No. 21A539

In the Supreme Court Of The United States

STATE OF LOUISIANA; STATE OF ARKANSAS; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; STATE OF TEXAS; AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AND NATIONAL HYDROPOWER ASSOCIATION,

APPLICANTS,

V.

AMERICAN RIVERS; MICHAEL S. REGAN; AND U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONDENTS.

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

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

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

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APPENDIX

Nos. 21-16958; 21-16960; 21-16961

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS, AMERICAN WHITEWATER, CALIFORNIA TROUT, IDAHO RIVERS UNITED, COLUMBIA RIVERKEEPER, SIERRA CLUB, SUQUAMISH TRIBE, PYRAMID LAKE PAIUTE TRIBE, AND ORUTSARARMIUT NATIVE COUNCIL,
Plaintiffs-Appellees,

v.

ANDREW R. WHEELER and U.S. ENVIRONMENTAL PROTECTION AGENCY,
Defendants,
AND
AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL HYDROPOWER ASSOCIATION,
Intervenors-Defendants/Appellants,
AND
STATES OF ARKANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA,
WEST VIRGINIA, WYOMING, AND TEXAS,
Intervenors-Appellants.

On Appeal From The U.S. District Court For The Northern District Of California
Nos. 3:20-cv-04636-WHA, -04869-WHA, -06137-WHA

PLAINTIFFS-APPELLEES AMERICAN RIVERS, AMERICAN WHITEWATER, CALIFORNIA TROUT, IDAHO RIVERS UNITED, COLUMBIA RIVERKEEPER, SIERRA CLUB, SUQUAMISH TRIBE, PYRAMID LAKE PAIUTE TRIBE, AND ORUTSARARMIUT NATIVE COUNCIL'S MOTION TO DISMISS

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MOTION TO DISMISS APPEAL

Pursuant to Fed. R. App. P. 27, Appellees Suquamish Tribe, Pyramid Lake Paiute, Orutsararmiut Native Council, Columbia Riverkeeper, Sierra Club, American Rivers, American Whitewater, California Trout, and Idaho Rivers United (collectively, "Tribal & Environmental Plaintiff Group") move to dismiss the appeal for lack of jurisdiction. Under applicable Ninth Circuit case law, Intervenor-Defendants/Appellants and Intervenors-Appellants ("Intervenors") cannot bring this appeal of the district court's order ("Remand Order") remanding and vacating the *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (the "2020 Rule"), because the district court's order is not a final and appealable judgment and the Intervenors do not have standing to pursue their appeal. The Tribal & Environmental Plaintiff Group requests that this Court dismiss this appeal in its entirety.

BACKGROUND

Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and included Section 401 to gives states and certified tribes the authority to review federal projects' potential impacts to state or tribal water quality, *see id.* § 1341. As the Environmental Protection Agency ("EPA" or "the Agency") recognizes, "Section 401 provides states and tribes with a powerful tool

to protect the quality of their waters from adverse impacts resulting from federally licensed or permitted projects." 86 Fed. Reg. 29,542.

Despite the clear purpose of Section 401, in April 2019, President Trump issued Executive Order ("EO") 13,868, entitled *Promoting Energy Infrastructure and Economic Growth*, that directed EPA to revise its interpretation of Section 401 to "promote private investment in the Nation's energy infrastructure." 84 Fed. Reg. at 15,495 (Apr. 10, 2019). EPA complied and published the 2020 Rule, which upended half a century's worth of regulatory practice under Section 401 and sought to drastically limit the role states and tribes could play in Section 401 reviews. Among other things, the 2020 Rule significantly limited the scope of projects subject to review under Section 401, prevented certifying agencies from asking for relevant information from applicants, limited state and tribal authority to impose conditions necessary to protect water quality, and substantially increased the role federal agencies could play in vetoing denials of Section 401 applications or conditions imposed on project certifications. *Id*. Although EPA claimed that these changes were enacted to prevent states from abusing their authority under Section 401, the record did not show that any systematic or widespread problem existed. *See* 84 Fed. Reg. 44,081–82; *see also* 85 Fed. Reg. 42,211, 42,223. Indeed, EPA admitted that thousands of projects were being processed under

Section 401 every year without any evidence of abuse.[1] Then-EPA Administrator Wheeler made clear that the real intent of the 2020 Rule was to foster the construction of energy infrastructure projects.[2]

Multiple plaintiffs—a group of 20 states and the District of Columbia and the Tribal and Environmental Plaintiff Group—promptly challenged the 2020 Rule in the Northern District of California. The district court consolidated all cases before it challenging the 2020 Rule. ECF No. 69.[3]

On January 20, 2021, President Biden issued EO 13,990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, which directed all federal agencies to review their existing regulations to determine

[1] *See* EPA, *Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking* 6 (2019), https://www.epa.gov/sites/default/files/2019-08/documents/economic_analysis.pdf; *see also* EPA, EPA ICR No. 2603.02, *ICR Supporting Statement Information Collection Request For Updating Regulations On Water Quality Certification Proposed Rule* 8 (2019), https://downloads.regulations.gov/EPA-HQ-OW-2019-0405-0070/content.pdf.

[2] *See* Press Release, EPA, EPA Administrator Wheeler New York Post Op-Ed: Here's How Team Trump Will Bust Cuomo's Gas Blockade (Aug. 16, 2019), https://www.epa.gov/newsreleases/epa-administrator-wheeler-new-york-post-op-ed-heres-how-team-trump-will-bust-cuomos-0 (stating that the proposed rule would "streamline the approval for and construction of energy infrastructure projects"); *see also* Press Release, EPA, EPA Issues Final Rule That Helps Ensure U.S. Energy Security and Limits Misuse of the Clean Water Act (June 1, 2020), https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0 (stating that certifying authorities "have held our nation's energy infrastructure projects hostage").

[3] Unless otherwise indicated, all ECF citations are to the consolidated docket No. 3:20-cv-04636-WHA below.

whether any "are or may be inconsistent with, or present obstacles to" environmental policies, including the promotion of "access to clean air and water." 86 Fed. Reg. 7037, 7037. President Biden's EO further revoked EO 13,868, which formed the basis of the 2020 Rule, implying that President Trump's directive to revise the interpretation of Section 401 to foster the construction of energy infrastructure was itself at odds with promoting clean water. *See id.* at 7042. In a press statement released the same day, the Biden administration included the 2020 Rule in a list of regulations that it would review in accordance with President Biden's EO.[4]

Subsequently, the district court stayed the case against the 2020 Rule for several months and EPA announced that it intended to revise the 2020 Rule. In its Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, EPA pointed to multiple potential errors and deficiencies within the 2020 Rule and stated that its revisions would address those problems. *See Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule*, 86 Fed. Reg. 29,541 (June 2, 2021). The agency admitted the possibility that "portions of the rule impinge on" cooperative federalism principles

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

that Congress envisioned as core to interpretation of the Clean Water Act Section 401. *Id.* at 29,542. EPA also conceded that there are several ways that the 2020 Rule could chip away at the powers Congress reserved for states and tribes. For example, EPA admitted that the 2020 Rule may prevent states and tribes from gaining access to information necessary for Section 401 review. 86 Fed. Reg. at 29,543. EPA further stated that the 2020 Rule may "not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests" and "that the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality." *Id*. In addition, the Agency pointed to potentially serious problems with the 2020 Rule's provision of excessive authority to federal agencies to permanently waive certification conditions based on "nonsubstantive and easily fixed procedural" grounds, as well as the prohibition on modifications of certifications. *Id.*

Most recently, EPA went a step further and affirmatively determined that the 2020 Rule "erodes state and tribal authority as it relates to protecting water quality."[5] The agency announced that, through the new rulemaking, "EPA intends to restore the balance of state, tribal, and federal authorities . . . [and] to strengthen

[5] EPA, *Statement of Priorities* 13 (Dec. 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_2000_EPA.pdf.

the authority of states and tribes to protect their vital water resources." *Id.* EPA expects to publish a proposed rule in spring of 2022 and a final rule in spring of 2023. ECF No. 143-1, at ¶¶ 23, 27.

In the meantime, on July 1, 2021, EPA filed a motion to remand the 2020 Rule to EPA, with prejudice, and without vacatur. ECF No. 143. All of the Plaintiffs opposed EPA's Motion and sought to have the district court either deny the request to remand the rule or allow remand only if the 2020 Rule also was vacated. ECF Nos. 145, 146, 147. Plaintiffs argued that leaving the 2020 Rule in place for the lengthy period of time it would take EPA to enact another rule would prejudice Plaintiffs by depriving them of the opportunity to challenge the 2020 Rule while subjecting them to a flawed rule that was causing irreversible harm. For example, the 2020 Rule would prevent states and tribes from including certain activities that could impair water quality in their Section 401 reviews or from imposing conditions on activities that would be necessary to protect water quality. *See, e.g.*, ECF No. 145 at 9–11. Plaintiffs also presented uncontroverted evidence of the administrative chaos that the 2020 Rule's sudden departure from 50 years of established practice was causing, as well as the concrete and specific environmental harms that would result from leaving the 2020 Rule in place for two years while EPA considered how to revise it. *See* ECF Nos. 145-1, 146-1 to 146-9.

Intervenors did not oppose EPA's Motion, but, after Plaintiffs sought vacatur, moved to strike Plaintiffs' request for vacatur in the event of an order to remand. ECF No. 148. Following oral argument, the district court gave Intervenors an opportunity to brief the appropriateness of vacatur. ECF No. 172. At no point did Intervenors oppose EPA's request to remand the 2020 Rule.

Thereafter, the district court denied Intervenors' motion to strike, granted EPA's motion to remand the 2020 Rule to the agency, and exercised its equitable discretion to vacate the rule while EPA reconsidered it. ECF No. 173 (the "Remand Order"). The court found that "leaving an agency action in place while the agency reconsiders [the 2020 Rule] 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." *Id.* at 7. The judge concluded that the district court had the authority to vacate an agency's action without first making a decision on the merits and that remand orders without vacatur are granted "only in limited circumstances." *Id.* (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

The district court applied the *Allied-Signal* test to conclude that vacatur of the 2020 Rule was warranted. *Id.* at 8 (citing *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993)). First, relying upon the text of the 2020 Rule and its preamble, as well as EPA's statements on the record, the court

expressed "significant doubts that EPA correctly promulgated the certification rule due to the apparent arbitrary and capricious changes to the rule's scope." *Id.* at 13. The court further highlighted EPA's statements of its intent to restore the balance of cooperative federalism Congress intended and the long list of items EPA identified as being of "substantial concern[]", which address "nearly every substantive change introduced in the current rule," as evidence that EPA would not and could not adopt the same rule on remand and that the 2020 Rule must be vacated. *Id.* at 14.

Second, the court found that vacatur would not cause undue disruption. *Id.* at 15. Indeed, any whipsawing that had or would occur was due to the 2020 Rule's "dramatic[] br[eaking] with fifty years of precedent" and EPA completely reversing course less than nine months later. *Id.* By comparison, the 2020 Rule had been in effect only thirteen months—an "insufficient time for institutional reliance to build up"—and had been "under attack since before day one." *Id.* Moreover, the court concluded that there would be significant environmental harm in the absence of vacatur, because the 2020 Rule attempted to limit states and tribes' authority to protect water quality. And any economic harms alleged by Intervenors that would result from vacatur did not outweigh the environmental damage that would occur by keeping the 2020 Rule in place. *Id.* at 16.

After a month of unexplained delay, during which time both EPA and the U.S. Army Corps of Engineers ("the Corps") advised the states and tribes that they could return to their pre-2020 practices relating to Section 401 requests,[6] Intervenors filed a notice of appeal and moved the district court to stay the Remand Order while the appeal was pending. ECF No. 179. Both Plaintiffs and EPA opposed Intervenors' request. ECF Nos. 185, 186. The district court promptly denied Intervenors' motion, finding that Intervenors failed to make a strong showing of success on the merits, including the claim that courts cannot remand with vacatur prior to reaching the merits; that Intervenors had "at best, [made] a marginal showing of irreparable harm;" and that the injuries caused to the environment and other parties by leaving the 2020 Rule in place would not be in the public interest. ECF No. 191 at 10. The district court did not address the argument that the Remand Order was not a final appealable order. *See id.* at 14.

Intervenors have renewed their request to stay the Remand Order to this Court, Intervenors Mot. (Dec. 15, 2021) ("Mot."), which all Plaintiffs-Appellees and EPA oppose. Pursuant to Circuit Rule 27-1(2), Tribal & Environmental Plaintiffs state that (1) EPA does not oppose the instant motion to dismiss and

[6] *See CWA Section 401 Certification, Q&A on EPA's Intent to Revise 2020 Rule*, EPA, https://www.epa.gov/cwa-401/qa-epas-intent-revise-2020-rule (last updated Nov. 05, 2021).

plans to set out the reasons why Intervenors' appeal should be dismissed either in response to the motion or in its own motion to dismiss, (2) the remaining Plaintiffs take no position on the motion to dismiss, and (3) Intervenors oppose the instant motion.

DISCUSSION

I. THE REMAND ORDER IS NOT AN APPEALABLE FINAL DECISION.

Although there is no "hard-and-fast rule prohibiting a non-agency litigant from appealing a remand order," *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075 (9th Cir. 2010), a remand order generally is final and appealable only when it satisfies three criteria: (1) it conclusively resolves a separable legal issue, (2) it forecloses review of any of those issues in the absence of an immediate appeal, and (3) it forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding. *Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1184 (9th Cir. 2004) (citing 28 U.S.C. § 1291). Intervenors' arguments that the *Alsea Valley* factors do not apply here already have been rejected by this Court, and their failure to establish the existence of any of the three factors requires dismissal of this appeal.

A. The *Alsea Valley* Finality Test Applies to the Remand Order.

Intervenors unsuccessfully attempt to sidestep their failure to satisfy any of the factors needed to demonstrate finality and appealability by arguing that *Alsea*

Valley does not apply here, because Intervenors are appealing the district court's vacatur of the 2020 Rule prior to reaching the merits and not the remand itself. *See* Mot. at 27–28. They wrongly contend that the Remand Order is a final decision because EPA's Section 401 rulemaking will not address whether the lower court had the authority to vacate the 2020 Rule without reaching the merits. However, this Court already has squarely rejected exactly the same attempt to "parse" between the remand and vacatur of a challenged rule. *See Alsea Valley*, 358 F.3d at 1185. Intervenors ignore the clear holding in *Alsea Valley* that vacatur and remand are not "separately appealable" decisions, as "vacatur . . . normally accompanies a remand." *See id.* at 1185. Where, as here, a non-agency appellant fails to show that a remand order is final, the Court lacks jurisdiction over the "entire Remand Order, including its provision setting aside" the challenged rule. *See id.* at 1186; *see also Pit River Tribe*, 615 F.3d at 1073–78 (holding that an order remanding a rule with vacatur was non-final).

Intervenors' attempt to parse the district court's order even further by focusing on the lack of merits briefing below also is unavailing. *See* Mot. at 28. The only remedy Intervenors would obtain if allowed to pursue their appeal is pre-vacatur briefing below on the exact same set of issues that EPA will be considering in its rulemaking, which Intervenors can litigate once the new rule is final. Thus, the absence of merits briefing does not "vitiate[Intervenors'] access to appellate

review of the eventual outcome of the district court's decision" and "until all these contingencies have played out…any decision by the Court could prove entirely unnecessary." *See Alsea Valley*, 358 F.3d at 1185.[7]

Moreover, Intervenors' attempt to cast the district court's decision as final, even in the face of *Alsea Valley*, does not make it so. This Court has previously held that a remand order is nonfinal even if the district court dismissed the proceeding and "intended to dispose of the entire case." *Pit River Tribe*, 615 F.3d at 1076 (citation omitted).[8] And contrary to Intervenors' characterizations, the Remand Order did not amount to a "full adjudication" of any issues, including Plaintiffs' claims. *See* Mot. at 27. Indeed, the Remand Order does not discuss a number of Plaintiffs' claims, including that EPA failed to meaningfully engage with the tribal plaintiffs in violation of its fiduciary responsibilities, Case No. 3:20-

[7] As is discussed *infra* Section II, Intervenors also cannot allege any injury the Court can remedy through this appeal.

[8] Cases that discuss the effect of entering a final judgment but do not involve orders to remand agency rules are inapplicable or do nothing to alter the applicability of the *Alsea Valley* holding here. *See, e.g., Beveridge v. City of Spokane*, No. 20-35848, 2021 WL 3082003, at *1 (9th Cir. July 21, 2021) (involving the finality of the dismissal of various claims against a municipality, its police department, and various police officials); *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006) (involving an inquiry into whether an order to compel arbitration between a franchisor and franchisee was final); *see also Am. Ironworks & Erectors, Inc. v. N. Am. Constr.*, 248 F.3d 892, 897 (9th Cir. 2001) (lawsuit by subcontractors against general contractor under the Mill Act); *Montes v. United States,* 37 F.3d 1347 (9th Cir. 1994) (involving a judgment under the Alien Tort Claims Act).

cv-06137, ECF No. 1 at 25, or that the Clean Water Act does not authorize EPA to promulgate regulations implementing Section 401 that impact rights specifically reserved to the states, Case No. 3:20-cv-04869-WHA, ECF No. 1 at 26–27; ECF No. 1 at 16–17. Furthermore, all Plaintiffs sought a declaration that the 2020 Rule was unlawful, which would have prevented EPA from adopting the same interpretation of Section 401 in the future. The Remand Order leaves Plaintiffs in the same position as Intervenors with respect to the new rule—both will need to advocate for EPA to adopt their interpretation of Section 401, meaning that the Remand Order is not final.

B. Intervenors Fail to Show that the Remand Order Meets the Test for Finality.

Intervenors do not even attempt to show that the Remand Order meets the *Alsea Valley* test for finality, nor could they. The Remand Order does not (1) conclusively resolve a separable legal issue, (2) foreclose review of any of those issues in the absence of an immediate appeal, or (3) force EPA to apply a potentially erroneous rule which may result in a wasted proceeding, and therefore is not appealable by a non-agency party. *See Alsea Valley*, 358 F.3d at 1184; *see also Pit River Tribe*, 615 F.3d at 1075–77 (applying and reinforcing *Alsea Valley*). Intervenors' appeal, therefore, should be dismissed.

First, the Remand Order does not conclusively decide any separable legal issue. As is discussed above, Intervenors' attempt to parse out the Remand Order's

decision to vacate the 2020 Rule does not create a separate appealable legal question under *Alsea Valley*, and Intervenors admit that the Remand Order did not conclusively decide any other legal issue, *see* Mot. at 11. Although the district court noted that it had "significant doubts" about the legality of the 2020 Rule, it did not order EPA to consider or resolve any particular issue upon remand. *See* Remand Order at 13–14. This is not a case where the district court invalidated EPA's interpretation of the statute, *see Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990), required EPA to apply the district court's interpretation upon remand, *see id.*, or ordered EPA to recalibrate the rule and include components in the new rule that Intervenors oppose, *see Crow Indian Tribe v. United States*, 965 F.3d 662, 676 (9th Cir. 2020). Nothing in the Remand Order prevents EPA from resolving any of the Section 401 issues raised during notice-and-comment or prevent Intervenors from subsequently litigating any of the issues they would have raised on the merits below in subsequent legal proceedings challenging EPA's new rule.

Second, the Remand Order does not foreclose review of any legal issue. EPA has made it clear in its Advanced Notice of Proposed Rulemaking that it intends to reconsider every aspect of the 2020 Rule and has provided no indication that any legal issue being raised currently will be left out. 86 Fed. Reg. 29,541. There is no indication that EPA requested remand for any improper purpose,

including to prevent Intervenors' positions from being accounted for in the proceedings post-remand. *See Crow Indian Tribe*, 965 F.3d at 676. Intervenors will have every opportunity to participate in EPA's process and "influence the ultimate shape of" the resulting rule. *See Alsea Valley*, 358 F.3d at 1185. If upon the conclusion of that rulemaking Intervenors believe that EPA's final rule is "unlawful and adverse to [their] interests," they can challenge the final rule on any of the grounds they would seek to argue in any merits briefing resulting from the instant appeal. *See id.* As this Court has made clear, "[u]ntil all these contingencies have played out," there is no final appealable order under section 1291. *Id.* Thus, unlike where an agency is compelled on remand by a district court to take certain actions, which it cannot later appeal because it cannot appeal its own rulemakings, Intervenors here are in no way foreclosed by the Remand Order. *See, e.g.*, *id.* at 1184 (finding that a remand order would be final where an agency otherwise cannot appeal an order compelling it to refashion its own rules); *Collord v. U.S. Dep't of the Int.*, 154 F.3d 933, 935 (9th Cir. 1998).[9]

[9] For the same reasons, the Remand Order does not have the "practical effect" of granting an injunction and, therefore, also cannot be subject to interlocutory appeal. *See* 28 U.S.C. § 1292(a)(1). This Court has made clear that *Alsea Valley* cannot be circumvented by styling a remand and vacatur order as an injunction. *Alsea Valley*, 358 F.3d at 1186–87; *see also Pit River Tribe*, 615 F.3d at 1078. Unlike in cases where a remand order did constrain the agency's action, *see, e.g., Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1175–76 (9th Cir. 2011) (finding

Third, the Remand Order does not require EPA or any other agency to "apply a potentially erroneous rule" on remand. This is not a case where an agency is attempting to use vacatur to reinstate a regulatory reality that is insufficiently protective or out of compliance with a statute or where there is any evidence that the agency is otherwise acting in bad faith. The Remand Order's vacatur of the 2020 Rule in effect accomplished the opposite—it returned to a status quo regulatory system that had been in place for decades and is consistent with longstanding Supreme Court precedent to prioritize protecting water quality. ECF Nos. 173 at 12–14, 17; 191 at 9–11. EPA also has expressed significant concerns that the 2020 Rule was not consistent with the Clean Water Act and is diligently working to remedy this deficiency through a new rulemaking process.

In response, Intervenors do not contend that the pre-2020 Rule status quo is illegal, only that it allegedly allowed a small number of Section 401 processes to occur that Intervenors argue are examples of states acting in excess of their authority under the statute. *See* Mot. at 21, 23. Those allegations are not only

a final decision where the district court had constrained the agency's options as part of the remand and the agency had already released a supplemental decision document, completing "[a]s a practical matter" the work on remand, showing remand to be meaningless); *Crow Indian Tribe,* 965 F.3d at 676, EPA is free to revise its interpretation of Section 401 in whatever manner it believes is consistent with the Clean Water Act. In the absence of establishing any restrictions on EPA's future actions, the Remand Order cannot be considered an injunction and cannot be subject to interlocutory appeal. *See Pit River Tribe*, 615 F.3d at 1077.

largely false, Pls.' Opp'n to Mot. for Stay Pending Appeal at 18–21, but even if true, they represent a tiny fraction of the thousands of Section 401 applications processed every year and are exactly the type of problem that can be remedied through as-applied challenges. No regulatory scheme can prevent all abuses and a limited sampling of problems does not demonstrate that a return to the pre-2020 Rule system would be illegal. In short, Intervenors fail entirely to establish that the Remand Order is final and properly subject to appeal.

II. INTERVENORS DO NOT HAVE STANDING TO MAINTAIN THIS APPEAL.

Even if the question Intervenors raise on appeal is an exception to *Alsea Valley*—which it is not—Intervenors fail to show that they have standing to maintain that claim. As EPA is not appealing the Remand Order, Intervenors must establish Article III standing. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011). Intervenors did not show an injury that is concrete, particularized, and actual or imminent from the vacatur of the 2020 Rule in their briefing before the district court.[10] And on appeal, Intervenors continue fall far short of what is required by Article III, particularly any injury that would establish standing that stems from the "core issue" they raise on appeal of whether the

[10] The district court raised its own doubts about whether vacatur of the rule actually harmed the Intervenors. *See* ECF No. 191 at 10.

district court could vacate the 2020 Rule prior to reaching the merits. *See* Mot. at 19–28. Intervenors' claims of injuries to statutory or due process rights, harm to constitutional and sovereign interests, and economic loss all fail to show the specific and actual harm required to maintain this appeal.

Intervenors have not established harm to any statutory or due-process right from the Remand Order. *See id.* at 19–20. Intervenors do not oppose remanding the 2020 Rule; they object only to the district court's decision to vacate the 2020 Rule prior to merits briefing and return to the pre-2020 Rule status quo while EPA undertakes its new rulemaking process. *Id.* at 27–28. But Intervenors have no "statutory or due-process right[]" to retain the 2020 Rule while EPA works to promulgate a replacement. Nor have Intervenors shown that due process or any statute provides them with any right to the merits briefing they seek on appeal. Because the 2020 Rule was vacated pursuant to the district court's equitable powers, the vacatur did not trigger any statutory right to notice and comment procedures pending the new rulemaking. And Intervenors cannot establish a property interest in the temporary retention of a recently enacted rule that changed a 50-year state practice. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (to have a property interest protected by due process, entity must "have a legitimate claim of entitlement to it," rather than "a unilateral expectation of it"). Even if they could, however, they have received and will continue to

receive ample process through participation in EPA's ongoing notice-and-comment rulemaking process to replace the 2020 Rule and the future ability to seek judicial review if they disagree with the result of that rulemaking. *See Liberty Cable Co. v. City of New York*, 60 F.3d 961, 964 (2d Cir. 1995) ("A party's due process rights are not violated when it may participate fully in an administrative agency proceeding and later seek . . . court review."); *see generally Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (due process requires procedures that, under the circumstances, provide party with "meaningful opportunity to present their case").

Intervenors also fail to allege any injury to their "constitutional and sovereign interest" that would be redressable by a decision in this appeal. *See* Mot. at 20–21. The handful of past Section 401 decisions (out of thousands each year) Intervenors claim burdened interstate commerce, *see id.*, were neither the result of, nor affected by, the vacatur of the 2020 Rule and, therefore, do not establish standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (allegations of "past exposure to illegal conduct does not in itself show a present case or controversy"). Intervenors do not point to specific current or future examples where such burdens will or are likely to occur as a result of the Remand Order. Intervenors instead rely on speculation that these alleged sporadic abuses "will assuredly return," Mot. at 21, in the next the two years while EPA considers how

to revise the 2020 Rule, which is insufficient to establish standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (party failed to establish redressability where it challenged "generalized level of Government action" rather than specific "projects allegedly causing them harm"); *see also Hollingsworth v. Perry*, 570 U.S. 693, 705–07 (2013) (non-government intervenor lacks standing to appeal an order invalidating governmental action where government does not appeal and intervenor fails to show more than a "generalized grievance"). And as the record fails to establish that vacating the 2020 Rule harms Intervenors' constitutional or sovereign interests, vacating without merits briefing is even further removed from having any such effect on Intervenors.

In addition, Intervenors fail to show that they will suffer economic harm as a result of the vacatur. *See* Mot. at 21–23. Intervenors focus on initial delays with the Corps caused by a pause the agency took in processing permits immediately after the vacatur, but they acknowledge that the Corps is now processing Section 401 certifications again. *See id.* at A7–A9. The best Intervenors can do is allege that the vacatur created "the *potential*" for confusion, "conflicting directives," and delay "*if* [industry Intervenors] cannot rely on [nationwide permits] or individuals permits." *Id.* at A9 (emphasis added). But tenuous hypotheticals are not sufficient to establish standing. *See Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 943 (9th Cir. 2021). To satisfy Article III

standing, a party must assert an injury that is "actual and imminent, not conjectural or hypothetical," *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009), which Intervenors fail to do, *see N. Plains Res. Council v. Lujan*, 874 F.2d 661, 668 (9th Cir. 1989) ("Mere conjecture demonstrating potential injury is not sufficient" to establish standing). And although Intervenors' declaration from a state official with the Texas Commission on Environmental Quality ("TCEQ") describes general "confusion" and "concern" caused by the 2020 Rule's vacatur, Mot. at 13–14, it does not allege that any such concern has *increased* administrative burdens when compared to the impacts of the 2020 Rule, which TCEQ recently told EPA "caused considerable implementation confusion" and "brought about the breakdown of a long-standing, formally established and cooperative process" between TCEQ and the Corps.[11] Nor do Intervenors explain how reinstating the 2020 Rule at this point, when state and federal agencies have already adjusted to the vacatur and returned to the familiar pre-2020 status quo, would reduce this confusion.[12]

[11] Comment Submitted by TCEQ, Docket No. EPA-HQ-OW-2021-0302-0079.
[12] Similarly, Intervenors have failed entirely to show that the existence of any "irreparable consequences" that would allow them to bring their challenge to the Remand Order as an interlocutory appeal. *See Pit River Tribe*, 615 F.3d at 1077. As the district court concluded, ECF No. 191 at 12, and is discussed in Plaintiff-Appellees' Opposition to Intervenors' Motion to Stay, Intervenors have failed to make a showing of harm from reverting to the pre-2020 Rule status quo that had endured for decades before.

In addition, Intervenors fail entirely to allege that they will suffer any economic harm from the focus of their appeal—the district court's failure to reach the merits prior to vacating the 2020 Rule. Any remedy fashioned by the Court would not guarantee longer-term reinstatement of the 2020 Rule, only that the district court would be required to order merits briefing before arriving at a decision to vacate. The confusion and uncertainty caused by reinstating the 2020 Rule during merits briefing, only to potentially then have it vacated again by the district court, and then have the regulatory regime changed once more by EPA's rulemaking would undoubtedly cause far more whiplash, administrative burden, and delay for everyone involved, including industry and state and tribal officials administering Section 401. While Intervenors' question as to the scope of equitable power by a district court to vacate agency rules in general may have academic implications for the relationship between federal agencies and the judiciary, it has no direct impact on the rights and privileges of the private parties here. Intervenors' appeal, therefore, must be dismissed.

CONCLUSION

Under Ninth Circuit case law, Intervenors have not shown any reason why they should be able to maintain this appeal of a non-final order of the district court. Intervenors' interests are fully protected where they can and likely will participate in the new rulemaking and can appeal that new rule. The fact that the district court

vacated the 2020 Rule without first reaching the merits does not alter the result. Tribal & Environmental Plaintiff Group respectfully request that this Court dismiss this appeal in its entirety.

RESPECTFULLY SUBMITTED this 11th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will serve the document on the other participants in this case.

Dated: January 11, 2022

/s/ Moneen Nasmith
Moneen Nasmith

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 5,531 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman typeface.

Dated: January 11, 2022

/s/ Moneen Nasmith
Moneen Nasmith

ADDENDUM

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

Economic Analysis for the Proposed Clean Water Act Section 401 Rulemaking

U.S. Environmental Protection Agency

August 2019

1 Introduction

Under Clean Water Act (CWA) section 401, a federal agency cannot issue a license or permit that may result in a discharge into waters of the United States unless the authority (state/territory/authorized tribe/EPA) where the discharge would originate issues a section 401 water quality certification or waives its authority to do so. States, territories, and authorized tribes are the certifying authorities when the discharge originates within their jurisdiction, while the EPA is the certifying authority for lands of exclusive federal jurisdiction and tribal lands where tribes do not have Treatment as a State (TAS) authorization. Certifying authorities have exercised their section 401 certification authority for various federal licenses and permits that include, but are not limited to, dredge-and-fill activities in waters of the United States that require CWA section 404 permits from the U.S. Army Corps of Engineers (Corps), CWA section 402 industrial and municipal point source discharge permits issued by the EPA, permits issued under sections 9 and 10 of the Rivers and Harbors Act by the Corps (or the U.S. Coast Guard for bridges and causeways under section 9), and projects requiring licenses from the Federal Energy Regulatory Commission (FERC) or the Nuclear Regulatory Commission (NRC).

Section 401 certification decisions have varying effects on certifying authorities and project proponents (Table 2-1). When certifying authorities waive their section 401 certification authority, the project proponent faces no additional effects or processing times. However, a waiver does not necessarily indicate that the activity will comply with applicable water quality standards (WQS) and other CWA provisions since certifying authorities may waive certification for a variety of reasons, including a lack of resources to evaluate the request. The certifying authority can also waive its authority by exceeding the reasonable period of time for certifications, which is up to one year.[1] Conversely, when certifying authorities deny section 401 certification, the effects on project proponents can be significant, including potential processing delays and changes in project viability (see Section 4.1.3). However, the certification process provides certifying authorities with an important tool to help protect water quality of federally regulated waters within their borders in collaboration with federal agencies (U.S. EPA, 2019a). Finally, when certifying authorities grant certifications or grant with conditions, the effects on project proponents vary depending on request review time, license/permit type, and required conditions (if applicable).

2 Overview of Current Practice

The CWA section 401 certification process allows the certification authority (state/territory/tribe/EPA) to protect its water quality from adverse effects caused by potential discharges from federally licensed or permitted activities. Under current practices, certifying authorities determine whether the proposed activity and discharge requiring a federal license or permit is consistent with technology-based effluent limitations (CWA section 301), water quality-based effluent limitations (CWA section 302), water quality standards and implementation plans (CWA section 303), national standards of performance (CWA section 306), toxic and pretreatment effluent standards (CWA section 307). When issuing a certification, authorities may include conditions necessary to assure compliance with those enumerated provisions of the CWA and any other appropriate requirement of state law.[2] The certifying authority is determined based on the location (e.g., state, U.S. territory, tribal land) where the discharge originates. All states and U.S. territories have section 401 certification authority automatically. Tribes receive section 401 certification authority upon approval of TAS by the EPA. The EPA is responsible for section 401

[1] 33 U.S.C. § 1341(a)(1)

[2] 33 U.S.C. § 1341(d)

certification decisions on tribal lands where tribes do not have TAS and on lands with exclusive federal jurisdiction.

Section 401 gives the certifying authority four options: grant, grant with conditions, deny, or waive certification. Under current practice, certifying authorities make these determinations as follows:

1) **Grant certification**. Granting section 401 certification to a project proponent for a federal license or permit signifies that the certifying authority has determined that the proposed activity and discharge will comply with WQS, other relevant provisions of the CWA, and any other appropriate requirement of state law. When granted, the federal license or permit may issue.

2) **Grant certification with conditions**. Certifying authorities may include limitations or conditions in their certifications as necessary to ensure compliance with WQS, other provisions of the CWA, and any other appropriate requirement of state law. Once section 401 review is triggered, the certifying authority may consider and impose conditions on the discharge and the project activity in general to ensure compliance with the CWA and any other appropriate requirement of state law. Some courts have concluded that the federal agency must include all of the certifying authority's conditions as part of the resulting license or permit. In practice, some certifying authorities have included conditions on a section 401 certification that are not within the proposed scope of certification. When granted with conditions, the federal license or permit may issue.

3) **Deny certification**. Certifying authorities deny certification if they cannot certify that discharge will comply with WQS and other applicable sections of the CWA. A certification denial prohibits the federal agency from issuing the license or permit. In practice, some certifying authorities have issued denials for reasons that extend beyond water quality and are not within the proposed scope of certification. When denied, the federal permit may not issue.

4) **Waive review**. Certifying authorities may waive section 401 certification, either explicitly through notification to the project proponent or implicitly by failing or refusing to act on the certification request within the allotted timeframe. Although the CWA establishes a time limit of "any reasonable period not to exceed one year" for certifying authorities to complete their section 401 certification analysis and decision, the EPA's existing certification regulations[3] specify that the licensing or permitting agency determines the "reasonable" time period within that one-year timeframe. Under section 401, the clock starts upon the receipt of a request for certification. In practice, certifying authorities have adopted the practice of relying on "complete applications" to start the clock, as defined by the certifying authority. A waiver does not indicate a certifying authority's opinion regarding the water quality implications of a proposed activity or discharge since a certifying authority may waive certification for a variety of reasons, including a lack of resources to evaluate the request. When certifying authorities waive their section 401 authority, the federal licensing or permitting agency may continue with its own process and issue the license or permit without an affirmative certification from the certifying authority.

Table 2-1: Summary of potential section 401 certification decision effects on project proponents and certifying authorities under current practice

Section 401 Decisions	Magnitude of Potential Effect on Project Proponents	Effect on Certifying Authority / WQS	Potential Processing Time Effects
Review waived within, or at expiration of,	None – project proponent not subject to conditions from certifying authority	Varies - waiver does not necessarily indicate that the activity will comply with applicable WQS	No delay

[3] 40 CFR § 121.16(b)

Table 2-1: Summary of potential section 401 certification decision effects on project proponents and certifying authorities under current practice			
Section 401 Decisions	**Magnitude of Potential Effect on Project Proponents**	**Effect on Certifying Authority / WQS**	**Potential Processing Time Effects**
reasonable period of time			
Grant without conditions issued within reasonable period of time	None	Certifying authority has determined that the proposed activity will comply with WQS and other CWA provisions	No delay
Grant with conditions issued within reasonable period of time	Varies depending on whether conditions are water quality related	Conditions allow the certifying authority to ensure compliance with applicable WQS and other CWA provisions	No delay
Denials issued within reasonable period of time	High – project proponent must either discontinue the project or modify plans; project proponent may also challenge denial in court	Denial prohibits license/permit issuance for the activity that does not comply with WQS and other CWA provisions	Potential for extended delay / project withdrawal or modification
Grant without conditions issued beyond reasonable period of time	Low to medium, depending on how long after the reasonable period of time	Certifying authority has benefited from more time than statute allows and determined that the proposed activity will comply with WQS and other CWA provisions	Delayed beyond reasonable period of time
Grant with conditions issued beyond reasonable period of time	Medium to high, depending on how long after the reasonable period of time and whether conditions are water quality related	Certifying authority has benefited from more time than statute allows; conditions allow the certifying authority to ensure compliance with applicable WQS and other CWA provisions	Delayed beyond reasonable period of time
Deny beyond reasonable period of time	High	Certifying authority has benefitted from more time than statute allows; denial prohibits license/permit issuance for the activity that does not comply with WQS and other CWA provisions	Delayed beyond reasonable period of time

In summary, granting certification, with or without conditions, allows the federal agency to issue the license or permit consistent with any conditions of the certification. Denying certification prohibits the federal agency from issuing the license or permit. Waiving certification allows the license or permit to be issued without comment from the certifying authority.

Certifying authorities have exercised their section 401 certification authority for dredge-and-fill activities in waters of the United States that require section 404 permits from the Corps, for section 402 industrial and municipal point source discharge permits issued by the EPA, for permits issued under sections 9 and 10 of the Rivers and Harbors Act by the Corps or U.S. Coast Guard, and for projects requiring FERC or NRC licenses. Typically, certifying authorities conduct section 401 certification review at the same time as the federal agency's license or permit review. Some certifying authorities have established joint

application procedures with federal agencies to ensure simultaneous review (e.g., Alabama,[4] New York,[5] Oregon,[6] South Carolina[7]).

The federal licensing or permitting agency may set the certification response time limit to any "reasonable period of time (which shall not exceed one year)."[8] The certifying authority waives section 401 certification review if it does not respond within the allotted time limit. Federal agencies have established varying timeframes up to one year. For example, the Corps' federal regulations provide a 60-day response period for section 401 certification reviews associated with section 404 permits.[9] FERC federal regulations provide a full year for certifying authorities to act on a certification request.[10] The EPA regulations governing the certification of federally issued section 402 NPDES permits provide certifying authorities 60 days to act on section 401 certification requests associated with a draft permit.[11] The EPA's generally applicable regulations suggest a time limit of six months.[12] Certifying authorities have used different approaches when they need more time for review than has been set by the federal agency or authorized by section 401, including:

1) Determine that a request is "incomplete" until the certifying authority is prepared to issue the certification.
2) Restart the clock by coordinating with the project proponent to withdraw and resubmit the request for certification. The recent *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* decision (see Section II.F.4.b of the preamble) concluded this practice is inconsistent with section 401.
3) Deny section 401 certification "without prejudice" when they lack data necessary for their analysis and then encourage the project proponent to resubmit the request once data gaps have been addressed.

Section 401 certification authority rests with the jurisdiction where the discharge originates. However, other jurisdictions downstream or otherwise potentially affected by the discharge have an opportunity to provide comments on the federal license or permit. If the EPA Administrator determines at his or her discretion that a discharge subject to section 401 certification may affect water quality of neighboring jurisdictions, the EPA is required to notify those jurisdictions and allow them to submit their views and objections about the proposed license or permit and associated section 401 certification.[13] These jurisdictions may also request that the federal licensing or permitting agency hold a hearing at which the EPA also submits its evaluations and recommendations concerning the neighboring jurisdiction's objections. The federal agency must then condition the license or permit to ensure compliance with water

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[4] http://www.adem.state.al.us/DeptForms/Form166.pdf

[5] https://www.nan.usace.army.mil/portals/37/docs/regulatory/geninfo/genp/jointappinstruc.pdf

[6] https://www.nwp.usace.army.mil/Missions/Regulatory/Apply/

[7] https://scdhec.gov/environment/water-quality/water-quality-certification-401-process-explained

[8] 33 U.S.C. §1341(a)(1)

[9] 33 CFR § 325.2

[10] 18 CFR § 4.34(b)(5)(iii)

[11] 40 CFR § 124.53(c)(3)

[12] 40 CFR § 121.16(b): period shall generally be considered to be 6 months, but in any event shall not exceed 1 year.

[13] 33 U.S.C. §1341(a)(2)

quality requirements of neighboring jurisdictions. Recommendations from neighboring jurisdictions do not have the same weight as conditions from the certifying authority. The federal agency does not need to follow specific recommendations from neighboring jurisdictions and can instead develop its own measures to comply with water quality requirements. However, the federal agency cannot issue the license or permit if it cannot ensure compliance with neighboring jurisdictions' water quality requirements.[14]

The Association of Clean Water Administrators[15] recently surveyed the 50 states about their section 401 certification processes, including the average number of certification requests and denials, certification timeliness, request completeness, and best practices (ACWA, 2019). Thirty-one states provided survey responses. Survey responses indicate that the average length of time for states to issue a certification decision once they receive a complete request is 132 days. Responding states cited incomplete requests as the most common reason for delays. Survey results also indicate that denials are uncommon, with 17 states averaging zero denials per year and other states issuing denials rarely (ACWA, 2019). A 2011 review of Wisconsin's section 401 certification program found that Wisconsin denied approximately 2 percent of projects in 2009 and 2010 (ASWM, 2011a). During this timeframe, the most common cause for denial was the availability of a practical alternative that would better allow the project proponent to avoid or minimize impacts (ASWM, 2011a). A similar review of Delaware's section 401 certification program found that Delaware had not issued any denials in the last few years (ASWM, 2011b). Additional summary survey information was made available by the Western States Water Council (Western States Water Council, 2014). This survey further suggests that denials are uncommon, and most decision are made between 40-90 days.

While these summary survey data do not adhere strictly to the EPA's requirements regarding data and information quality (US EPA, 2001) (i.e. requirements guiding data generation and acquisition, data validation and usability, etc.), due to a lack of existing data on section 401 processes these results are being used for context when assessing the potential impacts of this proposed rule.

3 Overview of Federal Licenses/Permits and Certifying Authority Responses

Under section 401, certifying authorities decide whether to grant, grant with conditions, deny, or waive section 401 certifications. Certifying authorities typically conduct section 401 certification review at the same time as the federal agency's license or permit review to minimize delay and issue a section 401 certification in a timely manner.

The majority of federal permits that are subject to section 401 certification are CWA section 404 permits issued by the Corps. As described in Section 2, other federal licenses/permits include, but are not limited to, CWA section 402 permits issued by the EPA, FERC hydropower and pipeline licenses, Rivers and Harbors Act sections 9 and 10 permits, and NRC licenses. For a list of state websites with public documentation of licenses/permits and section 401 certification documents, see Table 8-1 in Appendix A. The EPA requests comment on the completeness of this summary of federal agencies involved in section 401 permitting.

[14] 33 U.S.C. §1341(a)(2)

[15] ACWA is a national organization representing the State, Interstate and Territorial officials who are responsible for the implementation of surface water protection programs throughout the nation.

Table 3-1 presents summary permit information, both available publicly and provided to the EPA by the federal agency, specific to section 401.

Table 3-1: Permit summary data by certifying authority

License/Permit Type	Annual Average # Licenses/Permits Issued[a]	Time Provided for Section 401 Review
CWA Section 404	50,159 general; 2,511 individual[b]	60 days – 1 year[h]
Rivers and Harbors Act Section 10	8,607 general; 1,670 individual[c]	60 days – 1 year[h]
CWA Section 402	16 general; 150 individual[d]	60 days[i]
Rivers and Harbors Act Section 9	30-35[e]	1 year[e]
Federal Energy Regulatory Commission license	47[f]	1 year[j]
Nuclear Regulatory Commission license	3[g]	1 year

a. Includes all permits issued by the relevant federal agency (section 401 certification either granted, granted with conditions, or waived)
b. Estimate based on the annual average number of 404 permits from 2013-2018 based on counts provided by the Corps.
c. Estimate based on the annual average number of section 10 permits from 2013-2018 based on counts provided by the Corps.
d. Estimate based on the annual average of EPA-issued 402 permits from 2012-2017.
e. Estimate based on personal communication with Shelly Sugarman, Bridge Permits and Policy Division, Coast Guard Bridge Program.
f. Estimate based on annual average license issuance for hydropower facilities/major natural gas pipelines from 2013-2018 (FERC, 2019a, 2019b)
g. Estimate based on annual average number of licenses for operating nuclear power reactors from 2013 to 2018 (NRC, 2018)
h. Timeframe depends on Corps district. Corps regulations (33 CFR 325.2) specify that waiver could occur if the certifying authority does not issue a decision within 60 days. In practice, many Corps districts allow a longer timeframe.
i. 40 CFR §124.53(c)(3), unless unusual circumstances warrant a longer timeframe.
j. 18 CFR § 4.34(b)(5)(iii)

3.1 Section 404 Permits

The Corps issues two types of CWA section 404 permits, general and individual. General permits are for activities that are similar in nature, cause only minimal adverse environmental impacts when performed separately, and have only minimal cumulative environmental impacts (USACE, 2017). There are three types of general permits: Nationwide Permits (NWPs), Regional General Permits (RGPs), and Programmatic General Permits (PGPs). The most common general permits are NWPs, which provide streamlined review and authorization for activity categories that are determined by the Corps to have minimal adverse impacts on the aquatic environment. NWPs automatically expire, unless renewed, every five years. The Corps has 52 NWPs as of March 2017, which are effective through March 18, 2022 (USACE, 2017). RGPs are issued on a regional basis by an individual Corps district (USACE, n.d.-a). There is no standard set of RGP activity categories that applies to all states, and there are varying numbers of RGPs issued by different Corps Districts. PGPs authorize states with regulatory programs similar to the 404 program to issue permits for certain activity categories, which differ from the activities covered under NWPs, rather than requiring the Corps to directly issue the 404 permits (USACE, n.d.-a).

Certifying authorities exercise their section 401 certification authority at various levels of stringency for section 404 permits. Almost all states issue "programmatic" or "blanket" section 401 certification for activities covered under certain NWPs and RGPs. When a certifying authority issues blanket certification, all actions or activities that meet the requirements of the NWP or RGP receive section 401 certification without additional review. Certifying authorities can issue blanket certifications with or without conditions. Some states condition certain NWPs to address concerns that the NWP requirements do not sufficiently prevent potentially authorized activities from causing or contributing to exceedances of WQS and criteria. NWPs that require additional review, for which the project proponent needs to submit a section 401 request, vary by state. For example, Colorado does not require any additional review on

NWPs (Colorado Environmental Records, n.d.), whereas California may require additional review for 40 NWPs (California Water Boards, 2018). This variability is due to multiple factors, including specific NWP conditions, differing project impacts, and applicable WQS. As for RGPs, states generally issue blanket certifications with or without conditions. Additional review is usually not required because the Corps often incorporates conditions in RGPs that meet WQS.

The Corps issues individual 404 permits for projects with more than minimal individual or cumulative impacts. Individual permits are subject to additional project specific review and involve a more comprehensive public interest review (USACE, n.d.-a). After reviewing the individual permit request, the certifying authority (state/territory/tribe/EPA) typically develops a section 401 certification with additional conditions that project proponents must meet to comply with sections 301, 302, 303, 306, and 307 of the CWA, as well as any other appropriate requirement of state law. This process allows the certifying authority to ensure that the 404 permit complies with WQS, other applicable CWA provisions, and any appropriate requirement of state law.

Some states require additional review of any permit, general or individual, that would authorize discharges to certain waters or is related to a certain activity. For example, Arizona reviews projects that would affect an "Outstanding Arizona Water," an impaired or non-attaining water, or a lake (Arizona Department of Environmental Quality, 2018). North Carolina reviews all projects related to oil and gas structures on the outer continental shelf, coal mining, and stormwater management facilities (North Carolina Department of Environmental Quality, n.d.).

Certifying authorities typically review each request for an individual 404 permit.

3.2 Section 402 NPDES Permits

The National Pollutant Discharge Elimination System (NPDES) permit program addresses water pollution by regulating point sources that discharge pollutants to waters of the United States. Table 3-2 lists non-404 federal permits, including the section 402 NPDES permit program, and licenses subject to section 401 certification authority as well as the types of activities that each license/permit type authorizes. For 402 NPDES permits, section 401 certification only applies when the EPA is the permitting authority. A state may receive authorization for one or more of the NPDES program components. EPA retains authorization for the program components for which a state is not authorized, and requests 401 certification from the state/tribe. For example, if the state has not received authorization for federal facilities, EPA would continue to issue permits to federal facilities (e.g., military bases, national parks, federal lands, etc.), and would request 401 certification for that permit. The EPA is the sole permitting authority for three states (Massachusetts, New Hampshire, and New Mexico), the District of Columbia, all U.S. territories except the Virgin Islands, and federal and tribal lands. All other states[16] and the Virgin Islands have authorization to issue 402 permits for either the entire NPDES program or certain components. NPDES program components include the NPDES permit program, authority to regulate federal facilities, state pretreatment program, general permits program, and biosolids program (U.S. EPA, 2019b). Table 3-2 contains the number of states and territories that issue section 401 certifications on 402 permits for each NPDES program component. Figure 8-1 in Appendix A shows a map of states and territories and their NPDES program status.

The two basic types of NPDES permits are individual and general permits. Typically, dischargers seeking coverage under a general permit are required to submit a notice of intent (NOI) to be covered by the permit. The EPA's general permits cover discharges meeting general permit requirements in areas where

[16] Idaho is authorized to issue NPDES permits for individual industrial permits, individual municipal permits, and the state pretreatment program. Idaho is projected to be fully authorized by July 1, 2021.

the EPA is the NPDES permitting authority (see U.S. EPA, 2017). The EPA works with certifying authorities during the development of 402 general permits to ensure that all certifying authorities subject to the EPA's general permits will issue section 401 certification for the general permit. For EPA-issued individual and general NPDES permits, certifying authorities can add conditions to ensure that the EPA's general permit requirements are consistent with WQS, applicable CWA provisions, and other appropriate requirements of state law, and the EPA must incorporate these conditions into the general permit.

3.3 FERC

Projects requiring FERC licenses, which cover interstate natural gas pipelines and hydropower projects (FERC, 2018), are also subject to section 401 authority. See Figure 8-2 in Appendix A for a map of interstate pipelines in the contiguous United States. Certifying authorities typically review each section 401 request for projects requiring a FERC license rather than waiving review. Certifying authorities have inadvertently waived their section 401 authority for projects requiring a FERC license by exceeding the one-year time limit (see Sections 9.2 and 9.3). Although section 401 denials for projects requiring FERC licenses are rare, a few cases have garnered attention. Section 4.1.1 discusses recent section 401 denials for natural gas pipelines.

3.4 Rivers and Harbors Act Sections 9 and 10

Rivers and Harbors Act sections 9 and 10 permits cover construction of structures in navigable waters. Section 9 permits authorize construction of bridges and causeways, which fall under U.S. Coast Guard jurisdiction, as well as dams and dikes, which fall under Corps jurisdiction .[17] Section 10 permits authorize construction of wharfs, piers, dolphins, booms, weirs, breakwaters, bulkheads, and jetties, which all fall under Corps jurisdiction (USACE, n.d.-b). The EPA found no examples where states, territories, or authorized tribes waived their section 401 authority to review projects requiring these permits.

3.5 NRC

NRC issues licenses for nuclear power plants, which are all subject to section 401 review. Figure 8-3 in Appendix A shows the locations of all nuclear power plants in the United States, which mostly lie east of the Mississippi River (U.S. Energy Information Administration, 2019). The EPA found no examples where certifying authorities waived their section 401 authority to review actions or activities requiring NRC licenses.

[17] 33 U.S.C. § 401

Table 3-2: Non-404 permits and licenses subject to section 401 water quality certification		
Federal license/permit	**Authorities that issue Section 401 certifications**	**Permitted activities**
402		
NPDES Individual permits	3 states, D.C., all 8 territories except Virgin Islands, and tribes with TAS[1]	Discharges from individual wastewater treatment plants; concentrated animal feeding operations; pesticide requests; and stormwater from municipal separate storm sewer systems, construction, and industrial activities.
NPDES General permits	4 states, D.C., all 8 territories except Virgin Islands, and tribes with TAS [1]	Discharges from wastewater treatment plants; concentrated animal feeding operations; pesticide requests; and stormwater from municipal separate storm sewer systems, construction, and industrial activities.
Federal facilities	8 states, D.C., all 8 territories except Virgin Islands, and tribes with TAS [1]	Discharges from federal facilities.
Pretreatment	13 states, D.C., all 8 territories, and tribes with TAS[1]	Discharges from industrial users to publicly owned treatment works (POTWs).
Biosolids	42 states, D.C., all 8 territories, and tribes with TAS[1]	Discharge of sewage sludge from wastewater treatment plants.
Federal Energy Regulatory Commission (FERC)		
FERC license	See map in Figure 8-2	Construction and operation of interstate natural gas pipelines and hydroelectric projects.
Rivers and Harbors Act Sect. 9 and 10		
Section 9 permit	All states, D.C., territories, and tribes with TAS	Construction of bridge, dam, dike, or causeway that results in discharge to navigable waters.
Section 10 permit	All states, D.C., territories, and tribes with TAS	Construction of wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures that results in discharge to navigable waters.
Nuclear Regulatory Commission (NRC)		
NRC license	See map in Figure 8-3	Construction and operation of nuclear power plants.

[1]U.S. EPA (2019b).

4 Section 401 Certification Case Studies

This section focuses on denials and other high-profile section 401 certification cases.

4.1 Denials

This section describes four recent energy-related section 401 certification denial cases. The four cases presented in this section include three natural gas pipelines in New York State (Section 4.1.1) and a coal export terminal in Washington State (Section 4.1.2). Section 4.1.3 discusses impacts of denials on certifying authorities and project proponents.

4.1.1 New York Natural Gas Pipelines

FERC regulates natural gas pipeline market entry under the Natural Gas Act by issuing a section 7(c) certificate of public convenience and necessity authorizing the construction of new facilities (Weiler and Stanford, 2018). Under the Energy Policy Act of 2005,[18] FERC has the authority to set a schedule for federal and state agencies to reach a final decision on requests for authorizations necessary for proposed natural gas pipeline projects. The Energy Policy Act of 2005 also specified that in cases in which another agency delays issuing a required permit, the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction to address the matter.

FERC recently granted NGA section 7(c) certificate authorization for the construction of three different interstate natural gas pipeline projects in New York State. FERC conducted environmental reviews, including analyses of each pipeline project's impact on water resources, and found that construction and operation of each pipeline project would result in no significant environmental impacts (Weiler and Stanford, 2018). The New York State Department of Environmental Conservation (NYSDEC) took a contrary position and denied issuance of section 401 certification for all three pipeline projects (Weiler and Stanford, 2018). Table 4-1 summarizes the three natural gas pipeline cases. Appendix B provides additional details about each case.

Table 4-1: Section 401 certification denial cases

Project Description	Request Timeline	Reasons for Denial	Current Status
Constitution Pipeline: 124-mile pipeline from Susquehanna County, PA to Schoharie County, NY that would provide 650,000 dekatherms/day of firm transportation service.	Project proponent filed 401 request on August 22, 2013. NYSDEC requested additional information until it considered the request complete in December 2014. In April 2015, NYSDEC requested the project proponent to withdraw and resubmit the request to restart the one-year time limit.	NYSDEC issued a denial in April 2016, stating the request failed to address significant water resource impacts that could occur from the project and failed to demonstrate compliance with NYS WQS.	Proponent appealed NYSDEC's decision to the Second Circuit, but the court upheld the denial. The Hoopa Valley ruling (see Section II.F.4.b of preamble) opened the possibility that NYSDEC waived its 401 certification authority by exceeding the one-year time limit. In February 2019, U.S. Court of Appeals granted FERC's request to remand the pipeline question for a new review, which is ongoing. NYSDEC informed FERC in April 2019 that they would appeal any decision that waives the state's section 401 certification review.

[18] 119 Stat. 594; P.L. 109-58; 42 U.S.C. § 15801

Table 4-1: Section 401 certification denial cases			
Project Description	**Request Timeline**	**Reasons for Denial**	**Current Status**
Valley Lateral Pipeline: 7.8-mile extension of an existing pipeline in Orange County, NY to serve a new gas-powered power plant in Wawayanda, NY.	Project proponent filed section 401 request on November 13, 2015. NYSDEC initially deemed the request incomplete and requested additional information through August 2016. Project proponent urged NYSDEC to complete its review after receiving FERC authorization in November 2016, but NYSDEC said it had until August 2017 to make a determination. In December 2016, the D.C. Circuit stated that NYSDEC's delay operated as a section 401 waiver and enabled Millennium to bypass NYSDEC.	In August 2017, NYSDEC denied the project proponent's request on the grounds that FERC's environmental review of the project was inadequate because it failed to consider downstream greenhouse gas emissions from the electric generator shipper.	Project proponent waited a few months after the D.C. Circuit's decision before submitting a request to FERC in July 2017 to proceed with construction, arguing that NYSDEC had waived its section 401 authority. In September 2017, FERC issued an order stating that NYSDEC had waived its section 401 authority by exceeding the one-year time limit and issued a Notice to Proceed with Construction. NYSDEC appealed FERC's decision to the U.S. Court of Appeals, but the court ruled in FERC's favor. In July 2018, FERC authorized the project proponent to place the new pipeline into service.
Northern Access Pipeline: Project includes 99 miles of pipeline from Sergeant Township, PA to Elma, NY and ancillary facilities to expand firm service by 847,000 dekatherms/day.	Project proponent filed section 401 request in February 2016. After NYSDEC did not notify the project proponent about whether the request was complete, they agreed to a March 2, 2016 receival date if NYSDEC issued a decision within the next year. In January 2017, NYSDEC asked the project proponent to amend the prior agreement so that April 8, 2016 would be the receival date instead of March 2, and the project proponent complied. After receiving the amendment, NYSDEC deemed the request complete.	In April 2017, NYSDEC denied the project proponent's request for failing to demonstrate compliance with state WQS because the project did not adequately mitigate impacts to water quality and thus jeopardized biological integrity and impeded best uses of affected waterbodies.	On August 6, 2018, FERC ruled that NYSDEC waived its section 401 certification authority by exceeding the one-year time limit. NYSDEC asked FERC to reconsider the decision. On April 2, 2019, FERC upheld its prior decision that NYSDEC waived its section 401 review and stated that the recent Hoopa Valley decision (see Section II.F.4.b of preamble) reinforced their determination.

See Appendix B for additional details and sources.

4.1.2 Millennium Bulk Terminals in Washington State

Millennium Bulk Terminals—Longview, LLC (Millennium) proposed to construct and operate an export terminal in Cowlitz County, Washington along the Columbia River (U.S. Army Corps of Engineers, 2016). The proposed export terminal would receive rail shipments of coal from the Powder River Basin in Montana and Wyoming, and the Uinta Basin in Utah and Colorado. Export terminal employees would receive, blend, and load coal onto vessels in the Columbia River for export. The proposed export terminal would have a maximum throughput of 44 million metric tons of coal per year. The purpose of the proposed project was to transfer western U.S. coal from rail to ocean-going vessels for export to Asia.

Millennium identified demand within the Asian market for western U.S. low-sulfur subbituminous coal and determined that existing West Coast terminals were unavailable to serve this need (USACE, 2016).

4.1.2.1 Water Quality Certification Denial

Millennium first submitted a 404 permit request to the Corps and a section 401 request to the Washington Department of Ecology in February 2012 but withdrew the requests in February 2013 with the intention of resubmitting after completion of the environmental review process (Washington Department of Ecology, 2019). Millennium resubmitted its section 401 request in July 2016. The Corps (2016) issued a draft Environmental Impact Statement (EIS) for the proposed project under the National Environmental Policy Act in September 2016. Cowlitz County and the Washington Department of Ecology also issued an EIS under the State Environmental Policy Act in April 2017 (Washington Department of Ecology, 2019). After reviewing these reports, the Washington Department of Ecology denied section 401 certification for the project in September 2017. The denial stated that the project would have unavoidable, adverse impacts to the local environment, transportation, public health, the local community, and tribal resources as a result of not meeting state WQS, and that the project would not meet state WQS (Washington Department of Ecology, 2019).

4.1.2.2 Current Status

To date, all court challenges to the section 401 certification denial have resulted in rulings favorable to the Department of Ecology. Millennium appealed the section 401 certification denial to Cowlitz County Superior Court and the Washington State Pollution Control Hearings Board. The Cowlitz County Superior Court dismissed Millennium's appeal in March 2018, stating that the appeal must first be heard by the Pollution Control Hearings Board (Washington Department of Ecology, 2019). The Pollution Control Hearings Board ruled in Washington Department of Ecology's favor in August 2018.[19] Millennium submitted a second appeal to the Cowlitz County Superior Court following the Pollution Control Hearings Board's ruling. Millennium also filed a challenge in Federal District Court against the Washington Department of Ecology director, the Department of Natural Resources commissioner, and the Washington governor, arguing that the section 401 certification denial interfered with foreign and interstate trade (Fairbanks, 2018). A federal judge dismissed the case against the Department of Natural Resources commissioner in October 2018, but the case against the Washington Department of Ecology director and the Washington governor will continue (Fairbanks, 2018). In December 2018, a U.S. District Court ruled against a portion of Millennium claims by determining that the State of Washington's section 401 certification denial did not violate two federal laws, the Interstate Commerce Commission Termination Act and the Ports and Waterways Safety Act.[20]

Although Washington denied section 401 certification for the proposed export terminal, the Corps restarted the federal permitting and environmental review process in November 2018 (Washington Department of Ecology, 2019). This decision prompted the Washington State Attorney General to send a letter to the Corps Lieutenant General expressing concern that restarting the permitting process undercuts the state/federalism partnership and section 401 of the CWA (Ferguson, 2018). The Corps' efforts to update the EIS and coordinate compliance with Section 106 are ongoing.[21]

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[19] Millennium Bulk Terminals—Longview, LLC v. State of Washington, Department of Ecology, PCHB No. 17-090 (2019)

[20] Case No. 3:18-CV-05005-RJB, United States District Court, Western District of Washington at Tacoma (2019)

[21] Personal communication with Patricia Graesser, USACE Public Affairs Supervisor

4.1.3 Impacts of Denials

4.1.3.1 On Certifying authorities

Certifying authorities deny certification if they cannot certify that the discharge will comply with WQS and other applicable sections of the CWA. Denials are an important option for ensuring that discharges from activities requiring a federal license or permit comply with the CWA. Some certifying authorities try to engage with project proponents early in the project development stages to better communicate their requirements, minimize activity impacts, and reduce the likelihood of certification denial (ACWA, 2019). For example, the Colorado Department of Public Health and Environment engages in pre-filing process with project proponents for large, complex projects to streamline the review process and minimize requests for additional information (Western States Water Council, 2014).

4.1.3.2 On Project proponents

Section 401 certification denials increase costs to project proponents in several ways. First, section 401 certification denials can delay proposed projects, which may increase total costs above the original cost estimates. Second, a denial may cause the project proponent to forgo the project after having invested funds and staff time into project development, environmental assessment, and mitigation planning. Project proponents can challenge a section 401 certification denial in court (incurring legal costs), but if the courts do not rule in their favor, they will need to invest additional resources to revise plans accordingly and submit a revised request to receive section 401 certification. Working closely with the certifying authority during the project development stages and providing all materials that the certifying authority requires to make a section 401 certification determination may help project proponents avoid denials and associated costs.

In addition to direct impacts on project proponents, recent section 401 certification denials on large infrastructure projects, such as natural gas pipelines and export terminals, highlighted the potential for section 401 certification denials to have broader economic impacts. While data to quantify these effects are limited, studies have noted that recurring section 401 certification denials of FERC-approved natural gas pipelines affects transportation of natural gas and could jeopardize the reliability of gas-fired electric generators (Weiler and Stanford, 2018).

4.2 Section 401 Certification Interpretations

Court decisions related to section 401 certification issuance have generated interpretations of CWA section 401 provisions, including clarifications regarding the timeline for review, the types of discharges subject to section 401 certification, the scope of federal agency authority, and how withdrawals and resubmittals of the same requests affect the one-year time limit for certifying authorities to exercise their section 401 certification authority. See section II.F.4 of the proposed rule preamble for detailed discussion of the relevant court decision on section 401.

5 Possible Effects of Proposed Section 401 Certification Regulations

Executive Order 13868 on Promoting Energy Infrastructure and Energy Growth directs the EPA to review and revise section 401 guidance to states, authorized tribes and federal agencies, and to publish a proposed rule to revise the EPA's existing certification regulations. On June 7, 2019, the EPA issued the revised guidance for states, authorized tribes, and federal agencies to provide recommendations concerning the implementation of CWA section 401 (U.S. EPA, 2019a).

The EPA is proposing the following clarifications, presented here across four categories, to its existing certification regulations:[22]

1) Timeline: The timeline for action on a section 401 certification is proposed to begin upon receipt of a certification request by the certifying authority. Review timeline is reinforced as one year.
2) Scope: The scope of a section 401 certification review, and the decision whether to issue or deny a section 401 certification, is proposed to be limited to an evaluation of whether the potential discharge will comply with applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory program provisions.
3) When the EPA is the certifying authority, the EPA is proposing additional procedures for pre-filing engagement and requests for additional information. Under the proposal, project proponents would be required to request a pre-filing meeting with the EPA, when it acts as the certifying authority, at least 30 days prior to submitting a request for certification to help ensure a timely section 401 certification decision. As proposed, when EPA is the certifying authority, it would be allowed to request additional data from the project proponent within 30 days of receipt of a request for certification; the EPA would only request additional information that could be collected or generated within the established reasonable period of time; and the EPA would include a deadline for the project proponent response, allowing sufficient time to review the information and act on the request within the federal agency's timeframe.

This section summarizes how each proposed revision differs from current implementation of CWA section 401. The section also presents potential impacts of each proposed revision. Table 5-1 summarizes potential impacts of the proposed revisions on certifying authorities and project proponents.

Table 5-1. Summary of possible impacts of proposed section 401 revisions

Revision	Certifying authorities		Project Proponent	
	Potential Pros	Potential Cons	Potential Pros	Potential Cons
Timeline	Improved clarity of when clock starts; less litigation about delays/potential waiver	Potentially less time to collect and generate information to inform decision; may lead to more denials or waivers	Improved clarity of when clock starts; less litigation about delays/potential waiver	Potentially more denials
Scope	In circumstances where the proposed scope is more narrow than current state or tribal practices, the proposal may translate to shorter section 401 request review times	Potential exclusion of conditions if conditions extend beyond the proposed scope of certification; potential waiver if reasons for denial extend beyond the proposed scope	Reduced wait times; fewer non-water quality conditions on certification	Additional legal challenges from certifying authorities and environmental organizations

[22] 40 CFR § 121

Table 5-1. Summary of possible impacts of proposed section 401 revisions				
Revision	Certifying authorities		Project Proponent	
	Potential Pros	Potential Cons	Potential Pros	Potential Cons
Pre-Filing Engagement & Additional Information Requests	Pre-filing meetings result in fewer incomplete requests; additional information request procedures may limit extended back and forth with project proponents	Not all EPA regions have the budget/capacity to support pre-filing meetings; limitations on additional information request timeline could result in insufficient data for decision and lead to more denials	Pre-filing meetings help establish data needs for a timely review; additional information procedures limit the timeline for requests to make process more efficient	Increased labor burden and project development costs from pre-filing meeting; additional fee/burden if initial request denied due to insufficient data

5.1 Timeline

5.1.1 Proposed Revision

The CWA establishes a time limit of "any reasonable period not to exceed one year" for certifying authorities to complete their section 401 certification analysis and decision. The EPA's existing certification regulations[23] specify that the licensing or permitting agency determines the "reasonable" time period within that one-year timeframe, and the proposed section 401 regulations reaffirm this practice.

The proposed revision clarifies that the timeline for action on a section 401 certification begins upon receipt of a certification request by the certifying authority. The CWA states that certifying authorities must act on a request for certification "within a reasonable period of time (which shall not exceed one year) after receipt of [a certification] request."[24] Existing practice indicates that the certifying authority determines what constitutes a "complete request" that starts the review clock. However, the statute does not use the "complete application" term.

This proposal clarifies that for a review timeline to start, the project proponent must submit a written request for certification to the certifying authority that includes the following information:

1. Identification of the project proponent(s) and an appropriate point of contact;
2. Identification of the proposed project;
3. Identification of the applicable license or permit and includes a copy of all application materials provided to the federal agency;
4. Identification of any discharge that may result from the proposed project and the location of such discharge and receiving waterbodies;
5. A description of the methods and means used or proposed to monitor the discharge and the equipment or measures employed or planned for the treatment or control of the discharge;

[23] 40 CFR § 121.16(b)

[24] 33 U.S.C. § 1341(a)(1)

6. A list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals received or denials already made; and
7. The following statement: "The project proponent hereby requests that the certifying authority review and take action on this CWA section 401 certification request within the applicable reasonable timeframe."

The EPA recommends that state and tribal requirements that go beyond the request requirements detailed above be revised after the establishment of final EPA regulations to ensure consistency with the EPA's regulations and those of other states. EPA is soliciting comment on the potential costs of revising these requirements.

Additional proposed revisions reinforce the existing one year timeline for project review. The proposed changes reiterate a firm one year review timeline from receipt of a certification request and prohibit a certifying authority from taking actions for the purpose of extending the timeline beyond one year from receipt of the section 401 request.

5.1.2 Potential Impacts of Revision

For both certifying authorities and project proponents, this revision would provide clarity regarding the start of the review clock and reduce litigation about whether certifying authorities waived their section 401 authority by exceeding the section 401 timeframe. Recent New York State natural gas pipeline case studies (see Sections 4.1.1, 9.2, and 9.3) demonstrate that the "complete application" standard for starting the clock has caused confusion and delays. In these cases, the certifying authority requested additional information from the project proponent before deeming the section 401 requests complete and starting its review. Although the certifying authority issued a decision within a year of deeming the request complete, FERC ultimately ruled that the certifying authority had waived section 401 authority by exceeding the one year timeframe. The "upon receipt of certification request" standard would reduce confusion about when the clock starts, reduce the number of inadvertent waivers and reduce delays.

Extended delay while waiting for a certification decision is an opportunity cost to the project proponent. Any sidelined investment funds awaiting a permit decision could have been invested elsewhere. The sooner the project proponent knows of a denial the sooner alternative investments can be considered which could generate benefits. Similarly, faster granting of certification would allow proposed projects to begin generating benefits sooner.

Legal risk and associated costs could also be minimized under the current proposed regulation. By providing more transparency and better defining milestones and responsibilities, both project proponents and other entities are less subject to the legal risk inherent in poorly defined approval processes.

Establishing that the review clock starts upon receipt of a request could lead to certifying authorities having less information available to make a section 401 certification decision if initial certification requests are incomplete. If the data gaps are significant, certifying authorities may respond by issuing more denials. Based on recent survey results (ACWA, 2019), incomplete requests are the most common cause of section 401 review delay. The list of information and materials required in a certification request could help ensure that certifying authorities receive all information necessary to make a section 401 certification decision in the initial certification request.

The EPA expects that the proposed request requirement clarifications will, in cases where certifying authority requirements go beyond these proposed requirements, reduce the burden placed on project proponents and certifying agencies involved in the section 401 certification process. Clear and transparent requirements allow all entities to make decisions with symmetrical information which should lead to reduced ambiguity, confusion, and delay.

The proposed revisions prohibiting actions by the certifying authorities to extend the clock is an attempt to deter the "withdrawal and resubmit" process which allowed for a project timeline to be informally extended beyond one year. By specifically addressing the mechanism whereby section 401 certifications were allowed to be informally extended, the EPA expects that requests for certification will be acted upon within the one year statutory timeline, allowing for a more streamlined and transparent process. If a certifying authority approaches the end of the one-year timeline and is unable to certify a section 401 request, two options remain available: denial or waiver. The CWA does not prevent a project proponent from reapplying for a section 401 certification once the original request is denied, and the proposal reaffirms the ability for a project proponent to submit a new certification request. In the case of a denial, the project proponent can submit a new request for certification that addresses the water quality issues identified in the denial in addition to the other request requirements.

5.2 Scope

5.2.1 Proposed Revision

The CWA section 401 certification process allows the certifying authority to protect water quality of federally regulated waters from adverse effects caused by discharges from federally licensed or permitted activities by determining whether the discharges comply with sections 301, 302, 303, 306, and 307 of the CWA.[25] Section 401 regularly references requirements to ensure compliance with "applicable effluent limitations" and "water quality requirements," prompting the EPA to propose that the scope of a section 401 certification review, and the decision whether to issue or deny a section 401 certification, be focused on water quality impacts from point source discharges to navigable waters. Specifically, the EPA proposes to define the scope of certification as follows: "The scope of a section 401 certification is limited to assuring that a discharge from a federally-licensed or permitted activity will comply with water quality requirements." See preamble section III.D for a full analysis of the proposed scope of certification. Under the proposal, any condition added to a section 401 certification that is not within the proposed scope of certification may not be included in the federal license or permit, and the condition does not become federally enforceable. If a certifying authority denies section 401 certification for reasons outside of the scope of certification (i.e., fails to meet the requirements of section 401), the EPA is proposing that the federal agency will treat the action in a similar manner as a waiver (U.S. EPA, 2019a). For both certifications with conditions and denials, the EPA is proposing that if a federal agency receives the certification decision prior to the end of the reasonable time period and determines they are not consistent with section 401, the federal agency may provide the certifying authority an opportunity to remedy any deficiencies within the remaining time period.

Additional proposed changes clarify what information must be present for a valid condition under a section 401 certification. Such information includes:

1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with the applicable water quality requirements;
2. A citation to federal, state, or tribal law that authorizes the condition; and
3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.

While these proposed requirements could produce an additional marginal administrative burden specific to this rulemaking, such a burden is not likely to be substantive. Certifying authorities are likely already consulting their respective water quality criteria and applicable requirements during their section 401

[25] 33 U.S.C. § 1341(a)(1)

review. The proposed changes would require disclosure of the basis for conditions to the project proponent, federal agency, and the public.

5.2.2 Potential Impacts of Revision

For states and tribes that currently review, condition or deny certifications on the basis of non-water quality impacts, the proposed scope could reduce the time that certifying authorities spend reviewing certification requests, potentially reducing labor costs. In these circumstances, reduced review times could translate into reduced wait times for project proponents. The water quality requirements limitation could also reduce the number of non-water quality related conditions required by the certifying authority, potentially reducing compliance costs for project proponents. For the majority of states and tribes that implement the section 401 certification program consistent with the CWA, these proposed revisions will have no impact.

However, limitations on the scope of section 401 review could reduce the authority of certifying authorities to protect against project impacts that could indirectly affect water quality and cause environmental and public health impacts, such as air pollution impacts on water resources through precipitation. Certifying authorities may respond by issuing more denials. Additionally, the water quality impacts limitation could lead to additional legal challenges from certifying authorities and environmental organizations, which could delay proposed actions and activities.

5.3 Pre-Filing Engagement and Additional Information

5.3.1 Proposed Revision

Pre-Filing Engagement: In its pre-proposal submittal to the docket,[26] ACWA indicated that incomplete requests are the most common cause of section 401 review delay (ACWA, 2019). In pre-proposal docket submissions, outreach, and correspondence project proponents suggested the lack of clear state processes and prolonged information requests contributed significantly to the delay in the 401 certification process. The Agency has also been made aware of relatively low staffing availability in many state certification programs.

In an effort to promote more complete requests, states have taken steps to inform project proponents about the information required to make a section 401 certification determination. Twenty-one states have used one of the following options to ensure completeness: (1) explain what constitutes a complete request in state regulations, (2) accept the federal Army Corps of Engineers request in lieu of a separate section 401 request form (for section 404/10 permits), or (3) list information requirements on the section 401 request form. Many states also work with project proponents through early engagement to ensure awareness of request requirements (ACWA, 2019).

The proposed revisions would make pre-request consultations more readily available when the EPA is the certifying authority. Under the proposal, thirty days prior to filing a request for certification, project proponents must submit a request for a meeting with the EPA. The proposed regulation would give the EPA the option to meet with project proponents before receiving a certification request to learn more information about a proposed project. The EPA would also have the option to deny the meeting request if the parameters and impacts of the project are sufficiently clear.

Additional Information: When certifying authorities need more information to make a section 401 certification determination, they ask project proponents to submit additional data. Under the proposed revisions, when the EPA acts as the certifying authority, it would need to issue the request for additional information within 30 days of receipt of a request for certification, and the request could only cover

[26] Docket No. EPA-HQ-OW-2018-0855

information that can be collected or generated within the established reasonable period of time (i.e., no National Environmental Policy Act review findings unless the request is submitted at or near the conclusion of the NEPA process). Under the proposed revisions, the EPA would include a deadline for the project proponent response, allowing sufficient time to review the additional information and act on the request within the agency's section 401 review timeframe.

5.3.2 Potential Impacts of Revision

Pre-filing Engagement: Many states have already implemented pre-filing meetings, indicating states believe the meetings are beneficial for improving communication of data needs and reducing the number of incomplete certification requests. These efforts could similarly benefit the EPA when it acts as the certifying authority by increasing the likelihood of receiving all necessary information in the initial request and by reducing the need to contact project proponents for additional information. Pre-filing meetings also benefit project proponents by helping them understand the data required for a timely section 401 review.

However, certifying authorities currently engage in these efforts on an inconsistent basis. The proposed revisions would require project proponents to submit written pre-filing meeting requests to the EPA, which could place a burden on project proponents, especially those already familiar with section 401 certification request requirements. The pre-filing meeting could also place a burden on the EPA regions, particularly those with limited staff and resources. To minimize this burden, the EPA could decline meeting requests for routine or non-complex projects and only accept the meeting for larger or complex projects where uncertainty exists.

Although the pre-filing meetings can place additional burden on both project proponents and the EPA, the process could save burden elsewhere in the section 401 certification process. The existing "withdrawal and resubmit" process highlights "unofficial" engagement currently occurring for larger and more complex projects. The pre-filing meeting would make this back and forth communication between the project proponent and the EPA more formal and shifts its occurrence to earlier in the process, which could help project proponents better accommodate concerns in the original planning stages and reduce confusion later in the process.

Additional Information: Limiting additional information requests to within 30 days of receiving the section 401 request would make the section 401 certification process more efficient. The 30-day limitation would also condense the time that the EPA and project proponents spend communicating about the status of the certification request. Since the EPA would need the additional materials to make a permit decision, they are more likely to receive the information they need to make a decision in a timely manner. Project proponents would have great incentive to provide all requested materials prior to the end of the reasonable period to minimize the risk of a denial. The EPA would have the remainder of the reasonable period of time to receive and review the additional materials to inform the Agency's decision.

The 30-day limitation could prevent the EPA from obtaining enough information to make an informed decision, particularly if project proponents do not submit additional information before the deadline, which could lead to more denials. The requirement to submit a request for additional information within 30 days of receipt of a certification request could be problematic for EPA regions with limited resources, particularly when the proposed project is complex. The 30-day limitation could result in rushed requests that do not address all data gaps, ultimately resulting in more denials when the EPA does not have sufficient information to make a section 401 certification determination. Project proponents may face additional costs from the proposed 30-day limitation if their initial section 401 certification request is denied due to insufficient information. They could incur labor burden costs to draft a second section 401

certification request and may need to pay an additional fee upon resubmittal, depending on the certifying authority's fee structure.

However, the EPA will learn about proposed projects at least 30 days prior to receiving section 401 requests through the proposed pre-filing meeting request. Since the EPA can begin to consider potential information needs after receiving pre-filing meeting requests, it has 60 days total (30 days prior to request receipt and 30 days after request receipt) to consider proposed projects and assess information needs. The combined timeframe of these two proposed revisions will reduce the possibility of rushed additional information requests and subsequent denials.

5.4 Effects on Partner Federal Agencies, States, and Tribes

Federal agencies play an important role in facilitating information collection, sharing that information amongst involved parties and clearly communicating project milestones and deadlines during the section 401 certification process. The changes proposed in this rulemaking highlight how federal agencies are uniquely poised to promote pre-request coordination to harmonize project planning activities, including data needs and timelines. These proposed changes do not explicitly require any federal agencies to change their existing regulations to reflect these updated requirements; however, the EO directs federal agencies to update their regulations to ensure consistency with the EPA's final updated regulations. This proposal highlights the need for clear communication between entities and outlines opportunities for federal agencies to facilitate this communication. While this proposal encourages federal agencies to work closely with certifying authorities and project proponents, formalization of this process via an agency rulemaking may not be required. The EPA requests comment on whether these proposed changes would necessitate any subsequent additional federal rulemakings from implementing agencies.

Similarly, states and tribes may decide to modify their existing regulations to comply with changes proposed in this EPA rulemaking. Subsequent rulemakings promulgated by other federal agencies (i.e. Corps, FERC, etc.) could further increase the need for additional state and tribal updates. The incremental labor hours required for rulemaking efforts are likely specific to each state and authorized tribe and will depend on existing requirements, the level of public interest, and administrative procedures.

6 Possible Effects on Case Studies

This section discusses how the proposed changes could have impacted the denial case studies presented in Section 4.1.

6.1 New York Natural Gas Pipelines

Table 6-1 summarizes how the proposed changes could have impacted recent denial cases for natural gas pipelines in New York State.

Table 6-1: Possible impacts of the proposed section 401 revisions on recent New York State pipeline denials

Proposed Revision	Constitution Pipeline	Valley Lateral Pipeline	Northern Access Pipeline
Timeline	Project proponent filed section 401 request on August 22, 2013. Under revision, a decision would have been required by August 2014 (actually issued April 2016).	Project proponent filed section 401 request on November 13, 2015. Under revision, a decision would have been required by November 2016 (actually issued August 2017).	Project proponent filed section 401 request in February 2016. Under revision, a decision would have been required by February 2017 (actually issued April 2017).
Scope	NYSDEC denied section 401 certification for failing to demonstrate	NYSDEC denied section 401 certification because FERC's environmental review of the	NYSDEC denied section 401 certification for failing to demonstrate

Table 6-1: Possible impacts of the proposed section 401 revisions on recent New York State pipeline denials			
Proposed Revision	**Constitution Pipeline**	**Valley Lateral Pipeline**	**Northern Access Pipeline**
	compliance with NYS WQS, so the proposed scope limitation would not have impacted this case.	project failed to consider downstream greenhouse gas emissions from the electric generator shipper. Since this reason is not related to water quality, FERC may have treated this denial as a waiver under the proposed scope limitation.	compliance with state WQS, so the proposed scope limitation would not have impacted this case.

Overall, the proposed revisions that could have resulted in the biggest outcome changes for the New York pipeline cases are the proposed timeline changes. The review timeline revision would have necessitated a section 401 certification decision within one year of receiving the request for certification. Instead, a decision took three years in the Constitution case, nearly two years in the Valley Lateral case, and 14 months in the Northern Access case.

NYSDEC may have still denied section 401 certification for these cases under the proposed revisions. Under the proposed timeline revisions, NYSDEC may not have received enough information to make a section 401 certification determination, or the information they received may have led to the same conclusion. The process, however, would have been much faster under the proposed revisions. Extended delays for a certification decision are an opportunity cost to the project proponent. Any sidelined investment funds awaiting the certification decision could have been invested elsewhere. The sooner the project proponent knows of a denial the sooner alternative investments can be considered which could generate benefits. Similarly, granting certification sooner would allow proposed projects to begin generating benefits sooner. The Valley Lateral pipeline denial is the most likely of the three cases to have a different result under the proposed revisions. In this case, NYSDEC denied section 401 certification because of greenhouse gas effects, which does not fall within the proposed scope of certification.

6.2 Millennium Bulk Terminals in Washington State

Millennium first submitted a 404 permit request to the Corps and a section 401 request to the Washington Department of Ecology in February 2012 via a Joint Aquatic Resources Permit Application (JARPA), which serves as a joint application for federal, state, and local aquatic resource permits.[27] Millennium withdrew its JARPA in February 2013 at the Corps' request to allow the federal agency more time to complete its regulatory process,[28] with the intention of resubmitting after the environmental review process (Washington Department of Ecology, 2019). Millennium resubmitted its JARPA in July 2016. Assuming the project proponent still withdrew its JARPA and resubmitted near the conclusion of the environmental review process under the proposed revisions, the Washington Department of Ecology would have needed to issue a section 401 certification determination by July 2017 to comply with the proposed timeline revision and avoid waiving review. The Washington Department of Ecology actually issued its decision two months later in September 2017, one year after the Corps issued its EIS. If the project proponent no longer agreed to withdraw its section 401 certification request and resubmit near the conclusion of the environmental review process, the Washington Department of Ecology would have

[27] Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology. Docket 18-2-00994-08. Petition for Review

[28] Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology. Docket 18-2-00994-08. Petition for Review

been required to act on the initial request by February 2013, the same month that the project proponent withdrew the initial request.

The Washington Department of Ecology's certification denial for the project, dated September 2017, identified several reasons, including that the section 401 certification request did not provide reasonable assurance that the project would meet state WQS, the project would have unavoidable, adverse impacts to the local environment, transportation, public health, the local community, and tribal resources, increased cancer risk from diesel pollution, more traffic congestion and delayed emergency response times, increased vessel traffic on the Columbia River, and limited tribal fishing access. In this case, the State's assertion that the certification request did not provide reasonable assurance that the project would meet WQS would be within the proposed scope of certification.

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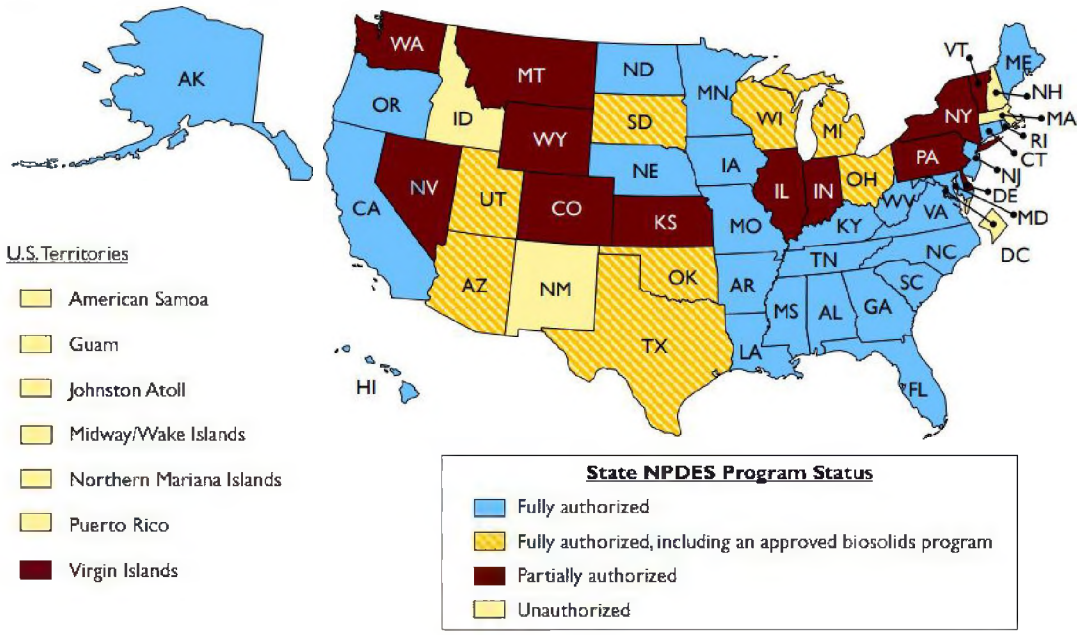
8 Appendix A. Tables/Figures for Federal License/Permit Overview

Figure 8-1. NPDES program authorizations as of July 2015.



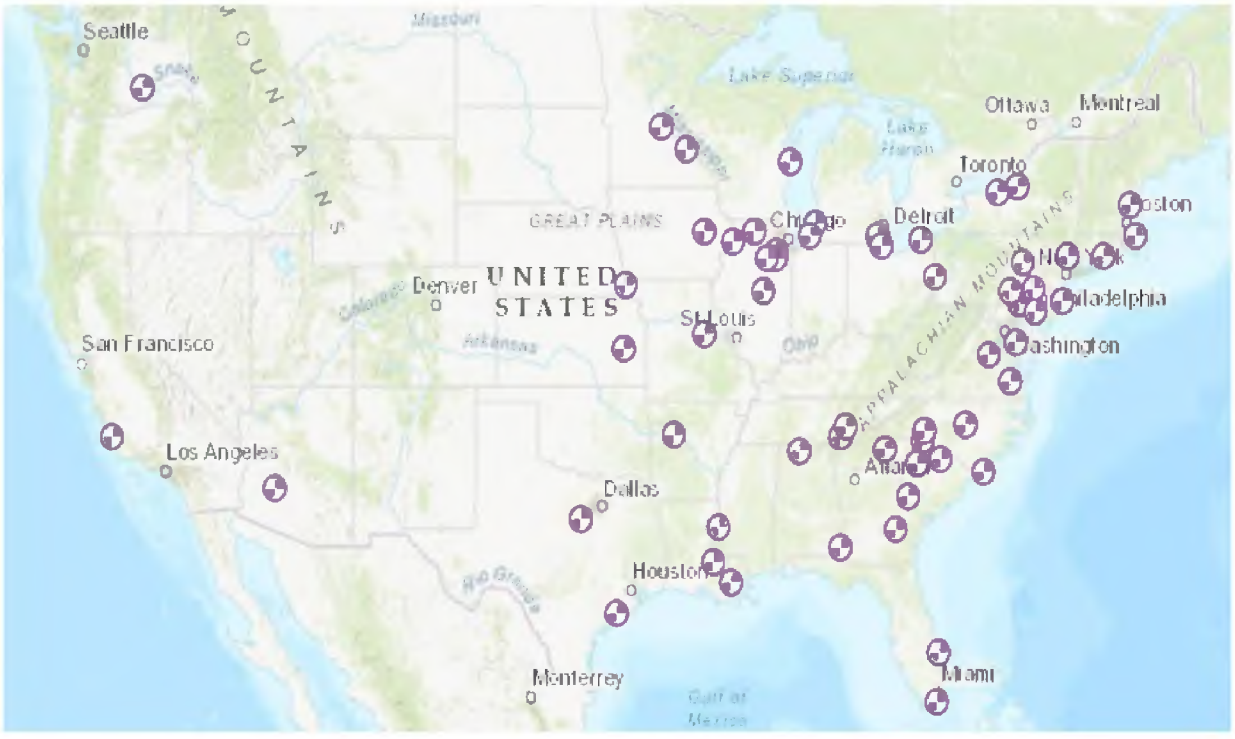
Source: U.S. EPA, 2015

Note: The EPA is currently delegating NPDES authority to Idaho. Idaho is projected to be fully authorized by July 1, 2021.

Figure 8-2. Interstate pipelines in the contiguous United States

Source: Esri, HERE, Garmin, FAO, NOAA, USGS, U.S. EPA, 2018

Figure 8-3. Locations of nuclear power plants in the United States.



Source: U.S. Energy Information Administration, U.S. Energy Mapping System, April 17, 2018

Table 8-1: State websites with public documentation of licenses/permits and section 401 certification documents		
State	**Website title**	**Link**
Arkansas	Instream 401 Certification and Short Term Activity Authorization	https://www.adeq.state.ar.us/water/planning/instream/
California (San Diego Region)	San Diego Region – Wetlands and Riparian Protection	https://www.waterboards.ca.gov/rwqcb9/water_issues/programs/401_certification/
California (San Francisco Bay)	Clean Water Act Section 401 Water Quality Certification	https://www.waterboards.ca.gov/sanfranciscobay/certs.html
Maine	Hydropower and Dams	https://www.maine.gov/dep/land/dams-hydro/index.html#state
Mississippi	Recently Issued Permits and Certifications	https://www.mdeq.ms.gov/ensearch/recently-issued-permits-certifications/
New Hampshire	Projects Requiring Individual 401 Certification for Federal Licenses or Permits (other than FERC)	https://www.des.nh.gov/organization/divisions/water/wmb/section401/coe_ind.htm

Table 8-1: State websites with public documentation of licenses/permits and section 401 certification documents		
State	**Website title**	**Link**
North Carolina	Environmental Request Tracker	https://deq.nc.gov/permits-regulations/permit-guidance/environmental-request-tracker
Oregon	Section 401 Hydropower Certification	https://www.oregon.gov/deq/wq/wqpermits/Pages/Section-401-Hydropower.aspx
Texas	401 Certification Tracking System	https://www6.tceq.texas.gov/cmpts/index.cfm
Washington	401 Water Quality Certifications for non-hydropower permits	https://ecology.wa.gov/Regulations-Permits/Permits-certifications/401-Water-quality-certification/non-hydropower-401-certifications

9 Appendix B. New York Natural Gas Pipelines Case Study Details

9.1 Constitution Pipeline

The Constitution Pipeline, proposed by Constitution Pipeline Company LLC, is an interstate pipeline that would provide up to 650,000 dekatherms per day of firm transportation service through approximately 124 miles of pipeline extending from Susquehanna County, Pennsylvania to Schoharie County, New York (Weiler and Stanford, 2018). Since the proposed pipeline would cross 289 surface waterbodies, Constitution's EIS focused on water issues (Weiler and Stanford, 2018). FERC concluded that the project would have some adverse environmental impacts, but the proposed plan would reduce these impacts to less-than-significant levels. On December 2, 2014, FERC granted Constitution certificate authorization to construct and operate the proposed pipeline, subject to 43 environmental conditions and other requirements.

9.1.1 Water Quality Certification Denial

Constitution filed a request for a FERC license on June 13, 2019.[29] Constitution initially filed a request with NYSDEC for section 401 certification on August 22, 2013 (Weiler and Stanford, 2018). However, NYSDEC deemed the request incomplete until FERC issued a draft EIS and asked Constitution to provide more information about stream crossings, freshwater wetlands, and related permits. Constitution submitted additional information on November 27, 2013. NYSDEC requested additional time to comply with section 401's one-year requirement on May 9, 2014, so Constitution withdrew and resubmitted its request. NYSDEC continued to request additional information, which prompted Constitution to supplement its request in August, September, November, and December of 2014. NYSDEC considered the request complete in late December of 2014. In April 2015, NYSDEC again requested more time to comply with the one-year requirement, prompting Constitution to again withdraw and resubmit its request. In April 2016, nearly four years after NYSDEC first began working with Constitution on the proposed pipeline, NYSDEC denied the section 401 certification request, stating that the Constitution request failed to meaningfully address the significant water resource impacts that could occur from the project and failed to provide sufficient information to demonstrate compliance with New York State WQS. Constitution appealed this decision to the Second Circuit, but the court ruled in favor of NYSDEC. Constitution's subsequent petition for certiorari to the U.S. Supreme Court and its request to FERC for a declaratory order that NYSDEC had waived its section 401 certification authority by exceeding the maximum one-year period were also denied (Weiler and Stanford, 2018).

9.1.2 Current Status

On November 5, 2018, FERC granted Constitution a two-year extension until December 2, 2020 to allow Constitution to obtain the necessary approvals and complete construction of the pipeline.[30] A recent D.C. Court of Appeals Decision, *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*[31] (see Section II.F.4.b of the preamble), prompted the D.C. Circuit to grant FERC a voluntary remand in February 2019

[29] 149 FERC ¶ 61,199

[30] *Constitution Pipeline Co., LLC,* 165 FERC ¶ 61,081 at P 24 (2018)

[31] 2019 WL 321025 (D.C. Cir. 2019).

to consider whether NYSDEC waived its section 401 authority on the Constitution Pipeline project.[32] The Hoopa Valley decision stated that repeated withdrawals and resubmissions of the same section 401 certification request violated the one-year time limit for section 401 decisions. The court declined to decide whether withdrawal of a section 401 request and submission of a new request can restart the one-year period, or how different a request would need to be to restart the clock.[33] The Hoopa Valley ruling opened the possibility that NYSDEC waived its section 401 certification authority by exceeding the one-year time limit. In February 2019, the U.S. Court of Appeals for the Washington D.C. Circuit granted FERC's request to remand the pipeline question for a new review following the Hoopa Valley ruling (Downey, 2019). NYSDEC informed FERC in April 2019 that they would appeal any decision that waives the state's water quality certification review and stated that courts would likely reverse a finding of a waiver (Cocklin, 2019).

9.2 Valley Lateral

Millennium Pipeline Company's Valley Lateral pipeline project includes a 7.8-mile extension of an existing pipeline in Orange County, New York to serve a new gas-powered power plant in Wawayanda, New York (Weiler and Stanford, 2018). In the Environmental Assessment, Millennium determined that that the proposed route would cross 12 waterbodies (seven perennial, four intermittent, and one ephemeral), and impact approximately 1.9 acres of wetlands. Millennium concluded that the primary impact of the project would be the temporary alteration of wetland vegetation from clearing and excavation and planned to use horizontal directional drilling and conventional bore construction methods to minimize clearing. FERC concluded that Millennium's Environmental Construction Standards, particularly the wetlands minimization and mitigation measures, met or exceeded the FERC's Waterbody Construction Procedures and that approval of the Valley Lateral Project would not constitute a major federal action that would significantly affect the quality of the human environment. FERC granted certificate authorization for Millennium's Valley Lateral project, subject to compliance with 17 multi-part environmental conditions. One of the conditions was to file documentation that it had received all authorizations required under federal law, including section 401 certification from New York State (Weiler and Stanford, 2018).

9.2.1 Water Quality Certification Denial

Millennium filed requests with NYSDEC for section 401 certification and other New York environmental permits on November 13, 2015, the same date it filed the FERC request (Weiler and Stanford, 2018). NYSDEC initially deemed the request incomplete pending FERC's completion of the Environmental Assessment. After FERC issued the Environmental Assessment, NYSDEC still considered the request incomplete and requested information needed to complete the request in June 2016, including an assessment of the project's impacts on federal and state endangered species and clarifications about impacts on water quality and wetlands. Millennium provided additional information in August 2016 (Weiler and Stanford, 2018).

After FERC issued certificate authorization in November 2016, Millennium urged NYSDEC to complete its review after FERC issued certification authorization in November 2016, but NYSDEC said it would continue reviewing the request to determine whether the request was complete and had until August 2017 to make a section 401 certification determination (Weiler and Stanford, 2018). In December 2016, more than a year after filing the section 401 certification request, Millennium petitioned the D.C. Circuit for

[32] Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand, D.C. Cir. Case No. 18-1251 (2019).

[33] *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 2019 WL 321025 (D.C. Cir. 2019).

review of the NYSDEC's delay. The D.C. Circuit rejected Millennium's petition, holding that the pipeline did not have standing to bring the petition because the pipeline was not injured by NYSDEC's delay since the inaction operated as a section 401 waiver and enabled Millennium to bypass NYSDEC. Millennium waited a few months after the D.C. Circuit's decision before submitting a request to FERC in July 2017 to proceed with construction of the Valley Lateral project, arguing that NYSDEC had waived its right to issue the section 401 certification. In August 2017, NYSDEC denied Millennium's request on the grounds that FERC's environmental review of the project was inadequate because it failed to consider downstream greenhouse gas emissions from Millennium's electric generator shipper (Weiler and Stanford, 2018).

9.2.2 NYSDEC Decision Overturned

In September 2017, FERC issued a declaratory order stating that NYSDEC had waived its section 401 certification authority by waiting more than one year to issue a decision (Weiler and Stanford, 2018). FERC subsequently issued a Notice to Proceed with Construction. NYSDEC appealed FERC's decision in the U.S. Court of Appeals, but the court ruled in FERC's favor. In July 2018, with the construction work of the pipeline completed, FERC authorized Millennium to place the new pipeline facilities into service (Weiler and Stanford, 2018).

9.3 Northern Access Pipeline

The Northern Access Project, proposed by National Fuel Supply Corporation and Empire Pipeline Inc., includes approximately 99 miles of pipeline, one modified and one new compressor station, a new dehydration facility, and ancillary facilities. The project would expand firm service on National Fuel's system by 497,000 dekatherms per day and on Empire's system by 350,000 dekatherms per day.[34]

FERC's Northern Access Environmental Assessment, released in July 2016, found that pipeline construction would not likely result in significant impacts on groundwater resources since most construction would involve shallow, temporary, and localized excavation (Weiler and Stanford, 2018). The Environmental Assessment stated that seven private water wells and no public water wells are located within 150 feet of the project area. The project area includes 261 waterbodies, and the proposed pipeline would cross 134 of these. Many of the impacted streams and wetlands in New York State support several significant animal species, including trout (brown and rainbow) and the Eastern Hellbender, which is a State-listed species of concern.[35] FERC determined that the greatest potential impact from pipeline construction would result from sediment loading, particularly from the wet open-cut crossing method, but National Fuel planned to use that method for only one crossing at Buffalo Creek in Erie County since other methods were not feasible. National Fuel proposed using dry crossing methods at 195 crossings and horizontal directional drilling at five crossings to minimize impacts. National Fuel provided an Erosion and Sediment Control and Agricultural Mitigation Plan, which incorporated State and Federal regulatory plans, procedures, and manuals, to mitigate impacts resulting from water crossings. On February 3, 2017, FERC granted certificate authorization for National Fuel's Northern Access project in February 2017, conditioned upon compliance with 27 multi-part environmental conditions (Weiler and Stanford, 2018).

9.3.1 Water Quality Certification Denial

National Fuel filed requests with NYSDEC for section 401 certification and other New York environmental permits in February 2016 (Weiler and Stanford, 2018). After NYSDEC did not notify

[34] 164 FERC ¶ 61,084 (2018)

[35] NYSDEC (April 7, 2017). *National Fuel Denial Letter.*

National Fuel about whether the request was complete, National Fuel agreed to suspend interim procedural deadlines in return for NYSDEC acknowledging that the request was received on March 2, 2016 and issuing a decision within the next year (Weiler and Stanford, 2018). In January 2017, NYSDEC asked National Fuel to amend the prior agreement so that April 8, 2016 would be the deemed receipt date instead of March 2, and National Fuel executed the amendment "to preserve its long-standing relationship with [NYSDEC]."[36] Shortly after receiving the amendment, NYSDEC determined that National Fuel's request was complete. In April 2017, NYSDEC denied National Fuel's section 401 certification request, stating that the request failed to demonstrate compliance with New York State WQS because the project did not adequately mitigate impacts to water quality and would jeopardize biological integrity of affected waterbodies (Weiler and Stanford, 2018). NYSDEC also stated that the project would impede the best usages of many affected waterbodies by degrading the survival and propagation of balanced, indigenous populations of shellfish, fish and wildlife that rely upon these waters.[37]

9.3.2 NYSDEC Decision Overturned

On August 6, 2018, FERC ruled that NYSDEC waived its section 401 certification authority by exceeding the maximum one-year period allowed to make a section 401 certification determination.[38] NYSDEC asked FERC to reconsider the decision. On April 2, 2019, FERC upheld its prior decision that NYSDEC waived its section 401 review and stated that the recent Hoopa Valley decision (see Section II.F.4.b of the preamble) reinforced their determination (Marcellus Drilling News, 2019).

[36] Comments of National Fuel Gas Supply Corp. and Empire Pipeline, Inc. in Support of Petition for Declaratory Order of Constitution Pipeline Co. at 10 n. 41, Constitution Pipeline Co., Docket No. CP18-5-000 (Nov. 9, 2017).

[37] NYSDEC (April 7, 2017). *National Fuel Denial Letter*.

[38] 164 FERC ¶ 61,084 (2018)

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401 Certification Survey Summary
May 2019

On April 10, 2019, the White House issued the *Executive Order on Promoting Energy Infrastructure and Economic Growth*. Part of the executive order called for reforms to Clean Water Act ("CWA") Section 401 certification processes. Therefore, EPA announced that the Agency would engage with states, authorized tribes, and relevant federal agencies to identify provisions requiring clarification within CWA Section 401 and related federal regulations and guidance. EPA is taking pre-proposal recommendations on the issue.

To assist in responding to EPA's efforts, ACWA released a survey to states inquiring into state Section 401 certification processes including the average number of state certification requests and denials, certification timeliness, application completeness, and best practices.

ACWA received thirty-one (31) responses to the survey. The results show that states work hard to issue Section 401 certifications in a timely manner and very rarely issue denials of certification. Specifically, for the thirty-one (31) states that responded the median of the average number of requests for certification received per state per year is approximately seventy (70) (the survey found a large range of average annual number of certification requests. At the high end, Michigan has approximately 5000 requests and New York approximately 4000 annual requests. At the low end, New Hampshire has approximately ten (10) annual requests and South Dakota approximately fifteen (15) requests). The average length of time it takes these states to complete a certification once a complete application is received is approximately 132 days (under 4.5 months). Seventeen (17) states average zero (0) denials per year. The rest of the states very rarely issue denials of certification.

Regarding certification delays, states cited many reasons. The most common reason for certification delays cited by states was incomplete requests. Other reasons for delays cited by multiple states included slow responses from applicants, time taken responding to public comments, negotiating conditions necessary to protect water quality, and staff workload issues.

Though delays sometimes occur, states have taken significant steps to ensure timely Section 401 certifications. Most states either require or encourage pre-submittal meetings with applicants. States have also adopted electronic submittal and hired additional staff to assist with making certifications. Regulatorily, states have clarified "completeness" of requests and set hard time limits for review in state regulations.

Because it is the most common reason for certification delays, states have taken significant steps to inform applicants what constitutes a "complete" request. Twenty-one (21) states either have regulations that explain completeness, accept the federal Army Corps of Engineers application, or clearly list requirements on the application. Many states work with applicants through early engagement to ensure applicants are aware of request requirements.

States also employ a series of "best practices" to ensure complete requests and timely certifications. Twenty-seven (27) states require or encourage pre-request meetings with applicants or their consultants or have clear application instructions. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete.

ACWA purposely kept this survey simple. Therefore, there may be nuance to specific state 401 certification programs and efforts not reflected in the survey results or in this summary.

For more information on this survey, contact ACWA's Mark Patrick McGuire at mpmcguire@acwa-us.org.