessary . . . is that [the] intervenor's claim or defense and the main action have a question of law or fact in common." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002), *overruled in part on other grounds as stated in Wilderness Soc'y*, 630 F.3d at 1178–79. The Court should also "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b).

Permissive intervention here is plainly appropriate. NHA intends to litigate in defense of the rule, and, given Plaintiffs' Complaint, Dkt. 1 at 24–26, this places NHA's defense within the confines of the "main action." *Kootenai Tribe*, 313 F.3d at 1108 (citation omitted). Furthermore,

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and as discussed above, *see*, *supra*, Part III.A.1., the case is in its infancy, so neither Plaintiffs nor Defendants will suffer any prejudice if NHA is permitted to intervene. *See Alisal Water Corp.*, 370 F.3d at 922. And, finally, NHA is willing to abide by all of the Court's scheduling orders, further supporting permissive intervention here. *See Kootenai Tribe*, 313 F.3d at 1111 n.10. In such cases, where an intervention motion is "filed near the case outset and the [proposed intervenors] said they could abide the court's briefing and procedural scheduling orders, there [is] no issue whatsoever of undue delay." *Id.* Therefore, even if this Court concludes that NHA may not intervene as of right, it should then grant it permission to intervene in this lawsuit.

IV. CONCLUSION

This Court should grant NHA's motion to intervene, and the accompanying Proposed Answer should be accepted for filing.

Respectfully submitted,

Dated: September 4, 2020

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By: */s/ Elizabeth Holt Andrews*
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American Petroleum Institute and
Interstate Natural Gas Association of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

AMERICAN RIVERS, et al.;

Plaintiffs,

v.

ANDREW R. WHEELER, et al.,

Defendants.

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

AMERICAN PETROLEUM INSTITUTE AND INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA:

(1) NOTICE OF MOTION AND MOTION TO INTERVENE IN NO. 3:20-CV-04869-WHA; AND

(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

[Proposed] Orders filed concurrently herewith]

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

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

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TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on October 8, 2020, at 8:00 a.m., or as soon thereafter as this matter may be heard before the Honorable William H. Alsup, the American Petroleum Institute (API) and the Interstate Natural Gas Association of America (INGAA) (collectively the Coalition) will and hereby do move to intervene in this matter, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to defend against the challenge to the U.S. Environmental Protection Agency's July 13, 2020, final rule entitled "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42,210 (July 13, 2020), brought by the State of California and others (together, Plaintiffs) in No. 3:20-cv-04869-WHA. The Coalition requests that this motion be heard on October 8, 2020 at 8:00 am for efficiency, since the hearing on the motion to intervene filed by the State of Louisiana and other States is scheduled to be heard at that time..

As demonstrated in the accompanying memorandum, the Coalition is entitled to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2) because: (1) the motion to intervene is timely; (2) the Coalition has a significant protectable interest relating to the subject of the suit; (3) that interest may be impaired or impeded by the disposition of this case; and (4) none of the other parties adequately represent the Coalition's interests. In the event that the Coalition is not granted intervention as of right, it requests that it be granted permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1)(B). The defenses that the Coalition would assert present questions of law and fact in common with the underlying suit and would respond directly to the Plaintiffs' claims.

Counsel for API and INGAA met and conferred with counsel for the Parties in this matter, in advance of filing this Motion, in an effort to negotiate a stipulation for intervention. Plaintiffs indicate that they take no position on the motion but reserve the right to oppose it after seeing the Memorandum of Points and Authorities in support of the Motion. The federal Defendants take no position on the Motion.

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This Motion is made based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the declarations of Robin Rorick and Joan Dreskin, the pleadings and papers on file, and upon such oral argument as may be made at the hearing.

The Coalition respectfully requests that the Court grant this Motion. A proposed order is filed herewith.

DATED: September 4, 2020

HUNTON ANDREWS KURTH LLP

By: /s/ *Clare Ellis*
Clare Ellis
George P. Sibley, III
Deidre G. Duncan
Counsel for Proposed Intervenor-Defendants American Petroleum Institute and Interstate Natural Gas Association of America

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF INTERESTS 2

A. API 2

B. INGAA 3

III. ARGUMENT 5

A. The Coalition Is Entitled to Intervene as of Right. 5

1. The Motion to Intervene is Timely. 5

2. The Coalition Has a Direct and Recognized Interest in the Final Rule. 6

3. The Coalition's Interests May Be Impaired or Impeded by the Disposition of this Litigation. 11

4. The Current Parties Do Not Adequately Represent the Coalition's Interests. 12

B. Alternatively, the Coalition Should Be Granted Permissive Intervention. 16

C. The Coalition Should Be Allowed To File Its Answer After The Federal Defendants. 17

IV. CONCLUSION 19

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

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir. 2003) 10

Beckman Indus., Inc. v. Int'l Ins. Co.,
966 F.2d 470 (9th Cir. 1992) 17, 19

California v. Bureau of Land Mgmt.,
No. 18-cv-00521, 2018 WL 3439453 (N.D. Cal. July 17, 2018) 8

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,
152 F.3d 1184 (9th Cir. 1998) 12

Chevron, U.S.A. Inc., v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 14

Citizens for Balanced Use v. Mont. Wilderness Ass'n,
647 F.3d 893 (9th Cir. 2011) 6, 11, 12

Conservation Law Found. of New England, Inc. v. Mosbacher,
966 F.2d 39 (1st Cir. 1992) 13

Daggett v. Comm'n on Governmental Ethics & Election Practices,
172 F.3d 104 (1st Cir. 1999) 17

Driftless Area Land Conservancy v. Huebsch,
No. 20-1350, 2020 WL 4592147 (7th Cir. Aug. 11, 2020) 7

In re Fin. Oversight & Mgmt. Bd. for Puerto Rico,
297 F. Supp. 3d 261 (D.P.R. 2017) 19

Fresno Cty. v. Andrus,
622 F.2d 436 (9th Cir. 1980) 10

Ga. River Network v. U.S. Army Corps of Eng'rs,
334 F. Supp. 2d 1329 (N.D. Ga. 2003) 7

Georgia v. U.S. Army Corps of Eng'rs,
302 F.3d 1242 (11th Cir. 2002) 12

Gibraltar Mausoleum Corp. v. Cedar Park Cemetery Ass'n,
No. 92 C 5228, 1993 WL 135454 (N.D. Ill. Apr. 29, 1993) 18

Idaho Farm Bureau Fed'n v. Babbitt,
58 F.3d 1392 (9th Cir. 1995) 6

Kentuckians for the Commonwealth, Inc. v. Rivenburgh,
204 F.R.D. 301 (S.D. W.Va. 2001).....8

Kootenai Tribe of Idaho v. Veneman,
313 F.3d 1094 (9th Cir. 2002) 16

Marshall v. Meadows,
921 F. Supp. 1490 (E.D. Va. 1996) 18

N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of New York,
516 F.2d 350 (2d Cir. 1975) (per curiam).....7

NAACP v. New York,
413 U.S. 345 (1973).....5

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.,
545 U.S. 967 (2005).....15

Nat'l Farm Lines v. Interstate Commerce Comm'n,
564 F.2d 381 (10th Cir. 1977) 7

Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs,
243 F.R.D. 253 (S.D. W.Va. 2007).....7

Parker v. Morton,
No. 18-00234-KD-B, 2019 WL 1645207 (S.D. Ala. Apr. 16, 2019) 18

Perry v. Schwarzenegger,
630 F.3d 898 (9th Cir. 2011) 10, 16

PUD No. 1 of Jefferson County v. Washington Department of Ecology,
511 U.S. 700 (1994).....14, 15

Sagebrush Rebellion, Inc. v. Watt,
713 F.2d 525 (9th Cir. 1983) 15

Sierra Club, Inc. v. EPA,
358 F.3d 516 (7th Cir. 2004) 16

Sierra Club v. EPA,
995 F.2d 1478 (9th Cir. 1993) 6

Sierra Club v. Espy,
18 F.3d 1202 (5th Cir. 1994) 7

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

South Dakota v. Ubbelohde,
330 F.3d 1014 (8th Cir. 2003) 12

Spangler v. Pasadena City Bd. of Educ.,
552 F.2d 1326 (9th Cir. 1977) 16

Spring Constr. Co. v. Harris,
614 F.2d 374 (4th Cir. 1980) 18

Sw. Ctr. for Biological Diversity v. Berg,
268 F.3d 810 (9th Cir. 2001) 10, 11, 12

Trbovich v. United Mine Workers,
404 U.S. 528 (1972).....12

United States v. Aerojet Gen. Corp.,
606 F.3d 1142 (9th Cir. 2010) 5

United States v. Albert Inv. Co.,
585 F.3d 1386 (10th Cir. 2009) 11

United States v. Alisal Water Corp.,
370 F.3d 915 (9th Cir. 2004) 5, 10, 11

United States v. City of Hialeah,
899 F. Supp. 603 (S.D. Fla. 1994) 18

United States v. City of Los Angeles,
288 F.3d 391 (9th Cir. 2002) 5, 6

United States v. Metro. St. Louis Sewer Dist.,
569 F.3d 829 (8th Cir. 2009) 17

Utahns for Better Transp. v. U.S. Dep't of Transp.,
295 F.3d 1111 (10th Cir. 2002) 7

Westchester Fire Ins. Co. v. Mendez,
585 F.3d 1183 (9th Cir. 2009) 18, 19

WJA Realty Ltd. P'ship v. Nelson,
708 F. Supp. 1268 (S.D. Fla. 1989) 18

Federal Statutes

15 U.S.C. § 717f(c)(1)(A).....4, 6

33 U.S.C. § 1341(a)(1).....13

33 U.S.C. § 1344.....6

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

Hunton Andrews Kurth LLP
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San Francisco, CA 94111

Federal Register

85 Fed. Reg. 42,210 (July 13, 2020) 1

85 Fed. Reg. 42,224–25 15

85 Fed. Reg. 42,229 15

85 Fed. Reg. at 42,233–34 15

Federal Rules

Fed. R. Civ. P. 24(a)(2) 5, 6, 16, 19

Fed. R. Civ. P. 24(b)(1)(B) 16, 19

Fed. R. Civ. P. 24(c) 17, 18

Docketed Material

Fed. Defs.' Resp. to States' & to Private Party Pls.' Mots. for Summ. J., *Texas v. EPA*, No. 3:15-cv-00162 (S.D. Tex. Nov. 8, 2018) (Dkt. 170) 16

Order Denying Mots. to Intervene, *California v. Wheeler*, No. 3:20-cv-03005 (N.D. Cal. Aug. 13, 2020) 14

United States' Resp. to Pls.' & Intervenor Pls.' Mots. for Summ. J., *Georgia v. Wheeler*, No. 2:15-cv-00079-LGW-BWC (S.D. Ga. Oct. 10, 2018) (Dkt. 215) 16

Miscellaneous

Domestic Energy Producers Alliance, Comments on Updating Regulations on Water Quality Certification, Proposed Rule, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Oct. 21, 2019), EPA-HQ-OW-2019-0405-0935, https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0935 3

INGAA, Comments on EPA's Proposal to Update Regulations on Clean Water Act Section 401 Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Oct. 21, 2019), EPA-HQ-OW-2019-0405-0918, https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0918 4

Natural Gas Council, Comments on Updating Regulations on Water Quality Certification, Proposed Rule, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Oct. 21, 2019), EPA-HQ-OW-2019-0405-0852, https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0852 (Natural Gas Council Comments) 3

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

The Clean Water Act (CWA) uses a "cooperative federalism" approach to achieve its aims. It carves out complementary roles for federal agencies on the one hand and States and tribes on the other. CWA section 401 gives each State and tribe an important but limited say in the licensing of federal projects that could affect water quality. Specifically, federal agencies cannot license activities that may result in a discharge into waters of the United States until, the State whose waters would be affected by the discharge certifies that the activity will comply with applicable water-quality requirements or waives the section 401 requirement, either affirmatively or through inaction. Section 401 authority is powerful—when triggered, State certification or waiver is an essential requirement for the federally-licensed activity to proceed. But to preserve the CWA's federal-State balance, that authority is also limited—section 401 only authorizes States to address water quality, and only within reasonable time limits that can never exceed one year.

Some States have exceeded these limits. They have improperly used procedural gimmicks to extend the time the CWA gives them to make certification decisions. And they have used section 401 to effectively veto projects based on non-water quality considerations, such as preferences regarding energy policy, which infringes on the federal government's exclusive authority. These abuses of section 401 have acutely affected the members of American Petroleum Institute (API) and the Interstate Natural Gas Association of America (INGAA) (collectively, the Coalition) who routinely seek federal authorizations that require section 401 certification and recently have been subjected to these extra-legal State reviews.

On July 13, 2020, the U.S. Environmental Protection Agency (EPA) published a final rule that aims to stop these abuses and, for the first time, provides a comprehensive framework for the implementation of section 401. *See* Clean Water Act Section 401 Certification Rule, 85

Fed. Reg. 42,210 (July 13, 2020) (the Rule). The Rule restores the federal-State balance by clarifying the limits section 401 places on State action. Specifically, the Rule gives effect to Congress's decision to limit the scope of State review to water quality determinations and the duration of that review to a reasonable timeframe not to exceed one year.

Plaintiffs—the State of California and 20 other States—challenge the Rule, claiming it unlawfully limits the States' authority. State Compl. ¶¶ 7.1–7.5. The Plaintiffs also allege that in promulgating the Rule, EPA improperly disregarded its prior agency policy and practice without reasoned explanation. State Compl. ¶¶ 7.6–7.12. And they claim that the Rule is arbitrary and capricious, because EPA failed to consider the applicable statutory requirements and important issues, including the protection of water quality. State Compl. ¶¶ 7.13–7.19. Due to these alleged failures, the Plaintiffs argue that the Rule is arbitrary and capricious, an abuse of discretion, not in accordance with law, and in excess of jurisdiction in violation of the Administrative Procedure Act (APA). State Compl. ¶¶ 7.20–7.25.

The Coalition moves to intervene in these related actions to defend against Plaintiffs' challenge. Intervention will allow the Coalition to defend its unique and critical interests in the Rule and will aid the Court in understanding the purpose of the Rule, as well as the merits and implications of the Plaintiffs' claims and requested relief. The Coalition's motion is timely. The Coalition has an obvious interest in the Rule, which may be impaired if the Plaintiffs prevail. And the other parties to the case cannot adequately protect the Coalitions interests. The motion should be granted.

II. STATEMENT OF INTERESTS

A. API

API is a nationwide, nonprofit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8% of the U.S. economy. Rorick Decl. ¶ 3. API's 600-plus member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service

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and supply firms. *Id.* API was formed in 1919 as a standards-setting organization, and API developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. *Id.*

API members engage in exploration, production, and construction projects that routinely involve both State and federal water permitting that require section 401 certification. *Id.* ¶ 4. API's members have a significant interest in the Rule's provisions clarifying the timeframes for certification, the scope of certification review and conditions, and the related certification requirements and procedures. To protect these significant interests, API joined two comment letters submitted by the Natural Gas Council and the Domestic Energy Producers Alliance in response to the EPA's August 22, 2019, proposed rule.[1]

B. INGAA

INGAA is a non-profit trade association representing 25 of the interstate natural gas transmission pipeline companies operating in the U.S. INGAA's members, which constitute approximately two-thirds of the interstate pipeline industry, operate a network of approximately 200,000 miles of pipelines. Dreskin Decl. ¶ 3. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity, and manufacturing a wide variety of goods. *Id.* Natural gas plays a prominent role in the nation's energy mix, and interstate natural gas pipelines are an integral part of the energy infrastructure. *Id.* ¶¶ 3–4. U.S. natural gas production likely will increase to 130 billion cubic feet per day by 2035, spurred by growing markets, if available supplies are developed. Investment in new oil and gas infrastructure likely will total $791 billion from 2018 through 2035, averaging $44 billion per year. *Id.* ¶ 4. Natural

[1] Natural Gas Council, Comments on Updating Regulations on Water Quality Certification, Proposed Rule, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Oct. 21, 2019), EPA-HQ-OW-2019-0405-0852, https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0852 (Natural Gas Council Comments); Domestic Energy Producers Alliance, Comments on Updating Regulations on Water Quality Certification, Proposed Rule, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Oct. 21, 2019), EPA-HQ-OW-2019-0405-0935, https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0935.

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gas also will serve as a backstop to help firm up variable resources, like wind and solar, which are expected to grow. *Id.* This increased demand for natural gas creates a need for thousands of miles of new and replacement pipelines to meet market demand or to modernize existing pipeline facilities. *Id.*

INGAA members routinely utilize the CWA section 401 process. First, due to the linear nature of pipelines, pipeline construction and maintenance often unavoidably involves crossing wetlands and streams, which require permitting under CWA section 404. *Id.* ¶¶ 5–6. Section 401 prohibits the Corps from issuing a section 404 permit until the authorized state or tribe provides a certification or waives certification. *Id.* ¶ 6. Second, to construct and operate an interstate pipeline, INGAA members must obtain from the Federal Energy Regulatory Commission (FERC) a certificate of "public convenience and necessity" based on demonstrated need. *See* 15 U.S.C. § 717f(c)(1)(A); Dreskin Decl. ¶ 5. Where a proposed pipeline project may result in a discharge into waters of the United States, section 401 certification or waiver is required before FERC authorizes construction resulting in the discharge. Dreskin Decl. ¶¶ 5–6.

Coalition members thus have a significant interest in the efficient operation of the section 401 certification process. Interstate natural gas pipeline construction and maintenance activities are typically conducted on tight schedules designed to ensure the safety, security, and reliability of the natural gas pipeline network, and to meet the growing demands of natural gas consumers, which makes the predictability and efficiency of the section 401 process critical. *Id.* ¶ 21. To protect these interests, INGAA joined the Natural Gas Council comment letter (a group which represents all segments of the natural gas value chain from the wellhead to the burnertip) and also filed a separate, extensive comment letter in response to the EPA's August 22, 2019, proposed rule.[2]

[2] Natural Gas Council Comments; INGAA, Comments on EPA's Proposal to Update Regulations on Clean Water Act Section 401 Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019) (Oct. 21, 2019), EPA-HQ-OW-2019-0405-0918, https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0918.

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III. ARGUMENT

A. The Coalition Is Entitled to Intervene as of Right.

Federal Rule of Civil Procedure 24(a)(2) provides that, "[o]n timely motion, the court *must permit* anyone to intervene" who:

> [C]laims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2) (emphasis added); *see also United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010). In determining whether intervention is appropriate, the Ninth Circuit is "guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention." *Aerojet Gen. Corp.*, 606 F.3d at 1148 (internal quotation marks and citation omitted). The Coalition satisfies each of the requirements for intervention under Rule 24(a)(2).

1. The Motion to Intervene is Timely.

The timeliness of a motion to intervene "is to be determined from all the circumstances" of the case. *NAACP v. New York*, 413 U.S. 345, 366 (1973). In making that determination, courts consider "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (internal quotation marks and citation omitted).

Here, each of these considerations shows the Coalition's motion is timely. The Coalition filed its motion as early as practicable, and before any meaningful proceedings have occurred. The Defendants have filed no responsive pleading, no party has filed a substantive motion, and the initial case management conference is still more than a month away. And significantly, the merits of the case may only be decided on the administrative record, which has not yet been submitted to the Court. Granting intervention will not cause prejudice to the other parties, and no unreasonable delay will result. *See United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th

Cir. 2002) (finding timely a motion to intervene filed "approximately one and [a] half months after the suit was filed"); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (finding timely a motion "filed at a very early stage, before any hearings or rulings on substantive matters" even though it was filed two months after the defendant filed its answer and submitted the administrative record). Under these circumstances, the Coalition's motion is timely.

2. The Coalition Has a Direct and Recognized Interest in the Final Rule.

To intervene as of right, a movant must have "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). Whether a movant has "a significant protectable interest in the action, . . . is a 'practical, threshold inquiry,' and '[n]o specific legal or equitable interest need be established.'" *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citation omitted). The movant need only "establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Id.* "The relationship requirement is met 'if the resolution of the plaintiff's claims actually will affect the [movant].'" *City of Los Angeles*, 288 F.3d at 398 (citation omitted).

The Coalition's members have a significant interest in the Rule that is protectable under law. Section 401, by its own terms, limits the scope and duration of State reviews. The Rule seeks to clarify and enforce these limits, which will benefit the Coalition's members, who regularly rely on federal permits and licenses that require certification. Rorick Decl. ¶ 4; Dreskin Decl. ¶¶ 3–6. Absent the Rule, States may continue the practice of denying or delaying action on certification requests in violation of these limits, which clearly impairs Coalition members' legally protectable interest in the associated federal permits and licenses. *See*, *e.g.*, 33 U.S.C. § 1344; 15 U.S.C. § 717f(c)(1)(A).

Courts regularly recognize that an interest in a federal permit satisfies the significant protectable interest requirement. *See, e.g., Sierra Club v. EPA*, 995 F.2d 1478, 1482 (9th Cir.

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1993), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc); *Driftless Area Land Conservancy v. Huebsch*, No. 20-1350, 2020 WL 4592147, at *3 (7th Cir. Aug. 11, 2020); *Ga. River Network v. U.S. Army Corps of Eng'rs*, 334 F. Supp. 2d 1329 (N.D. Ga. 2003) (allowing Corps permit holder to intervene in NEPA suit challenging the permit); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 243 F.R.D. 253, 257 (S.D. W.Va. 2007) (granting intervention to Corps permit holders in litigation challenging the permit).

Here, the Plaintiffs are not directly challenging any federal permit or license or any State certification, but are challenging EPA's ground rules for the section 401 process which will impact projects developed by members of the Coalition, and that interest is sufficient for intervention as of right. Courts routinely find the interest requirement satisfied where the litigation involves a challenge to a regulatory regime that the intervenor routinely engages. For example, timber purchaser associations had a right to intervene based on their members' contracts that would have been affected by litigation challenging U.S. Forest Service practices for managing national forests. *Sierra Club v. Espy*, 18 F.3d 1202, 1203–04, 1207 (5th Cir. 1994). Similarly, motor vehicle common carriers had a right to intervene where the litigation risked setting aside a regulatory scheme that "directly protects their economic interests." *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 382 (10th Cir. 1977). And transportation trade associations were granted intervention in litigation concerning federal approval of regional transportation plans where the associations' members had existing contracts that would be affected by the case and had contributed to the transportation plans at issue. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) (explaining that "[t]he threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest" for purposes of intervention.).

Indeed, Courts regularly allow trade associations to intervene when the validity of a regulation that affects their members' economic interests is at stake. *N.Y. Pub. Interest Research*

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Grp., Inc. v. Regents of Univ. of State of New York, 516 F.2d 350, 352 (2d Cir. 1975) (per curiam) (concluding trade associations have "a sufficient interest to permit [them] to intervene since the validity of a regulation from which [their] members benefit is challenged"); *California v. Bureau of Land Mgmt.*, No. 18-cv-00521, 2018 WL 3439453, at *8 (N.D. Cal. July 17, 2018) (granting API motion to intervene in litigation challenging rescission of a regulation concerning hydraulic fracturing on public and tribal lands); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F.R.D. 301, 306 (S.D. W.Va. 2001) (allowing intervention in CWA and National Environmental Policy Act case by "an association composed of members of the regulated industry").

Under this well-settled precedent, litigation over the Rule is likely to affect the Coalition's interests. The Coalition's members regularly must satisfy section 401 to obtain federal authorizations for construction and maintenance projects. Rorick Decl. ¶ 4; Dreskin Decl. ¶¶ 5–6. And they have experienced significant delays and financial harm because States have exceeded the statutory review period or denied certification on non-water quality grounds. Rorick Decl. ¶ 11; Dreskin Decl. ¶¶ 8–9. For example, a Coalition member submitted a certification request for a $683 million, 124-mile natural gas pipeline designed to connect natural gas production in Pennsylvania to demand in the northeastern markets. Rorick Decl. ¶ 12; Dreskin Decl. ¶ 10. The New York State Department of Environmental Conservation (NYSDEC) requested additional information and deemed the request complete in December 2014. Rorick Decl. ¶ 12; Dreskin Decl. ¶ 10. In April 2015, NYSDEC requested that the member withdraw and resubmit its request to restart the waiver period. Rorick Decl. ¶ 12; Dreskin Decl. ¶ 10. In April 2016, nearly three years after the project's initial request for certification, NYSDEC denied certification. Rorick Decl. ¶ 12; Dreskin Decl. ¶ 10. The project's sponsor halted investment in the pipeline and cancelled the project in February 2020. Rorick Decl. ¶ 12; Dreskin Decl. ¶ 10.

Coalition members have also had projects cancelled or otherwise negatively affected by States' unlawful expansion of their review to include considerations unrelated to water quality.

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For example, in August 2020, the State of North Carolina denied certification for an API member's $468 million, 75-mile natural gas pipeline project on grounds that the purpose of the project was "unachievable" due to the "uncertainty" of completion of a different pipeline project even though FERC had already decided that public convenience and necessity required approval of the project. Rorick Decl. ¶ 14. Similarly, in November 2015, the Millennium Pipeline Company's request for certification for its 7.8-mile pipeline was denied, not on water quality grounds but because the State determined that FERC's environmental review failed to adequately assess potential downstream greenhouse gas emissions. Dreskin Decl. ¶ 11. Another example is the Atlantic Coast Pipeline, a $5.1 billion pipeline project proposed by an INGAA member that would transport gas produced in the Marcellus Shale region to the Mid-Atlantic region. *Id.* ¶ 13. In 2017, Virginia approved water quality certification of the project subject to conditions regulating activities in upland areas that may indirectly affect state waters, which reaches beyond the scope of federal CWA jurisdiction and the project's direct discharges into navigable waters. *Id.* Another INGAA member project was delayed as the result of the NYSDEC's decision to deny certification more than one year after the member submitted its certification request. *Id.* ¶ 12. FERC determined the State exceeded the statutory deadline and so waived certification. FERC's waiver decision is on appeal to the Second Circuit. *Id.* In a separate proceeding, the Second Circuit determined that the certification denial failed for a different reason—that it lacked any rational connection between the facts found and choice made. *Id.*[3]

Given the significant ramifications for oil and gas pipeline projects from State violation of section 401's statutory limits, the Coalition's members have a significant interest in the procedures and substantive requirements of the Rule that correct these abuses. To protect that interest, the Coalition filed detailed comments on the proposed rule, which were part of the administrative record before the EPA when it adopted the Rule. Rorick Decl. ¶ 20; Dreskin Decl.

[3] In August 2019, NYSDEC issued a second denial of the section 401 water quality certification. Dreskin Decl. ¶ 12. The pipeline appealed this decision to the Second Circuit; the court stayed the case, pending a decision on the FERC waiver decision. *Id.*

¶ 18. The Coalition's members thus have direct interests in protecting the Rule, which creates an efficient, transparent, and effective section 401 certification process.

The litigation's potential effect on these interests is imminent, not speculative or attenuated. A speculative economic interest that is "several degrees removed" from the issues at the heart of the litigation is insufficient to support intervention. *Alisal Water Corp.*, 370 F.3d at 920. But that is not the case here. The Coalition's interest is much more closely tied to the issues presented in this litigation, because the Coalition's members regularly must engage the section 401 certification process. The Coalition's members have numerous projects for which they will soon request certification, which will be made under the Rule. Rorick Decl. ¶ 22; Dreskin Decl. ¶ 22. If this Court declares the Rule unlawful, the Coalition's members could face years of additional delays and substantial additional costs with respect to those projects, without any commensurate benefit to the aquatic environment. Rorick Decl. ¶ 23; Dreskin Decl. ¶ 23. This connection is more than sufficient to support intervention. *Cf., e.g., Fresno Cty. v. Andrus*, 622 F.2d 436, 437 (9th Cir. 1980) (concluding that an association of small farmers had a sufficient interest for intervention in litigation to enjoin the Secretary of the Interior from promulgating regulations governing excess land sales before an environmental impact statement was prepared); *Arakaki v. Cayetano,* 324 F.3d 1078, 1088 (9th Cir. 2003) (finding a significant protectable interest by a group of Native Hawaiians in litigation concerning the State's provision of benefits).

In sum, the Coalition has a substantial protectable interest in the Rule that is the object of this litigation, because its members regularly apply for section 401 certifications and stand to experience substantial additional cost and delay if Plaintiffs obtain the relief they seek.[4]

[4] Although the Coalition is not required to separately demonstrate standing to participate as defendant-invervenors, *see Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) (per curiam), the Coalition's interests in the Rule, and the impairment the Coalition and its members would suffer if the plaintiffs prevail, easily satisfy any standing requirement, *see Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 821 n.3 (9th Cir. 2001).

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3. The Coalition's Interests May Be Impaired or Impeded by the Disposition of this Litigation.

Courts in this circuit adhere to "the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'" *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (citation omitted). Impairment is routinely found when the movant has "a significant protectable interest"—in those circumstances, courts have "little difficulty concluding that the disposition of th[e] case *may*, as a practical matter[] affect" the movant. *Citizens for Balanced Use*, 647 F.3d at 898 (emphasis added) (internal quotation marks and citation omitted). A non-speculative economic interest in the outcome of the litigation is also sufficient to warrant intervention, if the interest is "concrete and related to the underlying subject matter of the action." *Alisal Water Corp.*, 370 F.3d at 919; *see also United States v. Albert Inv. Co*., 585 F.3d 1386, 1393 (10th Cir. 2009) ("threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest" to warrant intervention) (internal quotation marks and citation omitted).

Here, it is readily apparent that, if the Rule is found unlawful, the Coalition's members' interests could be substantially impaired or impeded. If Plaintiffs obtain a judgment declaring the Rule unlawful, Coalition members would not realize the benefits of the Rule and could face years of additional delays and substantial additional costs, without any commensurate benefit to the aquatic environment. Rorick Decl. ¶ 23; Dreskin Decl. ¶ 23. States would be able to continue to condition or deny certification for Coalition members' projects based on policy objections unrelated to water quality. Rorick Decl. ¶ 23; Dreskin Decl. ¶ 23. Accordingly, many important activities associated with oil pipelines, natural gas pipelines, and natural gas liquids pipelines may be delayed or otherwise encumbered if the Rule is declared unlawful and States and return to their previous practices of improperly denying or delaying certification.

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4. The Current Parties Do Not Adequately Represent the Coalition's Interests.

A proposed intervenor's burden of showing inadequacy of representation is a "'minimal'" one. *Citizens for Balanced Use*, 647 F.3d at 898 (citation omitted). As the Supreme Court has explained, "the applicant [need only] show[] that representation of [its] interest[s] [by existing parties] *'may be'* inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (emphasis added); *see also Sw. Ctr. for Biological Diversity*, 268 F.3d at 823. Adequacy of representation is determined by "examin[ing] three factors: '(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.'" *Citizens for Balanced Use*, 647 F.3d at 898 (citation omitted).

Courts in this Circuit and elsewhere routinely recognize that private parties and the federal government do not necessarily share the same interests even when they both support a given government action. As the Ninth Circuit has explained, "the government's representation of the public interest may not be identical to the individual parochial interest of a particular group" notwithstanding that "both entities occupy the same posture in the litigation." *Id.* at 899 (internal quotation marks and citations omitted). For that reason, the Ninth Circuit found that a union's employment interests were not adequately represented by the State of California because they are "potentially more narrow and parochial than the interests of the public at large." *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998). Courts across the country have taken the same view. *See*, *e.g.*, *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003) (in suit challenging Corps policy to lower reservoir water level, Corps could not adequately represent interests of proposed intervenors—downstream users—because Corps was required to balance the interests of the upstream and downstream users); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1259 (11th Cir. 2002) ("[A] federal defendant with a primary interest in the management of a resource" does not have

an "interest[] identical to those of an entity with an economic interest[] in the use of that resource.") (citation omitted); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44-45 (1st Cir. 1992) ("[A] governmental entity charged by law with representing the public interest of its citizens might shirk its duty were it to advance the narrower interest of a private entity . . . .").

EPA's institutional considerations make it ill-suited to adequately represent the Coalition's interests. Although EPA has an interest in providing regulatory clarity to industry, as well as States and tribes, it has to balance that interest against its myriad other interests including environmental protection, its institutional reputation, and its own authority as the regulator tasked with implementing the CWA and as a permitting authority in certain situations. These considerations mean that the Coalition and EPA have different interests, particularly when it comes to matters of EPA's authority, which the Rule undoubtedly implicates. Further, EPA has no particular interest in defending the Coalition members' financial interests in their federal permit and license applications.

The interests of Coalition members and EPA also diverge due to their different roles in the section 401 certification process. Section 401 provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). And "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived." *Id.* Applicants, including Coalition members, thus have a concrete interest in ensuring that States and tribes exercise their certification authority expeditiously so that the appropriate federal agency can grant their permit or license application. EPA's role is markedly different. In some cases (e.g., where a tribe lacks authority to give certification) EPA itself is the certifying authority. *Id.* And when a discharge in one State may affect the water quality of another State, section 401 requires EPA to give to the permitting or licensing authority, its opinion on

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certification. *Id.* § 1341(a)(2). So EPA's section 401 duties can put it in direct opposition to Coalition member's interests. That statutory role will almost certainly affect the way in which EPA defends the Rule, which provides the rules of the road for certifications both when made by EPA and when made by States or tribes. EPA cannot be expected to fully defend the Coalition's financial interests in permit and license approval under such conditions.

The number of issues involved in the Rule further indicates that the Coalition and the Federal Defendants will present different arguments and place different emphasis on different aspects of the Rule. The Rule addresses a number of certification issues, including the permissible scope of section 401 review, the timeframe for certification, when certification is required, and pre-filing meeting requests, to name a few. This is not a rule that defines a single statutory term where there are a relatively narrow set of issues, and thus, a narrow set of arguments that will likely be made in defense of the Rule. *See* Order Denying Mots. to Intervene, *California v. Wheeler*, No. 3:20-cv-03005 (N.D. Cal. Aug. 13, 2020) (Dkt. 200) (denying intervention because there was no indication that proposed intervenors' interests would be inadequately represented and a preliminary injunction had already been granted). Instead, the Coalition and the Federal Defendants will present different arguments not only on the substance of some of these issues but will also approach differently questions about the relative importance of the various aspects of the Rule.

In particular, the government may devote more time and energy to advocating broad legal principles at the expense of other arguments in defense of the Rule that are more important in the Coalition's view. For example, this case presents questions about the extent to which a federal agency may interpret ambiguous statutes under *Chevron, U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the Rule, EPA correctly concludes that the Supreme Court's majority opinion in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), does not deprive EPA of its authority to interpret ambiguous terms in the statute regarding the scope of authority provided in subsections 401(a) and 401(d).

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See 85 Fed. Reg. at 42,224–25, 42,229 (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005)). The Coalition agrees that given the unique aspects of the Supreme Court's *PUD No. 1* decision, *see* 85 Fed. Reg. at 42,233–34, it does not preclude EPA's interpretation of section 401. The government's defense of the Rule, however, may rely on and advocate for a broader application of the principles espoused in *Brand X*, which could conflict with the Coalition's position.

The Coalition also will make arguments that are uniquely within its area of expertise given its members' substantial experience applying for section 401 certifications. The proposed intervenor's expertise in a particular area that is not shared by the federal government defendant is a factor courts consider in granting intervention. *See Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 528 (9th Cir. 1983) (granting intervention in litigation over the Secretary of the Interior's decision to recommend establishment of a national conservation area where the non-profit wildlife protection association had specific "expertise apart from that of the Secretary [of the Interior]"). Here, the Coalition will be able to enhance the Court's understanding of the section 401 certification process from the perspective of permit applicants. Rorick Decl. ¶ 25; Dreskin Decl. ¶ 25. The Coalition will be able to explain the importance of an efficient certification process and how businesses, consumers, and employees are affected when States exercise their certification authority improperly by, for example, failing to comply with the statutory timeframe or blocking infrastructure projects for reasons outside the scope of section 401. Rorick Decl. ¶ 25; Dreskin Decl. ¶ 25. The Federal Defendants do not have the experience or expertise to fully develop these arguments.

Further supporting intervention is the real risk that the Coalition and the Federal Defendants' interests will diverge even further during the course of litigation due to a change in administration or policy. A number of recent examples show that this is a real possibility. In 2018, the federal government abandoned its defense of the 2015 waters of the United States (WOTUS) Rule in litigation in the Southern District of Georgia and the Southern District of

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Texas when the new Administration initiated a rulemaking to revise the rule. *See* Fed. Defs.' Resp. to States' & to Private Party Pls.' Mots. for Summ. J., *Texas v. EPA*, No. 3:15-cv-00162 (S.D. Tex. Nov. 8, 2018) (Dkt. 170); United States' Resp. to Pls.' & Intervenor Pls.' Mots. for Summ. J., *Georgia v. Wheeler*, No. 2:15-cv-00079-LGW-BWC (S.D. Ga. Oct. 10, 2018) (Dkt. 215). Similarly, courts have noted when granting intervention that an agency "may decide that the matter lacks sufficient general importance to justify" an appeal. *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004). Here, the upcoming presidential election presents the real possibility that the interests of a new administration will cause a change in the way the present case is litigated that departs significantly from the Coalition's interests. This possibility only further confirms that the Federal Defendants will not adequately represent the Coalition's substantial interest in the litigation.

B. Alternatively, the Coalition Should Be Granted Permissive Intervention.

Although the Coalition is entitled to intervene as of right under Rule 24(a)(2), in the alternative, the Court should permit the Coalition to intervene under Federal Rule of Civil Procedure 24(b)(1)(B). Under Rule 24(b)(1)(B), the Court may exercise its discretion to permit intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see also Perry*, 630 F.3d at 905. This Court has broad discretion to grant permissive intervention. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc).

In deciding whether to allow intervention under Rule 24(b)(1)(B), the Court may consider any number of factors, *see Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977), but intervention should generally be permitted when the movant (1) asserts an interest related to the issue in dispute, and (2) raises defenses that respond directly to the plaintiff's claim for relief. *See, e.g., Kootenai Tribe*, 313 F.3d at 1110. "The fact that the applicants may be helpful in fully developing the case is a reasonable consideration in deciding

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on permissive intervention." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999).

Permissive intervention is warranted here. Plaintiffs challenge the Rule and, if successful, the Coalition's interests would be substantially affected. The defense the Coalition would assert would be based on the administrative record to be filed by Federal Defendants, present questions of law and fact in common with the underlying suit, and respond directly to Plaintiffs' claims. The Coalition represents the unique perspective of applicants for section 401 certifications that are required for federal CWA permits and other licenses. That interest is not shared by any other party in the suit. The Coalition's participation would thus aid the Court's understanding of the section 401 certification process, the problems that the Rule solves, and the potential impact on permit applicants if the Rule is declared unlawful. The Coalition is uniquely positioned to assist the Court in understanding the merits and implications of Plaintiffs' claims, and thereby assist in the equitable resolution of these related actions.

Finally, granting intervention will not delay the litigation. The Coalition's motion is timely and, if granted intervention, the Coalition expects to participate on the same schedule established for the existing parties.

C. The Coalition Should Be Allowed To File Its Answer After The Federal Defendants.

A motion to intervene "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Rule 24(c) may be satisfied by a motion to intervene, even without an accompanying pleading, when the motion provides sufficient information to apprise the court of the grounds for the motion. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992) (when "the movant describes the basis for intervention with sufficient specificity to allow the district court to rule, its failure to submit a pleading is not grounds for reversal."); *see also United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009) ("we conclude that the statement

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of interest satisfies Rule 24(c) because it provides sufficient notice to the court and the parties of [movant's] interests."); *Spring Constr. Co. v. Harris*, 614 F.2d 374, 376–77 (4th Cir. 1980). In fact, the Ninth Circuit has permitted intervention even where the intervenor did not file an answer, adopt any pleading filed by another party, or seek leave to file an answer until months after a motion to strike the defendant's answer. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009).

Short of waiving the pleading requirement entirely, courts have also recognized that a pleading may be filed at a later time after the motion to intervene has been filed. *See Marshall v. Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996) (allowing proposed intervenor to file an answer three weeks and one day after the motion to intervene "where even the named defendants are not yet required to answer"); *WJA Realty Ltd. P'ship v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989) (explaining that "[f]ailure to file an accompanying pleading . . . may be rectified by the later filing of such a pleading."); *see also Parker v. Morton*, No. 18-00234-KD-B, 2019 WL 1645207, at *5 (S.D. Ala. Apr. 16, 2019); *United States v. City of Hialeah*, 899 F. Supp. 603, 608 n.5 (S.D. Fla. 1994), *aff'd*, 140 F.3d 968 (11th Cir. 1998); *Gibraltar Mausoleum Corp. v. Cedar Park Cemetery Ass'n*, No. 92 C 5228, 1993 WL 135454, at *4 (N.D. Ill. Apr. 29, 1993).

The circumstances warrant allowing the Coalition to file its pleading within a reasonable time after the Federal Defendants file their pleading for at least two reasons. First, judicial economy and efficiency support this approach. The Coalition is filing the present motion to intervene at this early stage of the proceedings because, as demonstrated in this memorandum, the Coalition has a substantial interest affected by the Rule and that such interest will not be adequately represented by the existing parties. As it has done in filing this motion, the Coalition intends to participate in this litigation as efficiently and expeditiously as possible. Although the Coalition does not intend to stand on the Federal Defendants' pleading, allowing it to file after the Federal Defendants will allow the Coalition to minimize duplication as much as possible while still protecting its interests.

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Second, principles of fairness counsel in favor of allowing the Coalition to file its pleading after the Federal Defendants. The Coalition has proceeded as expeditiously as possible in filing this motion and should not be placed in a worse position than any other intervenor because it has filed expeditiously. Further, allowing the Coalition to file its answer after the Federal Defendants will not impair this Court's ability to decide this motion because the Coalition has provided ample support for intervention, which is sufficient standing alone for the court to grant intervention. *See Westchester Fire Ins. Co.*, 585 F.3d at 1188 ("'Courts, including this one, have approved intervention motions without a pleading where the court was otherwise apprised of the grounds of the motion.'" (quoting *Beckman Indus.*, 966 F.2d at 474)). It also will not prejudice any other party since the Plaintiffs will not receive the Federal Defendants' pleading until September 21, 2020. *See In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 297 F. Supp. 3d 261, 265 (D.P.R. 2017) (recognizing "discretion to allow a motion to intervene filed without an accompanying pleading where its absence is not prejudicial to a party.").

IV. CONCLUSION

The Coalition respectfully requests that this Court grant its Motion to Intervene as of Right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, the Coalition respectfully requests that this Court grant permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B).

DATED: September 4, 2020

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, Administrator of the United States Environmental Protection Agency, et al.,

Defendants,

and

STATE OF LOUISIANA, et al.,

Defendant-Intervenors.

No. C 20-04869 WHA

ORDER GRANTING INTERVENTION

The National Hydropower Association (Dkt. No. 75) and the American Petroleum Institute and the Interstate Natural Gas Association of America (Dkt. No. 84) move to intervene under Rule 24 in defense of the Administrator's final rule. Plaintiffs do not oppose (Dkt. No. 103). The motions are **GRANTED**.

IT IS SO ORDERED.

Dated: October 9, 2020.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE