

1 JEAN E. WILLIAMS
Acting Assistant Attorney General
2 VANESSA R. WALDREF (D.C. Bar No. 989692)
Vanessa.R.Waldref@usdoj.gov
3 LESLIE M. HILL (D.C. Bar No. 476008)
Leslie.Hill@usdoj.gov
4 ELISABETH H. CARTER (N.Y. Bar No. 5733274)
Elisabeth.Carter@usdoj.gov
5 Environmental Defense Section
6 Environment & Natural Resources Division
7 United States Department of Justice
4 Constitution Square
8 150 M Street, N.E.
9 Suite 4.1133 (Waldref)/4.149 (Hill)/4.1406 (Carter)
Washington, D. C. 20002
10 Telephone: (202) 514-2741 (Waldref)
11 (202) 514-0375 (Hill)
(202) 514-0286 (Carter)
12 Facsimile: (202) 514-8865

13 *Attorneys for Defendants*

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

17 In re

18 Clean Water Act Rulemaking
19

20
21 This Document Relates to:

22 ALL ACTIONS
23
24
25
26
27
28

Case No. 3:20-cv-04636-WHA
(consolidated)

**EPA'S MOTION FOR REMAND
WITHOUT VACATUR**

Courtroom: 12, 19th Floor
Date: August 26, 2021
Time: 8:00 a.m. PDT

Notice of Motion and Motion

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

TABLE OF CONTENTS

BACKGROUND	1
STANDARD OF REVIEW FOR VOLUNTARY REMAND	6
ARGUMENT	6
CONCLUSION.....	12

TABLE OF AUTHORITIES

CASES

<i>Am. Forest Res. Council v. Ashe</i> , 946 F. Supp. 2d 1 (D.D.C. 2013), <i>aff'd</i> , 601 F. App'x 1 (D.C. Cir. 2015)	9, 11, 12
<i>B.J. Alan Co. v. ICC</i> , 897 F.2d 561 (D.C. Cir. 1990)	9
<i>Cal. Communities Against Toxics v. EPA</i> , 688 F.3d 989 (9th Cir. 2012)	6
<i>Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta</i> , 375 F.3d 412 (6th Cir. 2004)	8, 9
<i>Ethyl Corp. v. Browner</i> , 989 F.2d 522 (D.C. Cir. 1993)	9
<i>FBME Bank Ltd. v. Lew</i> , 142 F. Supp. 3d 70 (D.D.C. 2015)	7, 8, 9
<i>Friends of Park v. Nat'l Park Serv.</i> , No. 13-cv-03453-DCN, 2014 WL 6969680 (D.S.C. Dec. 9, 2014)	9
<i>Limnia, Inc. v. U.S. Dep't of Energy</i> , 857 F.3d 379 (D.C. Cir. 2017)	8
<i>Macktal v. Chao</i> , 286 F.3d 822 (5th Cir. 2002)	6
<i>Nat'l Res. Def. Council v. United States Dep't of Interior</i> , 275 F. Supp. 2d 1136 (C.D. Cal. 2002)	6, 7, 9
<i>N. Coast Rivers All. v. United States Dep't of the Interior</i> , No. 11-CV-00307-LJO-MJS, 2016 WL 8673038 (E.D. Cal. Dec. 16, 2016)	6, 7, 8
<i>Ohio Valley Envtl. Coal. v. Aracoma Coal Co.</i> , 556 F.3d 177 (4th Cir. 2009)	8
<i>SKF USA Inc. v. United States</i> , 254 F.3d 1022 (Fed. Cir. 2001)	6, 7, 8
<i>State v. Bureau of Land Mgmt.</i> , No. 18-CV-00521-HSG, 2020 WL 1492708 (N.D. Cal. Mar. 27, 2020)	6

1		
2	<i>Trujillo v. Gen. Elec. Co.</i> ,	
3	621 F.2d 1084 (10th Cir. 1980)	6
4	<i>Util. Solid Waste Activities Grp. v. EPA</i> ,	
5	901 F.3d 414 (D.C. Cir. 2018)	9
6	<i>United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.</i> ,	
7	No. C-09-4029 EMC, 2011 WL 3607790 (N.D. Cal. Aug. 16, 2011)	6, 7
8	STATUTES	
9	33 U.S.C. § 1341	1
10	CODE OF FEDERAL REGULATIONS	
11	40 C.F.R. § 121.5(b)	3
12	40 C.F.R. § 121.5(c)	3
13	FEDERAL REGISTER	
14	85 Fed. Reg. 42,210 (July 13, 2020).....	1
15	86 Fed. Reg. 7037 (Jan. 25, 2021), Executive Order 13,990.....	1, 10
16	86 Fed. Reg. 29,541 (June 2, 2021)	1, 2, 5, 7, 8, 10
17	LOCAL RULES	
18	Civil L.R. 7-2	1
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

MEMORANDUM OF POINTS AND AUTHORITIES

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW FOR VOLUNTARY REMAND

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

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

ARGUMENT

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

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

4 **First**, voluntary remand is appropriate because EPA has identified “substantial and
 5 legitimate concerns” with the Certification Rule and has publicly announced its intention to
 6 reconsider and revise the Rule. *SKF*, 254 F.3d at 1029 (“[I]f the agency’s concern [with the
 7 challenged action] is substantial and legitimate, a remand is usually appropriate.”); *N. Coast*
 8 *Rivers All.*, 2016 WL 8673038, at *3 (same); *Gonzales & Gonzales Bonds & Ins. Agency, Inc.*,
 9 2011 WL 3607790, at *4 (same). Specifically, EPA has identified “substantial concerns with a
 10 number of provisions of the 401 Certification Rule that relate to cooperative federalism
 11 principles and CWA section 401’s goal of ensuring that states are empowered to protect their
 12 water quality.” 86 Fed. Reg. at 29,542. EPA also has serious concerns about whether the
 13 Certification Rule “constrains what states and Tribes can require in certification requests,
 14 potentially limiting state and tribal ability to get information they may need before the 401
 15 review process begins.” *Id.* at 29,543. Likewise, EPA “is concerned that the rule does not allow
 16 state and tribal authorities a sufficient role in setting the timeline for reviewing certification
 17 requests and limits the factors that federal agencies may use to determine the reasonable period
 18 of time.” *Id.* EPA is also “concerned that the rule’s narrow scope of certification and conditions
 19 may prevent state and tribal authorities from adequately protecting their water quality.” *Id.* And
 20 EPA “is concerned that a federal agency’s review may result in a state or tribe’s certification or
 21 conditions being permanently waived as a result of non-substantive and easily fixed procedural
 22 concerns identified by the federal agency [and] that the rule’s prohibition of modifications may
 23 limit the flexibility of certifications and permits to adapt to changing circumstances.” *Id.* These
 24 concerns mirror many of Plaintiffs’ allegations.²

25
 26
 27 ² See Am. Rivers Compl. ¶¶ 94, 98, 107, 112-14, 123, 130-31, 136; States’ Compl. ¶¶ 1.9-1.13,
 28 5.43-5.46, 5.48-5.50, 5.54-5.61; Suquamish Compl. ¶¶ 62-76.

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

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

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

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

3 **Second**, granting remand here is in the interest of judicial economy. “Remand has the
 4 benefit of allowing ‘agencies to cure their own mistakes rather than wasting the courts’ and the
 5 parties’ resources reviewing a record that both sides acknowledge to be incorrect or
 6 incomplete.” *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018)
 7 (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)); see *Nat. Res. Def.*
 8 *Council v. United States Dep’t of Interior*, 275 F. Supp. 2d at 1141 (“Voluntary remand also
 9 promotes judicial economy by allowing the relevant agency to reconsider and rectify an
 10 erroneous decision without further expenditure of judicial resources.”). Here, allowing EPA to
 11 reconsider its decision made during the prior Administration—including the legal basis and
 12 policy effects of the Rule—and address its substantial concerns with the Rule through the
 13 administrative process will preserve this Court’s and the parties’ resources. See *FBME Bank*,
 14 142 F. Supp. 3d at 74; see also *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990)
 15 (“[A]dministrative reconsideration is a more expeditious and efficient means of achieving an
 16 adjustment of agency policy than is resort to the federal courts.” (quoting *Pennsylvania v. ICC*,
 17 590 F.2d 1187, 1194 (D.C. Cir. 1978))). Continuing to litigate the very same issues that EPA is
 18 currently reconsidering and “would be inefficient,” *FBME Bank*, 142 F. Supp. 3d at 74, and a
 19 waste of “scarce judicial resources,” *Friends of Park v. Nat’l Park Serv.*, No. 13-cv-03453-DCN,
 20 2014 WL 6969680, at *2 (D.S.C. Dec. 9, 2014).

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

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

- 7 • pre-filing meeting requests, *Notice*, 86 Fed. Reg. at 29,543;
- 8 • certification requests, 86 Fed. Reg. at 29,543;³
- 9 • reasonable period of time, 86 Fed. Reg. at 29,543;⁴
- 10 • scope of certification, 86 Fed. Reg. at 29,543;⁵
- 11 • certification actions and federal agency review, 86 Fed. Reg. at 29,543;⁶
- 12 • certifying authority enforcement of certification conditions, 86 Fed. Reg. at 29,543;
- 13 and
- 14 • certifying authority modification of certifications, 86 Fed. Reg. at 29,543.

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

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

24 ³ *See* Am. Rivers Compl. ¶¶ 39, 71, 100; States’ Compl. ¶¶ 5.54-5.58.

25 ⁴ *See* Am. Rivers Compl. ¶¶ 19, 25, 28, 99-102; States’ Compl. ¶¶ 6.11-6.13, 6.17; Suquamish
 26 Compl. ¶¶ 62, 70.

27 ⁵ *See* Am. Rivers Compl. ¶¶ 19, 36, 39, 94, 115-18; States’ Compl. ¶¶ 6.4, 6.16-6.17; Suquamish
 28 Compl. ¶¶ 37, 62-68, 75, 80, 84.

⁶ *See* Am. Rivers Compl. ¶¶ 130-32; States’ Compl. ¶¶ 1.11, 7.4, 7.11-7.12; Suquamish Compl.
 ¶¶ 69-76, 80.

1 and administrative burdens associated with instituting or expanding their water protection
 2 programs or to bear the burdens of degraded waters.” States’ Compl. ¶ 6.15.⁷ The States further
 3 allege that the Certification “Rule increases the chances that section 401 requests will be
 4 needlessly denied, leading to administrative inefficiencies and unnecessary litigation, and the
 5 loss or delayed benefits of projects that would have been certified had the States been operating
 6 under the previous regime.” *Id.* ¶ 6.17. The Plaintiff Tribes allege harm from “EPA’s attempts to
 7 dilute the authority under CWA Section 401 of tribes eligible for [Treatment in the same Manner
 8 as a State (“TAS”)] to review, set conditions upon, and deny federal licenses for activities that
 9 may discharge waters into its jurisdiction.” Suquamish Compl. ¶¶ 17, 18. The Tribes also allege
 10 harm from a lack of meaningful consultation with the Tribes. *Id.* ¶¶ 36, 60, 88-89. But these
 11 harms are “too abstract and speculative to clearly outweigh [remand’s] benefits,” *Am. Forest*
 12 *Res. Council v. Ashe*, 946 F. Supp. at 43, including the critical benefit of allowing EPA to
 13 reconsider the Rule in light of the concerns raised by Plaintiff States and Tribes.

14 The other Plaintiffs⁸ are not directly regulated by the Certification Rule, which regulates
 15 the conduct of states, federal agencies, tribes, and project proponents. Those Plaintiffs’ alleged
 16 harms all flow from the implementation of the Certification Rule to specific future projects.⁹ But
 17 those harms are too speculative to overcome EPA’s interest in remand, because they depend on a
 18 causal chain of events for potential future projects that may or may not occur, including (1) how
 19 a state may apply the Certification Rule to a specific project; (2) how a federal agency will apply
 20

21
 22 ⁷ See States’ Compl. ¶¶ 6.11-6.13 (alleging financial harm from increased regulatory expenses).

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

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

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

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

21 CONCLUSION

22 EPA has identified numerous concerns with the Certification Rule, many of which have
 23 been raised by Plaintiffs in this case, and the Agency has already begun reconsidering the Rule.
 24 Where an agency has committed to reconsidering the challenged action, the proper course is
 25 remand to allow the agency to address its concerns through the administrative process. *See Am.*
 26 *Forest Res. Council*, 946 F. Supp. 2d at 43. Rather than requiring EPA to litigate a rule that it is
 27
 28

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

3 Respectfully submitted this 1st day of July, 2021.

4 JEAN E. WILLIAMS
5 Acting Assistant Attorney General

6 /s/ Leslie M. Hill

7 _____
8 LESLIE M. HILL (D.C. Bar No. 476008)
9 Leslie.Hill@usdoj.gov
10 VANESSA R. WALDREF (D.C. Bar No. 989692)
11 Vanessa.R.Waldref@usdoj.gov
12 ELISABETH H. CARTER (N.Y. Bar No. 5733274)
13 Elisabeth.Carter@usdoj.gov
14 U.S. Department of Justice
15 Environment & Natural Resources Division
16 Environmental Defense Section
17 4 Constitution Square
18 150 M Street, N.E.
19 Suite 4.1133 (Waldref)/4.149 (Hill)/4.1406 (Carter)
20 Washington, D.C. 20002
21 Telephone: (202) 514-2741 (Waldref)
22 (202) 514-0375 (Hill)
23 (202) 514-0286 (Carter)
24 Facsimile (202) 514-8865

18 *Attorneys for Defendants*

19
20 Of counsel:

21 James Curtin
22 Diane McConkey
23 Alexander Mullee
24 Office of General Counsel
25 U.S. Environmental Protection Agency
26
27
28