ROB BONTA
Attorney General of California
SARAH E. MORRISON
ERIC KATZ
Supervising Deputy Attorneys General
CATHERINE M. WIEMAN, SBN 222384
TATIANA K. GAUR, SBN 246227
ADAM L. LEVITAN, SBN 280226
BRYANT B. CANNON, SBN 284496
LANI M. MAHER, SBN 318637
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6329
Fax: (916) 731-2128
E-mail: Tatiana.Gaur@doj.ca.gov
*Attorneys for Plaintiff State of California, by and through Attorney General Rob Bonta and the State Water Resources Control Board*

ROBERT W. FERGUSON
Attorney General of Washington
KELLY T. WOOD (*admitted pro hac vice*)
GABRIELLE GURIAN (*admitted pro hac vice*)
Assistant Attorneys General
Washington Office of the Attorney General
Ecology Division
2425 Bristol Court SW
Olympia, Washington 98501
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov
*Attorneys for Plaintiff State of Washington*

*[Additional Plaintiffs and Counsel Listed on Signature Pages]*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

In Re

Clean Water Act Rulemaking

CASE NO. 20-cv- 04636-WHA
(consolidated)
Applies to all actions

**PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR REMAND WITHOUT VACATUR**

COURTROOM: 12, 19TH FLOOR
DATE: AUGUST 26, 2021
TIME: 12:00 PM (via telephone)

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## I. INTRODUCTION

In September of 2020, the Environmental Protection Agency's final *Clean Water Act Section 401 Certification Rule* took effect, drastically curtailing state authority under section 401 of the Clean Water Act, 33 U.S.C. § 1341. Because of the significant harms to state fiscal and natural resources posed by the 2020 Rule, the undersigned States filed the current action challenging the rule as violative of the Administrative Procedure Act and the Clean Water Act. Following the new Presidential Administration's statements that it would review the 2020 Rule to determine compliance with an executive order on improving public health and protecting the environment, Exec. Order No. 13,990, the States agreed to stay the case pending EPA's decision on what, if any, actions it would take upon the conclusion of its review. EPA has now made its decision, announcing its intent not to repeal, but to revise, the 2020 Rule and committing only to an "expected" spring 2023 completion date. EPA seeks remand of the 2020 Rule without vacatur, leaving the Rule in place for at least an additional two years and causing significant harms to the States during that time. Moreover, EPA seeks dismissal of the States' legal challenge with prejudice, permanently insulating the 2020 Rule from judicial review.

The States support EPA's efforts to revisit the 2020 Rule and certainly share the substantial concerns EPA itself raises as to the Rule's lawfulness. The States, however, oppose EPA's remand motion and urge the Court to establish an expedited briefing schedule on the merits at the Court's earliest convenience. EPA's assertion that remand will have "limited" prejudicial effect on the States' interests is demonstrably false. As documented in the States' declarations and outlined below, the harms that will flow from the continued application of the 2020 Rule over the next two years are severe and potentially irreversible. Indeed, significant harms that greatly prejudice the States and the States' co-Plaintiffs in this case are *already* occurring. Moreover, no judicial economy is gained by forcing piecemeal litigation of 401

certification decisions over the next several years. As such, the Court should deny EPA's request for remand, lift the litigation stay, and proceed to the merits.

If, however, the Court is inclined to grant EPA's remand request, the Court should exercise its equitable discretion to remand the rule *with* vacatur. While EPA claims that it seeks remand of the Rule without confessing error, EPA's statements about the 2020 Rule indicate its agreement with the States' core argument on the Rule's invalidity; i.e., that the Rule is inconsistent with both the case law and the Clean Water Act's careful preservation of state authority to protect water resources. Because the errors here are significant and no disruptive consequences would result from vacating the Rule, any remand should be with vacatur.

## II. ARGUMENT

### A. Remand Without Vacatur Is Improper Because It Will Unduly Prejudice the Plaintiff States.

While an agency's stated intent to revisit a challenged rule is a necessary condition to obtain remand, "it is not always a sufficient condition." *Am. Waterways Operators v. Wheeler*, 427 F.Supp.3d 95, 98–99 (D. D.C. 2019). Courts have "broad discretion" to grant or deny an agency's remand request and, in exercising that discretion, routinely deny remand when it would "unduly prejudice the non-moving party." *See Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018), *citing FBME Bank Ltd. v. Lew*, 142 F.Supp.3d 70, 73 (D. D.C. 2015). Courts have also denied agency requests for voluntary remand where the agency does not propose to vacate the rule and plaintiffs are left "subject to a rule they claimed was invalid." *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000).

Here, EPA fails to justify its request for remand because harms to the States from the 2020 Rule are both significant and already occurring. Every day, Plaintiff States receive requests for 401 certifications, with some individual states handling thousands of certification requests per year. Declaration of Scott E. Sheeley in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Sheeley Decl.) ¶ 23; Declaration of Eileen

Sobeck in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Sobeck Decl.) ¶¶ 9–10; Declaration of Paul Wojoski in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Wojoski Decl.) ¶ 8; Declaration of Loree' Randall in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Randall Decl.) ¶ 5. Between now and EPA's estimated completion of a revised rule in 2023, the 21 States challenging the Rule in this action will receive and process thousands of 401 certification requests.[1] *See, e.g., id*. All of those requests are (or will be) governed by the illegal and restrictive 2020 Rule—a rule that, even by EPA's own reckoning, fails to adhere to the cooperative federalism principles embodied within the Clean Water Act and significantly impairs the States' abilities to protect water quality. EPA Motion for Remand at 7 (EPA Br.). As set out below, far from having "limited" impacts, the 2020 Rule is causing (and will continue to cause) detrimental effects to water quality and State resources. Because the States will be severely prejudiced if the Rule is allowed to stand while EPA conducts a multi-year revision process, the Court should deny EPA's request for remand and allow the parties to proceed to the merits.

**1. The 2020 Rule's limitation on the scope of section 401 review results in the elimination of critical environmental protections**

First, the 2020 Rule hamstrings state authority under the Clean Water Act and undermines—or in some cases eliminates—state environmental protections that have been applied to control the water quality impacts of federally approved projects for decades. Prior to the 2020 Rule, section 401 certifications considered *all* potential water quality impacts of a proposed project, both direct and indirect and over the project's full operational life. *See PUD No. 1 of Jefferson Cy. v. Dept. of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*). Parallel to that scope, and consistent with the Clean Water Act's requirement that section 401 certifications

[1] In addition to the Plaintiff States, tribal plaintiffs expect to receive a substantial number of requests for 401 certification during the same period.

include "any" conditions necessary to assure compliance with "appropriate" requirements of state law, state section 401 certification conditions long sought to assure that all aspects of a proposed project would comply with applicable state water quality laws. *See e.g.*, Wojoski Decl. ¶¶ 16–22; Randall Decl. ¶ 6, Declaration of Paul Comba in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Comba Decl.) ¶¶ 4, 11. Thus, for example, there was no question that a state could impose minimum flow conditions on a dam to protect aquatic species habitat even if those conditions were not directly associated with any specific point source discharge from the dam. *See PUD No. 1*, 511 U.S. at 711–12. Or, states might include erosion and sediment control measures designed to address nutrient and sediment pollution. Wojoski Decl. ¶¶ 18–20. That broad scope of state 401 certification review and conditions has long been viewed as the cornerstone of the Clean Water Act's system of cooperative federalism and reflected the incontrovertible fact that Congress intended section 401 to "provide reasonable assurance . . . that no license or permit will be issued by a federal agency for any activity … that could in fact become a source of pollution."[2]

The 2020 Rule unlawfully guts this authority. In conflict with Supreme Court precedent and decades of EPA's own legal analysis, the 2020 Rule purports to limit state review to only the narrow range of water quality impacts from a project that relate to specific, point-source discharges to certain narrowly-defined "waters of the United States." 40 C.F.R. §§ 121.1(f), (n); 121.3. Thus, when it comes to federally licensed or permitted projects, the 2020 Rule has greatly complicated—if not eliminated—the use of section 401 as a tool for assessing and addressing water quality impacts from non-point sources to state waters and wetlands. Further, the 2020 Rule, for the first time in section 401's history, prohibits states from modifying existing certification conditions to adapt to changing circumstances such as a change in water quality standards.

[2] H.R. Rep. No. 91-127, at 24 (1969), reprinted in 1970 U.S.C.C.A.N. 2691, 2697.

These impacts on state water resources occur across a wide spectrum of activities requiring approvals from various federal agencies, but are perhaps most acutely felt in the context of hydropower licensing and relicensing. In addition to point source impacts, dams are significant sources of non-point water pollution. Randall Decl. ¶ 7. Without proper mitigation measures, dams cause increased water temperature resulting from decreased water flows within streams and decreased flow rates as a result of ponding behind dam structures. Randall Decl. ¶ 7; Declaration of Corbin J. Gosier in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Gosier Decl.) ¶ 13; Sobeck Decl. ¶¶ 76, 79–80. Dam structures alter flow in rivers and creeks downstream of hydroelectric dams, cause fluctuations of water levels within the impoundment created by dams, kill fish passing through hydroelectric turbines, and prevent the upstream movement of fish and other water or wetland-dependent wildlife. Gosier Decl. ¶ 13; Sobeck Decl. ¶¶ 79, 80. Dam reservoirs also lead to vegetation loss, reducing shading and increasing temperatures, and wave impacts caused by reservoir creation increase turbidity and sedimentation. Randall Decl. ¶ 7; Sobeck Decl. ¶ 79–80. These impacts from dam structures and operations, in turn, can result in a host of adverse impacts, including further temperature increases, smothered aquatic habitat, interference with predation patterns, and lower oxygen levels. Randall Decl. ¶ 7; Gosier Decl. ¶ 15; Sobeck Decl. ¶ 76, 79–80. Increased turbidity triggered by dams can also cause an increase in toxin mobility, including PCBs and other "forever chemicals," due to increased absorption of these chemicals by sediment particles. Randall Decl. ¶ 7.

Typically, states and tribes have relied on the section 401 certification process to mitigate or eliminate these and other impacts. For example, certifying authorities included in 401 certifications requirements to mitigate vegetation loss, geoengineer shorelines to decrease erosion, and ensure reservoir discharge points are lower in the water column where temperatures are lower. Randall Decl. ¶ 8; Gosier Decl. ¶ 15; Sobeck Decl. ¶ 78. Additionally, because hydropower licenses can last up to 50 years, the ability to revisit and modify 401

certifications to adapt to changing conditions (such as modifications to state water quality standards) provided states with a critical means to adjust conditions for these long-term projects as new research and data establish needs for further or modified protections.[3] Randall Decl. ¶¶ 9–10; Gosier Decl. ¶¶ 11, 15; Sobeck Decl. ¶¶ 72, 78, 81.

The 2020 Rule substantially frustrates these efforts, resulting in severe harm to states and tribes. While some states will continue to attempt to apply section 401 as broadly as possible, the fact remains that they do so against the headwind of the 2020 Rule's unlawful limitation on scope and the use of "reopener" clauses, among other detrimental provisions. At *best*, the 2020 Rule will result in scores of lawsuits related to individual 401 certification decisions. At *worst*, critical protections of water resources may be eliminated from federally approved projects altogether.

Far from being hypothetical, these impacts will occur during EPA's reconsideration of the 2020 Rule, with numerous relicensings set to take place in multiple Plaintiff States if the 2020 Rule is in effect for the next two years. Randall Decl. ¶ 10; Gosier Decl. ¶ 23; Sobeck Decl. ¶ 73. And, 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*. Randall Decl. ¶ 11; Sobeck Decl. ¶ 72. For instance, in Washington alone three hydropower dams on the Skagit River will require 401 certifications between now and the spring of 2023, well within EPA's estimate of how long the 2020 Rule will remain in effect. Randall Decl. ¶ 10. The Skagit is home to numerous anadromous fish species, including Chinook salmon—a threatened species and the primary source of food for the endangered

[3] This practice was long permitted as a practical and necessary part of section 401 authority, but is now prohibited by the 2020 Rule. 85 Fed. Reg. 42,280 (July 13, 2020) *citing* 40 C.F.R. § 121.6(e).

Southern Resident Orca population in Puget Sound.[4] *Id*. Because Chinook and other salmonids are extremely sensitive to thermal stress, even relatively small temperature increases cause intense physical distress, with most perishing once water temperatures reach the upper 70 degrees Fahrenheit. *Id*. As such, Washington relies on its section 401 authority to impose conditions to minimize adverse thermal pollution (among other) impacts and as a key part of its Southern Resident Orca recovery efforts. *Id*. Similarly, New York is currently reviewing 40 hydropower project relicensings, at least 10 of which have pending section 401 requests or are anticipated to file request in the near future. Gosier Decl. ¶ 23.

Other states will suffer similar impacts. Like much of the West, California is experiencing extreme drought conditions and is struggling to maintain its rivers at a temperature habitable for salmonids and native fishes. Sobeck Decl. ¶¶ 53, 79–80. Even under non-drought conditions, temperature management is a material issue in most FERC-related certifications where inaction for decades could result in permanent water quality impairments and impacts to threatened, endangered, or other aquatic species of concern. *Id.* ¶ 79. The 2020 Rule hamstrings California's efforts to address temperature and other impacts resulting from hydropower operations. It may be too late to provide the water quality protections at all in some cases if the 2020 Rule is left standing until 2023. *Id.* ¶ 81. North Carolina regularly relied on section 401 to control nutrient loading and excess sedimentation, two of the most harmful threats to North Carolina's water quality and the cause of many of the impacts discussed above, including destruction of aquatic habitat and increased pollution transport. Wojoski Decl. ¶¶ 19–22, 33. Colorado estimates that the vast majority of conditions it utilizes under section 401 to control adverse water quality impacts from water supply projects to streams and reservoirs (like increased temperatures, reduced flows and higher metal concentrations) are

[4] Southern Resident Orcas are in severe decline and threatened with extinction. The iconic Puget Sound population is down to only 73 individuals, its lowest level in over four decades. Randall Decl. ¶ 10.

called into question by the 2020 Rule. Declaration of Aimee M. Konowal in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Konowal Decl.) ¶¶ 3–6.

As these examples demonstrate, the 2020 Rule will impede Plaintiff States' ability to apply water quality protections that have long been utilized to mitigate harms against multiple projects that will be permitted over the next two years.

**2. The 2020 Rule will continue to wreak havoc on the "nationwide" permit system**

The 2020 Rule is also causing ongoing harms related to the re-certification of the so-called "nationwide" permits issued by the U.S. Army Corps of Engineers (the Corps)—harms that will be repeated in dozens of general permit actions in the two years EPA expects it will take to revise the 2020 Rule. The Corps issues nationwide permits for activities occurring under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899 and that have "minimal impacts" to water quality. 33 U.S.C. § 1344(e); 33 C.F.R. § 330.1(b). Nationwide permits are considered "general" permits, and certifying authorities typically make programmatic section 401 decisions that apply to all activities within their respective jurisdictions issued under a nationwide permit, thereby eliminating the need for project proponents covered under such a permit to seek individual section 401 certifications. Randall Decl. ¶ 13. Nationwide permits are usually valid for periods of 5 years, after which they must be renewed. 33 U.S.C. § 1344(e)(2). Renewal triggers the need for re-certification under section 401. 33 U.S.C. § 1341(a)(1).

Shortly after EPA finalized the 2020 Rule, the Corps moved forward with the final steps necessary to re-issue and re-certify the Nationwide Permit Program, including 16 nationwide permits covering oil and gas pipelines, surface coal mining, residential development, and various aquaculture activities. *See* 86 Fed. Reg. 2,744 (Mar. 15, 2021); Randall Decl. ¶ 14. The Corps expects to renew the remaining 40 nationwide permits in the

next two years. Wojoski Decl. ¶ 30; Randall Decl. ¶ 24. Citing the 2020 Rule as justification, the Corps upended the nationwide permit system for these permits. To begin with, and as recently explained by the Council on Environmental Quality (CEQ), the Corps' expedited process for 401 certification of the nationwide permits was "unusual" and significantly curtailed state authority and input throughout the process. Randall Decl. ¶¶ 14–17, Ex. E. As CEQ noted, "[t]he timing for renewal of the permits occurred earlier than in previous renewals, 401 certification was requested on proposed permits rather than final ones, and requests for extensions of the reasonable period of time by which to submit 401 certifications were declined." *Id*.

Despite the fact that the Clean Water Act requires federal agencies to accept 401 certification decisions as written, the Corps relied on the 2020 Rule to require states to review certification requests and issue decisions within an unprecedented short review window, force states to certify draft permits, "declined to rely" on certifications based on its determination that certifications contained "reopener" clauses and, in one case, declared waiver of state certification authority based on a state's inadvertent omission of written explanations for certification conditions. Randall Decl. ¶ 14, 18; Declaration of Rebecca Roose in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Roose Decl.) ¶ 22, Wojoski Decl. ¶¶ 5, 26–28, Sheeley Decl. ¶ 31; Sobeck Decl. ¶ 17. As a result of the 2020 Rule, the Corps invalidated state certification decisions and conditions for these 16 nationwide permits throughout a wide swath of the country, including multiple Plaintiff States. The Corps' application of the Rule also led to the complete loss of section 401 authority for multiple permits in several states.

The Corps' actions on the nationwide permits and pursuant to the 2020 Rule have significant consequences absent reinstatement of prior procedures. For one, without programmatic 401 certifications for these permits, projects that would otherwise qualify for streamlined permit procedures must be processed individually—defeating the purpose of the

nationwide permit system and overwhelming both Corps staff and state certifying authorities. Randall Decl. ¶¶ 19–20; Roose Decl. ¶ 22; Sobeck Decl. ¶ 17. For example, in Washington, the invalidation of the nationwide aquaculture permits resulted in a flood of individual 401 certification requests for shellfish growing operations. Randall Decl. ¶ 20. Because the planting of shellfish seed must occur during specific, narrow windows of the growing season, timely permitting is essential, and the failure to begin these projects during the limited planting window can doom a grower for a season or even permanently. *Id.* ¶ 21. To meet the unprecedented demand for individual aquaculture permits and associated certification requests, Washington was forced to hire new staff and reassign existing employees. *Id.* ¶ 22. While this expenditure of extra resources has allowed Washington to keep pace with the surge (for now), the Corps has been unable to keep up with this increase and has notified Washington and its growers of a potential two-year delay in processing individual permits, which may force a number of growers out of business. Randall Decl. ¶ 23.

Similarly, California projects that the Corps' invalidation of California's general water quality certifications of the Corps' nationwide permits, purportedly due to the 2020 Rule, will require California to process approximately 135 additional individual water quality certifications that would otherwise have been addressed by the general water quality certifications. Sobeck Decl. ¶ 17. California estimates that this will require an additional workload of almost two full-time staff who would otherwise have been devoted to working on higher water quality priorities for California. *Id.* Yet, not all states facing these challenges have the funding necessary to hire new staff and thus are forced to choose between the various federal permitting actions when allocating limited water quality certification resources. *See* Roose Decl. ¶ 23.

Moreover, waiver determinations made by the Corps have effectively eliminated—and likely will continue to eliminate—section 401 authority altogether. For instance, in North Carolina the Corps used the 2020 Rule to declare waiver and refuse to accept North Carolina's

denial of certification for seven nationwide permits based on the state's inadvertent failure to include the rationale for the denial during the rushed and unusual 2020 nationwide certification process.[5] Wojoski Decl. ¶¶ 28–29. When North Carolina tried to remedy its omission, the Corps stated that it had "no choice" under the 2020 Rule other than to declare waiver. Wojoski Decl. ¶ 28, Attachment A. Three of these permits are final, and North Carolina expects the other four to be final in the coming months. Wojoski Decl. ¶ 28. As a result of the Corps' waiver decision under the 2020 Rule, North Carolina is prevented from using its section 401 authority to apply state water quality requirements to projects covered under these permits. Wojoski Decl. ¶¶ 29–30. Facing similar waiver determinations by the Corps, California has had to expend additional resources to issue additional state water quality approvals to protect the quality of its waters. Sobeck Decl. ¶ 18.

These impacts from the Corps' rejection of nationwide permit certifications will continue at least until the permits renew in five years. Wojoski Decl. ¶ 29; Roose Decl. ¶ 23. More importantly, the Corps is on target to renew 40 additional nationwide permits in the coming year and has indicated its intent to follow the same procedure, based on the 2020 Rule. Wojoski Decl. ¶ 30; Sobeck Decl. ¶ 17. These harms are significant and will only be avoided by invalidation of the 2020 Rule.

**3. Countless other harms to Plaintiff States are occurring—and will continue to occur—as a result of the 2020 Rule**

In addition to the harms noted above, countless other adverse impacts from the 2020 Rule will continue to affect Plaintiff States during EPA's review. These include, but are not limited to:

- The 2020 Rule mandates that project proponents submit a pre-filing meeting request 30 days before an application can be submitted, regardless of whether such a meeting has any

[5] The purpose of this denial was to ensure that North Carolina could include individualized conditions for projects relying on these nationwide permits. Wojoski Decl. ¶¶ 28–29.

utility. This requirement both upsets existing state procedures and leads to unreasonable delays. For example, under the 2020 Rule even environmentally beneficial projects that need to be performed on an expedited basis—such as wildfire restoration and recovery projects, cleaning up pollution discharges, stream bank repairs, and other in-water remediation work—are subject to the 30-day pre-application clock *without exception*. Declaration of Steve Mrazik in Support of Plaintiff States' Opposition to Defendants' Motion for Remand Without Vacatur (Mrazik Decl.) ¶ 5; Wojoski Decl. ¶ 9; Sheeley Decl. ¶ 25. Even where states have adopted their own procedures to address emergency situations, the 2020 Rule includes no exception for emergencies. *See* Sheeley Decl. ¶ 25. Because the 2020 Rule contains no provisions for addressing emergency permitting requests, the 30-day pre-application requirement creates an unnecessary, and potentially dangerous, regulatory hurdle that will continue to exist while EPA reconsiders the Rule. This was recently demonstrated in Oregon where projects focused on recovering from the historic 2020 wildfire season faced confusion and delay. *See* Mrazik Decl. ¶ 6.

- The 2020 Rule's elimination of any provision for modification of 401 certifications is causing significant problems and inefficiencies. In California, the 2020 Rule has led to confusion over whether California may modify conditions related to an emergency safety project on the Lake Fordyce Dam where an aspect of the approved proposal was determined to be unsafe. Sobeck Decl. ¶¶ 22–34. At present, and after shifting positions multiple times, the Corps is denying California's and the project proponent's request to amend the 401 certification for the project to accommodate the change in design, leading to significant delays to this critical (and potentially life-saving) project. *Id*. ¶¶ 35–49. *See e.g.* Randall Decl. ¶ 29; Sheeley Decl. ¶ 29 (applicants must submit entirely new applications solely for the modified elements resulting in two water quality certifications for one project).

- The 2020 Rule severely limits the amount of information that a project proponent must supply in order for a certification request to trigger the countdown for the "reasonable period of

time" in which state action must be completed. *See* 40 C.F.R. § 121.5(b). This portion of the 2020 Rule prohibits the certifying authority from determining when it has enough information about a proposed project such that the application can be deemed complete; instead, a project proponent is considered to have submitted a complete request so long as the minimal information required by the 2020 Rule is provided, and without regard to the requirements of state administrative procedures or the quality, descriptiveness, or completeness of the submitted materials. Wojoski Decl. ¶¶ 10–11; Randall Decl. ¶¶ 26–29. As a result, the "reasonable period of time" clock may begin counting down well in advance of when a certifying authority has the information necessary to adequately review the potential impacts to water quality. Wojoski Decl. ¶ 11; Randall Decl. ¶ 27. Moreover, while the 2020 Rule does permit a certifying authority to request additional information it deems necessary for an adequate (and legally defensible) review of the proposal, the clock for the state's review does not reset when that information is provided. EPA's solution to this is for certifying authorities to simply *deny* the certification request. 85 Fed. Reg. at 42,273 (July 13, 2020). Thus, where state administrative procedures require an applicant to provide additional information, state agencies must choose between complying with state administrative procedures (and risk waiving their authority under the 2020 Rule) or complying with the 2020 Rule (and risk being sued for noncompliance with state law). *See* Sheeley Decl. ¶¶ 30, 34; Randall Decl. ¶ 28. This leads to inefficiencies, project delays, and wasted staff time. Sheeley Decl. ¶ 30; Wojoski Decl. ¶ 11; Roose Decl. ¶ 21; Mrazik Decl. ¶ 7.

In summary, EPA's assertion that the resulting harms and the prejudice to Plaintiff States will be "limited" is inaccurate. The harms to Plaintiff States are neither abstract nor speculative. Instead, the harms are extant, and the resulting prejudice more than outweighs EPA's desire to avoid adjudication of the merits. Especially in light of the fact that EPA requests dismissal with prejudice, effectively insulating the 2020 Rule from scrutiny, EPA's motion should be denied. *See* ECF No. 143–2.

**B. Remand Without Vacatur Does Not Advance Judicial Economy in This Case.**

EPA attempts to support its remand request by asserting that granting remand without vacatur promotes judicial economy. EPA Br. at 9. These contentions are unsupported by the law and the facts.

First, cases cited by EPA in support of its judicial economy argument do not support remand. Instead, the cases either refute EPA's arguments for remand or do not address the situation at hand. In particular, *Utility Solid Waste Activities Group v. EPA*¸ 901 F.3d 414 (D.C. Cir. 2018), directly demonstrates that EPA's judicial economy argument is incorrect. In that case, EPA faced challenges from environmental and industry groups related to a rule governing the disposal of "coal residuals." *Id*. at 420. Some aspects of the rule were not subject to challenge, and all parties agreed that those provisions of the rule should stay in effect until a new rule was promulgated. *Id*. at 437. Because no controversy existed with regard to the rule's unchallenged provisions, the court found that "no party will suffer prejudice from remand without vacatur" of those provisions. *Id*. at 438. With regard to the rule's challenged provisions, however, EPA sought voluntary remand to reconsider its interpretation of the statute. *Id*. at 436.

The court granted remand with regard to some parts of the rule challenged by industry, in large part because industry petitioners supported remand. *Id.* at 435–36. The court, however, denied EPA's request for remand to reconsider the provisions challenged by environmental petitioners for two reasons. *Id*. at 436–37. First, because remand would prevent the court from reaching the merits of environmental petitioners' challenge, the court determined that remand would "prejudice vindication of [petitioners'] claim." *Id*. at 436. Second, and critically, the court denied remand because petitioners' claim involved the scope of EPA's statutory authority and, thus, was "intertwined with the exercise of agency discretion going forward." *Id*. at 436–67.

In other words, judicial economy favored denying remand and reaching the merits because it made little sense to allow EPA to reconsider its position without guidance from the court as to the scope of EPA's statutory authority on the very questions it would reconsider. *See id*. The court proceeded to the merits on these claims, determined that EPA's interpretation was arbitrary and capricious, and remanded *with* vacatur. *Id*. at 449. This is precisely the situation in the present case where Plaintiff States' arguments go to the very heart of EPA's statutory authority under section 401 and the very issues in the 2020 Rule that EPA seeks to reconsider. As a result, and consistent with *Utility Solid Waste*, remanding to the agency without reaching the merits both prejudices vindication of Plaintiff States' claims and fails to achieve an economy of judicial resources because it will not provide any guidance that would enable the agency to avoid repeating its prior mistakes.

Other cases cited by EPA are inapposite and do not counsel remand because none involve the situation presented here: i.e., where the agency's request for remand would leave the challenged rule in place for years despite serious concerns over its legality. In *FBME Bank*, the agency's remand request was granted, but only after the court expressly recognized that the rule in question had already been enjoined and would not apply to the plaintiff during the course of the agency's reconsideration. *FBME Bank v. Jacob Lew*, 142 F. Supp. 3d 70, 75 (2015). The court in *American Forest Resource Council v. Ashe*, 946 F. Supp. 2d 1 (D. D.C. 2013), had already determined on the merits that the rule was invalid and only departed from the typical rule requiring vacatur because the harms of leaving an endangered species without *any* habitat protections during remand outweighed the benefits of vacating the rule. *Id*. at 44–45.

Second, EPA's judicial economy argument is self-defeating. In attempting to undercut the non-governmental organization Plaintiffs' harms, EPA asserts that piecemeal litigation can be raised in the future as project proponents, environmental groups, and even states bring as-applied challenges to individual 401 certification decisions. EPA Br. at 12. But this contention

only serves to highlight the fallacy of EPA's claim of judicial economy. Rather than preserve judicial resources, this approach actually *increases* judicial strain by requiring multiple state and federal courts to take up the burden of adjudicating the 2020 Rule's merits on a case-by-case basis in the future. Moreover, this case does not present a situation where as-applied litigation would present additional information helpful to resolution of a merits challenge. Arguments related to the validity of the 2020 Rule are entirely legal ones; no further factual development of the record is required, and with the Rule having been in effect for most of the past year, the impacts to the states are already well known. *See, e.g., supra* Section A. The present case is by far the most efficient means of adjudicating the merits of the 2020 Rule.

Finally, EPA's argument on impacts to agency resources also rings hollow. To begin with, EPA is under no legal obligation to defend the 2020 Rule—especially in light of its concession that the 2020 Rule fails to adhere to cooperative federalism, is contrary to Supreme Court case law, and negatively impacts states' abilities to protect water quality. Indeed, agencies frequently decline to defend rules with which they disagree or have changed policy on. *See, e.g., League of Women Voters of U.S. v. Newby*, 838 F.3d 1 (D.C. Cir. 2016) (United States Election Assistance Commission declining to defend administrative decisions approving guidance on voting laws that required proof of citizenship). But, even if EPA does defend the validity of the 2020 Rule, impacts to the agency would be minimal. Notably, questions related to the legality of the 2020 Rule are entirely legal ones, and EPA will not be required to develop or provide any additional scientific or technical basis for the 2020 Rule. Indeed, in adopting the 2020 Rule, EPA admitted that it did not consider potential adverse water quality impacts or any other non-policy concerns. 85 Fed. Reg. 42,227 (July 13, 2020). Thus, any impacts to the agency are limited—a point that is driven home by the fact that EPA's declaration in support of its motion to remand does not allege any lack of resources necessary to engage in the current litigation. *See* ECF No. 143-1 (Goodin Declaration).

In short, neither the case law nor the circumstances relating to the 2020 Rule favor a finding that judicial resources are conserved by remand in this case. In fact, the opposite is true. The Court should decline EPA's request to avoid an adjudication on the merits and establish a briefing schedule for summary judgment.

**C. If the Court Determines That Remand of the 2020 Rule is Appropriate, it Should Be With Vacatur.**

In the event the Court decides to remand the 2020 Rule, the Court should remand with vacatur.[6] Generally, vacatur is the default in cases where a court orders a remand of a challenged agency action. *See, e.g., All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) (citing *Alsea Valley All. v. DOC*, 358 F.3d 1181, 1185 (9th Cir. 2004)). EPA's motion does not explain why vacatur of the 2020 Rule is not appropriate. Given (1) the clear and serious errors involved in the 2020 Rule; (2) the agency's essential concession that the Rule must be significantly revised in order to address its numerous deficiencies, and (3) the serious harms that will result from its continued implementation during EPA's two-year new rulemaking process, vacatur is appropriate and justified.

To determine whether vacatur is warranted, courts in the Ninth Circuit evaluate two key factors, commonly referred to as the *Allied-Signal* factors[7]: (1) the seriousness of the agency's errors and (2) the disruptive consequences that would result from vacatur. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). In analyzing the first factor, courts assess "whether the agency . . . could adopt the same rule on remand, or whether [the] fundamental flaws in the agency's decision make it unlikely that the same rule would be

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[6] Plaintiffs' Complaint seeks vacatur of the 2020 Rule. Compl. (Dkt. No. 1) at 6, 27. Accordingly, consideration of Plaintiffs' request of remand with vacatur together with Defendants' request for remand without vacatur is appropriate. *See N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 8673038, at *6 (E.D. Cal. Dec. 16, 2016).

[7] *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993).

adopted on remand." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). As to the second factor, "courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) (internal quotations).

In appropriate circumstances, and consistent with the Administrative Procedure Act, vacation of an agency action without an express determination on the merits "is well within the bounds of traditional equity jurisdiction." *Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–1242 (D. Colo. 2011) (*citing Nat. Res. Def. Council v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002)). In exercising this equitable discretion, courts generally consider the two-part test from *Allied-Signal* set out above. *Id*. at 1242 (*citing United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1993)). Additionally, the vacatur analysis discussed above applies to motions for voluntary remand. *See ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016) ("Courts faced with a motion for voluntary remand employ the same equitable analysis courts use to decide whether to vacate agency action after a ruling on the merits.") (internal punctuation and citation omitted); *see also Farmworker Ass'n of Fla. v. EPA*, No. 21-1079, 2021 U.S. App. LEXIS 16882, at *2–3 (D.C. Cir. June 7, 2021).

Applying the vacatur analysis here demonstrates that vacatur of the 2020 Rule is warranted and necessary. EPA's motion does not explain why vacatur of the 2020 Rule is not warranted. As set out below, EPA has effectively conceded that the 2020 Rule has significant legal deficiencies and, as a result, EPA plans to revise the Rule. Moreover, the overwhelming and potentially irreversible harms from continuing to apply the rule for the duration of EPA's planned rulemaking vastly outweigh the harms from vacating the rule promptly and restoring the previous regulatory framework. The *Allied-Signal* factors are met here, and the Court should exercise its equitable authority to vacate the rule on remand.

**1. EPA has conceded that the 2020 Rule must be revised because of its legal deficiencies.**

"One way to measure the seriousness of an agency's errors is to attempt to evaluate the likelihood that the agency will be able to justify future decisions" that would be the same as the challenged agency action. *N. Coast Rivers Alliance,* 2016 WL 8673038, at *8. In assessing this factor, courts have relied on the agency's admission of error or the agency's concession that the challenged decision must be revised. *See Cal. Cmtys. Against Toxics*, 688 F.3d 989, 993 (2012) (considering EPA's concession that there are flaws in the reasoning supporting its challenged rule in the evaluation of the first *Allied-Signal* factor); *N. Coast Rivers Alliance,* 2016 WL 8673038, at *8 (considering the Department of Interior's admission that its new decision will need to be revised). EPA has effectively conceded that the 2020 Rule was promulgated in error. EPA specifically admits that it must "reconsider and revise the 2020 Rule" because it has "'substantial concerns with a number of provisions of the 401 Certification Rule that relate to cooperative federalism principles and CWA section 401's goal of ensuring that states are empowered to protect their water quality.'" EPA Br. at 7 (citing 86 Fed. Reg. at 29,542) EPA also points to its serious concerns that "'the rule's narrow scope of certification and conditions may prevent state and tribal authorities from adequately protecting their water quality.'" *Id.* In particular, EPA will specifically seek to reconsider and revise "the Rule's interpretation of the scope of certification and certification conditions, and the definition of 'water quality requirements' as it relates to the statutory phrase 'other appropriate requirements of State law,' including whether the Agency should revise its interpretation of scope to include potential impacts to water quality not only from the 'discharge' but also from the 'activity as a whole' consistent with Supreme Court case law." EPA Br. at 3.

When seeking remand without vacatur, it is the agency's burden to demonstrate that it could re-adopt the challenged agency action on remand; failure to meet that burden weighs in favor of vacatur. *See N. Coast Rivers Alliance*, 2016 WL 8673038, at *9 (concluding that

because there was no evidence on the record to enable the court to evaluate whether the agency can reach the same decision on remand, the first *Allied-Signal* factor favors vacatur); *see also Nat. Res. Def. Council*, 275 F. Supp. 2d at 1145 ("Where the existing rule is more likely to fall during remand, the courts are more reluctant to enforce that rule in the intervening remand period.").

Tellingly, nowhere does EPA's motion attempt to establish that it "could adopt the same rule on remand." *Pollinator Stewardship Council*, 806 F.3d at 532. In fact, the motion lists a series of issues with the 2020 Rule that the agency "has committed to reconsidering" in its new rulemaking and unequivocally states that it will propose a "rule detailing revisions" to the 2020 Rule. EPA Br. at 2–5. Indeed, EPA admits that its "concerns mirror many of the Plaintiffs' allegations." *Id.* at 7. EPA promises that the revised rule will "restore the balance of state, Tribal, and federal authorities consistent with the cooperative federalism principles central to" section 401, effectively conceding that the 2020 Rule fails to strike the correct balance. EPA Br. at 2–3; Goodin Decl. ¶ 11

Because EPA has in fact conceded that the Rule was adopted in error and could not be re-issued as is, the first *Allied-Signal* factor demonstrates that vacatur may be appropriate if this Court determines that remand is necessary.

**2. Remand *without* vacatur will be significantly more harmful than any harm resulting from vacating the rule.**

The balance of equities similarly weighs heavily in favor of vacatur. EPA has not given any "indication that [they] . . . or anyone else would be seriously harmed or disrupted" if the 2020 Rule were vacated. *See ASSE Int'l v. Kerry*, 182 F. Supp. 3d 1059, 1065 (C.D. Cal. 2016). The 2020 Rule upended the long-standing regulatory regime that governed state certifications for nearly 50 years. Compl. ¶¶ 1.6, 5.15–5.31. Vacating the 2020 Rule will simply restore the status quo that existed for more than four decades while EPA engages in a rulemaking to remedy the Rule's defects. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The

effect of invalidating an agency rule is to reinstate the rule previously in force.") As courts have observed, a "return to the status quo causes little or no disruption." *See Burke v. Coggins*, No. 20-667, 2021 U.S. Dist. LEXIS 29999, at *10 (D.D.C. Feb. 18, 2021). Further, EPA's intent to revise the 2020 Rule in light of the various "substantial concerns" outlined by the agency provides another reason why vacatur of the flawed 2020 Rule will not be disruptive. *Cf. Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 46 (D.D.C. 2013) (vacatur "may well be disruptive" where the agency represented that the revised rule would *not* be materially different from the challenged rule).

Even if there was a credible argument to be made that vacatur and return to the prior familiar regulatory framework will be disruptive, the seriousness of any such disruption is vastly outweighed by the significant harms from continuing to implement the 2020 Rule on remand. As set forth in Section A above, Plaintiffs have presented detailed testimony demonstrating that the harms from maintaining the Rule while the agency engages in prolonged rulemaking are numerous, significant, and potentially irreparable. These serious harms include frustration of Plaintiffs' efforts to implement environmental protections to limit the water quality impacts of federally approved projects, such as hydropower projects and dams, on state natural resources and endangered species; ensure critical drought protections of water resources are put in place timely; and impose conditions required by state law on federal projects governed by Army Corps' nationwide permits, among others. Wojoski Decl. ¶¶ 16–22; Randall Decl. ¶¶ 7–10; Gosier Decl. ¶¶ 12–13; 23 Sobeck Decl. ¶¶ 17–19, 22–48, 70–79. And the Rule has and will continue to cause delay, confusion, inconsistencies, and increased administrative costs borne by the Plaintiffs as they try to comply with its onerous and illegal requirements. Sobeck Decl. ¶¶ 21, 22, 48, 50; Konowal Decl. ¶ 7 (issues with modification); Wojoski Decl. ¶ 10–11; Randall Decl. ¶¶ 26–28 (issues with insufficient info); Mrazik Decl. ¶ 5; Wojoski Decl. ¶ 9; Sheeley Decl. ¶ 25 (issues with prefilling meeting requests).

All of these harms are directly relevant to the Court's vacatur analysis. *See Ctr. for Native* Ecosystems, 795 F. Supp. 2d at 1243 (concluding that harms associated with delay and cost due to Endangered Species Act consultations that will be required as a result of vacatur are "irrelevant" because they contradicted Congressional intent to prevent species extinction regardless of cost). In particular, Plaintiffs' harms directly relate to Congress' goal in the Clean Water Act ensure water quality is protected and Congressional policy that states and tribes are afforded broad authority to safeguard their water resources. *See* 33 U.S.C. § 1251(a), (b). The fact that many of the harms that Plaintiffs have experienced and will continue to experience during EPA's new rulemaking consist of potentially irreversible environmental impacts on state water resources further supports the conclusion that the 2020 Rule must be vacated. *Cf. Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 F. App'x 742, 745 (9th Cir. 2016) (leaving agency decision to issue grazing permits in effect on remand because vacatur would result in reinstating prior permits with terms that are less environmentally protective).

Because the harms that Plaintiffs are bound to suffer if the 2020 Rule remains effective on remand significantly outweigh any potential disruption from reverting to the status quo, this Court should vacate the Rule.

## III. CONCLUSION

The Court should deny EPA's motion to remand without vacatur. EPA fails to establish that the harm to Plaintiff States is outweighed by EPA's desire to not defend the 2020 Rule on the merits. The harms are severe, extant, and well documented, and the burden on EPA if it chooses to defend the rule is minimal. Especially in light of the fact that EPA's motion would effectively shield the 2020 Rule from scrutiny, Plaintiff States request that the Court deny remand and set briefing schedule for adjudication on the merits. In the alternative, and to the extent the Court is inclined to grant remand, the Court should exercise its discretion to remand *with* vacatur in light of the significant legal deficiencies with the 2020 Rule, which EPA has essentially conceded. Vacatur would not result in any prejudice; rather restoring the status quo

would place both regulators and regulated parties on more predictable and sound footing while EPA revises the Rule.

Dated: July 26, 2021 Respectfully submitted,

**SIGNATURES – State Plaintiffs**

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ Kelly T. Wood
KELLY T. WOOD
Managing Assistant Attorney General
GABRIELLE GURIAN
Assistant Attorney General
Washington Office of the Attorney General
PO Box 40117
Olympia, Washington 98504-0117
Telephone: (360) 586-5109
E-mail: Kelly.Wood@atg.wa.gov

FOR THE STATE OF CALIFORNIA and THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

ROB BONTA
Attorney General of California

By: /s/ Tatiana K. Gaur
TATIANA K. GAUR
ADAM LEVITAN
Deputy Attorneys General
California Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Telephone (213) 269-6329
E-mail: Tatiana.Gaur@doj.ca.gov

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut

By: /s/ Jill Lacedonia
JILL LACEDONIA
Assistant Attorney General
Connecticut Office of the Attorney General
165 Capitol Avenue
Hartford, Connecticut 06106
Telephone: (860) 808-5250
E-mail: Jill.lacedonia@ct.gov

FOR THE STATE OF MARYLAND

BRIAN FROSH
Attorney General of Maryland

By: /s/ John B. Howard, Jr.
JOHN B. HOWARD, JR.
Special Assistant Attorney General
Maryland Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
Telephone: (401) 576-6970
E-mail: jbhoward@oag.state.md.us

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico

By: /s/ William Grantham
WILLIAM GRANTHAM
Assistant Attorney General
New Mexico Office of the Attorney General
Consumer and Environmental Protection Div.
201 Third Street NW, Suite 300
Albuquerque, New Mexico 87502
Telephone: (505) 717-3520
E-mail: wgrantham@nmag.gov

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

By: /s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (504) 947-4593
E-mail: paul.garrahan@doj.watate.or.us

FOR THE STATE OF NEVADA

AARON D. FORD
Attorney General of Nevada

By: /s/ Katie S. Armstrong
KATIE S. ARMSTRONG
Deputy Attorney General
Nevada Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (775) 684-1224
E-mail: karmstrong@ag.nv.gov

FOR THE STATE OF COLORADO

PHILIP J. WEISER
Attorney General of Colorado

By: /s/ Annette M. Quill
ANNETTE M. QUILL
Senior Assistant Attorney General
CARRIE NOTEBOOM
First Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, Colorado 80203
Telephone: (720) 508-6000
E-Mail: Annette.quill@coag.gov

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York

By: /s/ Brian Lusignan
BRIAN LUSIGNAN
Assistant Attorney General
New York State Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
Telephone: (518) 776-2399
E-Mail: Brian.Lusignan@ag.ny.gov

FOR THE STATE OF NORTH CAROLINA

JOSHUA S. STEIN
Attorney General of North Carolina

By: /s/ Daniel S. Hirschman
DANIEL S. HIRSCHMAN
Senior Deputy Attorney General
TAYLOR H. CRABTREE
ASHER P. SPILLER
Assistant Attorneys General
North Carolina Department of Justice
PO Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6400
E-Mail: tcrabtree@ncdoj.gov;
aspiller@ncdoj.gov

FOR THE STATE OF NEW JERSEY

ANDREW J. BRUCK
Attorney General of New Jersey

By: /s/ Lisa Morelli
LISA MORELLI
New Jersey Office of the Attorney General
Richard J. Hughes Justice Complex
25 Market Street
PO Box 093
Trenton, NJ 08625-4503
Telephone: (609) 984-6640

FOR THE STATE OF RHODE ISLAND

PETER F. NERONHA
Attorney General of Rhode Island

By: /s/ Alison B. Hoffman
ALISON B. HOFFMAN
Rhode Island Office of Attorney General
150 south Main Street
Providence, Rhode Island 02903
Telephone: (401) 274-4400
E-Mail: ahoffman@riag.ri.gov

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General of District of Columbia

By: /s/ Brian R. Caldwell
BRIAN R. CALDWELL
D.C. Office of the Attorney General
Public Advocacy Division
441 Fourth Street Northwest, Suite 600-S
Washington, DC 20001
Telephone: 202-727-6211
E-Mail: brian.caldwell@dc.gov

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General of Commonwealth of Virginia

By: /s/ David Cardwell Grandis
DAVID CARDWELL GRANDIS
Virginia Office of Attorney General
202 North 9th Street
Richmond, Virginia 23219
Telephone: 804-225-2741
E-Mail: dgrandis@oag.state.va.us

FOR THE STATE OF VERMONT

TJ DONOVAN
Attorney General of Vermont

By: /s/ Laura B. Murphy
LAURA B. MURPHY
Vermont Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
Telephone: (802) 828-1059
E-Mail: laura.murphy@bermont.gov

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota

By: /s/ Peter N. Surdo
PETER N. SURDO
Minnesota Office of the Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101
Telephone: (651) 757-1061
E-Mail: peter.surdo@ag.state.mn.us

FOR THE STATE OF MICHIGAN

DANA NESSEL
Michigan Attorney General

By: /s/ Gillian Wener
GILLIAN WENER
Michigan Office of the Attorney General
ENRA Division
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 335-7664
E-Mail: wenerg@michigan.gov

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Massachusetts Attorney General

By: /s/ Matthew Ireland
MATTHEW IRELAND
Massachusetts Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boxton, MA 02108-1598
Telephone: (617)-727-2200
E-Mail: Mathew.ireland@mass.gov

FOR THE STATE OF WISCONSIN

JOSH KAUL
Wisconsin State Attorney General

By: /s/ Gabe Johnson-Karp
GABE JOHNSON-KARP
Wisconsin Department of Justice
Post Office Box 7867
Madison, Wisconsin 53702
Telephone: (608) 267-8904
E-Mail: johnsonkarpg@doj.state.wi.us

FOR THE STATE OF ILLINOIS

KWAME RAOUL
Illinois State Attorney General

By: /s/ Jason Elliott James
JASON ELLIOTT JAMES
Illinois Office of the Attorney General
Environmental Bureau
69 West Washington Street 18th Floor
Chicago, Illinois 60602
Telephone: (312) 814-0660
E-Mail: jjames@atg.state.il.us

FOR THE STATE OF MAINE

AARON FREY
Maine State Attorney General

By: /s/ Jillian Renee O'Brien
JILLIAN RENEE O'BRIEN
Maine Office of the Attorney General
6 State House Station
Augusta, Maine 04333
Telephone: (207) 626-8582
E-Mail: jill.obrien@maine.gov

**SIGNATURE ATTESTATION**

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: July 26, 2021

/s/ Kelly T. Wood
Kelly T. Wood