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Attorneys for Defendants

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

In re

Clean Water Act Rulemaking

This Document Relates to:

ALL ACTIONS

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

**DEFENDANTS' STATUS REPORT AND
CONSENT MOTION TO SET
BRIEFING SCHEDULE FOR EPA'S
MOTION FOR REMAND WITHOUT
VACATUR**

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"), by and through their counsel, present the following status report and consent motion to set a briefing schedule for EPA's motion requesting that the Court remand the

1 challenged rule to EPA without vacatur. In support of this motion to set a briefing schedule, EPA
2 states as follows:

3 1. Plaintiffs in this action challenge an EPA final rule under the Clean Water Act,
4 entitled the Clean Water Act Section 401 Certification Rule (the “Certification Rule”) (codified
5 at 40 C.F.R. part 121). On January 20, 2021, President Biden signed Executive Order 13,990,
6 *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate*
7 *Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021), directing federal agencies to review certain actions
8 taken between January 20, 2017 and January 20, 2021. The Certification Rule was specifically
9 listed in a subsequent White House Statement as one of the agency actions to be reviewed
10 pursuant to the Executive Order for potential suspension, revision or rescission.¹

11 2. On February 19, 2021, the Parties jointly moved the Court to hold all proceedings
12 in abeyance to allow EPA additional time to brief new administration officials with decision-
13 making responsibility about the Certification Rule (Dkt. No. 131). This Court granted the
14 Parties’ joint motion and ordered the case held in abeyance until April 20, 2021. The Court
15 ordered EPA to provide a status report regarding EPA’s review of the Certification Review by
16 April 20, 2021 (Dkt. No. 132).

17 3. On April 20, 2021, EPA advised the Court that EPA had been reviewing the
18 Certification Rule and conducting briefings with senior leadership in EPA’s Office of Water as
19 well as Administrator Regan in order to determine a course of action with respect to the
20 Certification Rule. EPA determined that it would need additional time to select and announce its
21 intended course of action. Accordingly, EPA moved the Court to continue to hold this matter in
22 abeyance until June 4, 2021 (Dkt. No. 135). The Court granted EPA’s motion and ordered the
23 case held in abeyance until June 4, 2021. The Court also ordered EPA to provide a status report
24 regarding EPA’s course of action by June 4, 2021 (Dkt. No. 136).

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27 ¹ White House, Statements and Releases, Fact Sheet: List of Agency Actions for Review (Jan.
28 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (last visited April 5, 2021).

1 4. On May 26, 2021, EPA signed a notice announcing its intent to revise the
2 Certification Rule. *Notice of Intention to Reconsider and Revise the Clean Water Act Section*
3 *401 Certification Rule*, 86 Fed. Reg. 29541 (June 2, 2021) (the “Notice”).

4 5. As stated in the Notice, EPA intends to reconsider and revise the Certification
5 Rule to restore the balance of state, Tribal, and federal authorities. 86 Fed. Reg. at 29,542-44.
6 While EPA engages with stakeholders and develops a revised rule, it is the Agency’s intent that
7 the 2020 Certification Rule remain in place.

8 6. After EPA signed the Notice, EPA met and conferred with Plaintiffs and
9 requested an additional two weeks to determine the next steps in the litigation. (Dkt. No. 139)
10 The Court granted this request and ordered EPA to provide a status report regarding EPA’s
11 course of action by June 18, 2021 (Dkt. No. 140).

12 7. EPA’s position is that “[a] federal agency may request remand in order to
13 reconsider its initial action.” *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th
14 Cir. 2012). Accordingly, EPA plans to move this Court for remand of the Certification Rule to
15 EPA without vacatur.

16 8. Intervenor-Defendants do not oppose EPA’s motion for remand without vacatur
17 and consent to the briefing schedule set forth below.

18 9. Plaintiffs contend that substantial harms will continue to flow from portions of the
19 Certification Rule while it is being reconsidered and intend to oppose EPA’s motion for remand
20 without vacatur, and consent to the briefing schedule set forth below.

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1 WHEREFORE, EPA respectfully requests that the Court issue an order requiring the
2 following:

3 EPA shall file its motion for remand without vacatur of the Certification Rule no
4 later than July 1, 2021;

5 Intervenor's support brief(s) shall be due by July 15, 2021;

6 Opposition brief(s) shall be due by July 26, 2021;

7 EPA's reply brief in support of its motion shall be due by August 12, 2021;

8 Hearing shall be noticed for 8:00 a.m. on August 26, 2021.
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10 Respectfully submitted this 18th day of June, 2021.

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12 Acting Assistant Attorney General
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14 */s Leslie M. Hill*

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