

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
CLEAN WATER ACT
RULEMAKING.

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

This Document Relates to: (Consolidated)
ALL ACTIONS. **ORDER RE MOTION FOR
REMAND WITHOUT VACATUR**

INTRODUCTION

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

STATEMENT

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

1 navigable water of the United States,” and authorized the Secretary of the Army to permit such
2 discharges under certain conditions. *See* 33 U.S.C. §§ 407 *et seq.* In 1948, following an
3 increase in industrialization throughout the country, Congress passed the Federal Water
4 Pollution Control Act (FWPCA). *See generally* Joel Gross & Kerri Stelcen, *Clean Water Act*
5 2–7 (2d ed. 2012).

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

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

17 The Cuyahoga River Watershed: Proceedings of a Symposium Held at Kent State University
18 104 (George D. Cooke, ed., 1969); Gross & Stelcen, *supra*, at 7; Christine Mai-Duc, The 1969
19 Santa Barbara oil spill that changed oil and gas exploration forever, *L.A. Times*, May 20, 2015,
20 [https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-
21 htmlstory.html](https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-
htmlstory.html).

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

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

1 exercise of his authority under this chapter.

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

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

7 Under Section 401 of the Clean Water Act, a federal agency may not issue a permit or
8 license to an applicant that seeks to conduct any activity that may result in any discharge into
9 the navigable waters of the United States unless a state or authorized tribe where the discharge
10 would originate issues a water quality certification or waives the requirement. EPA is
11 responsible for the certification by non-authorized tribes or when a discharge would originate
12 from lands under exclusive federal jurisdiction. Importantly, “No [federal] license or permit
13 shall be granted if certification has been denied by the State, interstate agency, or the
14 Administrator, as the case may be.” 33 U.S.C. § 1341; *see also* Overview of CWA Section
15 401 Certification, [epa.gov/cwa-401/overview-cwa-section-401-certification](https://www.epa.gov/cwa-401/overview-cwa-section-401-certification) (last visited Oct.
16 21, 2021). Several major federal licensing and permitting schemes are subject to Section 401,
17 such as National Pollutant Discharge Elimination System (NPDES) permits under Section 402,
18 permits for discharge of dredged or fill material into wetlands under Section 404, Federal
19 Energy Regulatory Commission (FERC) licenses for hydropower facilities and natural gas
20 pipelines, and Rivers and Harbors Act Section Nine and Section Ten permits.

21 While EPA has promulgated myriad rules to administer the Clean Water Act, iterations
22 of the administrative rule implementing Section 401 had remained, until recently, singular.
23 EPA originally promulgated 40 C.F.R. Part 121 to implement water quality certifications for
24 Section 21(b) of the FWPCA as it existed in 1971 — a year before the Clean Water Act
25 amendments to the FWPCA. *See* 36 Fed. Reg. 22,487 (Nov. 25, 1971), redesignated at 37 Fed.
26 Reg. 21,441 (Oct. 11, 1972), further redesignated at 44 Fed. Reg. 32,899 (June 7, 1979). EPA
27 would continue to use this rule for the Section 401 licensing scheme. In brief, 40 C.F.R. Part
28 121 as promulgated set out: (i) the minimum procedural content of a certification to facilitate

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

6 * * *

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

17 Pursuant to the executive order, EPA revised its general Section 401 guidance in June
18 2019. Two months later, EPA published an economic analysis of existing Section 401
19 processes. That same month, in a publication dated August 22, 2019, EPA proposed an
20 updated Section 401 certification rule with extensive revisions. After a very active public
21 comment phase, EPA published the final rule in the Federal Register on July 13, 2020. The
22 rule went into effect September 11, 2020. *See* Economic Analysis for the Proposed Clean
23 Water Act Section 401 Rulemaking, NEPIS 810R19001A (Aug. 2019); Clean Water Act
24 Section 401 Guidance for Federal Agencies, States and Authorized Tribes,
25 www.epa.gov/sites/default/files/2019-06/documents/cwa_section_401_guidance.pdf (June 7,
26 2019); 84 Fed. Reg. 44,080 (Aug. 22, 2019); 85 Fed. Reg. 42,210 (July 13, 2020).

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

1 scope of certification to ensuring that a discharge from a point source into a water of the
 2 United States from a federally licensed or permitted activity will comply with “water quality
 3 requirements” — another defined term narrowed to mean applicable provisions of Sections
 4 301, 302, 303, 306, and 307 of the Clean Water Act; (ii) authorizes EPA to establish the
 5 reasonable amount of time for a certifying authority to certify a request; and (iii) authorizes
 6 EPA to determine whether a certifying authority’s denial has complied with the rule’s
 7 procedural requirements, and to deem certifications waived if not. *See* 40 C.F.R. pt. 121.

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

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

21 *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate*
 22 *Crisis*, Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). The administration
 23 specifically listed the certification rule as one agency action set to be reviewed, and EPA stated
 24 its intent to promulgate a new certification rule in a notice published on June 6, 2021. The
 25 earliest EPA will be able to promulgate a revised rule is Spring 2023 (Goodin Decl. ¶ 27). *See*
 26 86 Fed. Reg. 29,541 (June 2, 2021); Fact Sheet: List of Agency Actions for Review,
 27 [www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-](http://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review)
 28 [actions-for-review](http://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review) (Jan. 20, 2021).

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

6 ANALYSIS

7 1. THE APPLICABLE STANDARDS FOR REMAND AND VACATUR.

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

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

1 The deferential standard for reviewing an agency’s request for voluntary remand can
2 raise difficult issues when vacatur comes into play. When a district court rules that an agency
3 action is defective due to errors of fact, law, or policy, the APA explicitly instructs that the
4 court “shall . . . hold unlawful and set aside” the agency action. “This approach enables a
5 reviewing court to correct error but, critically, also avoids judicial encroachment on agency
6 discretion.” 33 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8381
7 (3d ed. 2021); 5 U.S.C. § 706(2). Nevertheless, our court of appeals has held that, when equity
8 demands, a flawed rule need not be vacated. *See CCAT*, 688 F.3d at 992. Oftentimes, an
9 agency may voluntarily request remand prior to a court’s adjudication of the merits of the
10 disputed action. The caselaw here is unsettled. Leaving an agency action in place while the
11 agency reconsiders may deny the petitioners the opportunity to vindicate their claims in federal
12 court and would leave them subject to a rule they have asserted is invalid. On the other hand,
13 vacatur “of an action may allow an agency to abandon a legislative rule without going through
14 the (extensive) trouble of developing a new one.” Wright & Miller, *supra*, at § 8383. Our
15 court of appeals has issued the broad guidance — albeit in opinions where the agency action
16 had been found erroneous — that remand without vacatur is appropriate only in limited
17 circumstances. *CCAT*, 688 F.3d at 994; *Pollinator Stewardship Council v. EPA*, 806 F.3d 520,
18 532 (9th Cir. 2015).

19 Contrasting policy implications have led to a split in authority regarding whether a court
20 may order vacatur without first reaching a determination on the merits of the agency’s action.
21 *Compare Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo.
22 2011) (Judge John L. Kane), with *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126,
23 135–36 (D.D.C. 2010) (Judge Emmet G. Sullivan). Our court of appeals has not had the
24 opportunity to address this question directly, but its holding that even a flawed rule need not be
25 vacated supports the corollary proposition that a flaw need not be conclusively established to
26 vacate a rule. Other district courts in our circuit have consistently acknowledged they have the
27 authority to vacate agency actions upon remand prior to a final determination of the action’s
28 legality. *See, e.g., Pascua Yaqui Tribe v. EPA*, — F. Supp. 3d —, 2021 WL 3855977, at *4

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

5 This order agrees with the foregoing opinions from district judges within our circuit that,
 6 when an agency requests voluntary remand, a district court may vacate an agency’s action
 7 without first making a determination on the merits. Vacatur is a form of discretionary,
 8 equitable relief akin to an injunction. This order finds persuasive the reasoning in *Center for*
 9 *Native Ecosystems*, which explains that “because vacatur is an equitable remedy, and because
 10 the APA does not expressly preclude the exercise of equitable jurisdiction, the APA does not
 11 preclude the granting of vacatur without a decision on the merits.” 795 F. Supp. 2d at 1241–
 12 42; *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542–43 (1987); *Coal. to*
 13 *Protect Puget Sound Habitat v. United States Army Corps of Engineers*, 843 Fed. App’x 77, 80
 14 (9th Cir. 2021).

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

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

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

14 **2. EPA AND INTERVENOR DEFENDANTS’ OBJECTIONS TO VACATUR**
15 **AND ALLIED-SIGNAL.**

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

18 *First*, intervenor defendants contend in a separate motion to strike that plaintiffs’
19 arguments for vacatur in their opposition briefing contravenes Federal Rule of Civil Procedure
20 7(b), Civil Local Rule 7-1(a), and the undersigned’s standing order (Dkt. No. 148 at 2). An
21 August 2021 order ensured that the parties fully briefed this issue concurrently with EPA’s
22 motion for voluntary remand (Dkt. No. 151). Upon review, this order finds that plaintiffs
23 properly addressed the issue of vacatur. EPA has moved for remand *without vacatur*. Yet as
24 our court of appeals has explicitly stated, “We order remand without vacatur only in ‘limited
25 circumstances.’” *Pollinator*, 806 F.3d at 532 (quoting *CCAT*, 688 F.3d at 994). EPA, in fact,
26 quoted *CCAT* in its opening brief, but neglected to address why the instant action is the
27 exception meriting remand without vacatur or why the default standard of vacatur stated in
28 *CCAT* should not apply here. EPA cannot avoid the default standard by strategically tailoring

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

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

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

1 in EPA’s words, “is the foundation of the final rule and [] informs all other provisions of the
2 final rule.” 85 Fed. Reg. at 42,256.

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

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

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

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

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

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

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

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

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

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

14 **A. THE CERTIFICATION RULE’S DEFICIENCIES.**

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

21 In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Supreme
 22 Court affirmed that Section 401(d) confers on states the power to “consider all state actions
 23 related to water quality in imposing conditions on [S]ection 401 certificates.” 511 U.S. 700,
 24 710 (1994). The majority recognized that Section 401(a) contemplates state certification that a
 25 “discharge” will comply with certain provisions of the Clean Water Act while subsection (d)
 26 “expands the State’s authority to impose conditions on the certification of a project” because it
 27 “refers to the compliance of the applicant, not the discharge.” *Id.* at 711. *PUD No. 1*
 28 concluded that Section 401(d) “is most reasonably read as authorizing additional conditions

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

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

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

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

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

- 12 • “the certification action process steps, including whether there is any
13 utility in requiring specific components and information for
14 certifications with conditions and denials; whether it is appropriate for
15 federal agencies to review certifying authority actions for consistency
16 with procedural requirements or any other purpose”
- 17 • “enforcement of CWA Section 401, including the roles of federal
18 agencies and certifying authorities in enforcing certification
19 conditions”
- 20 • “modifications and ‘reopeners,’ including whether the statutory
21 language in CWA Section 401 supports modification of certifications
22 or ‘reopeners,’”
- 23 • “application of the Certification Rule, including impacts of the Rule
24 on processing certification requests, impacts of the Rule on
25 certification decisions, and whether any major projects are anticipated
26 in the next few years that could benefit from or be encumbered by the
27 Certification Rule’s procedural requirements”

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

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

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

3 **B. THE DISRUPTIVE CONSEQUENCES OF VACATUR.**

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

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

19 Our court of appeals has measured the disruptive consequences of vacating an EPA rule
20 by measuring the extent to which a faulty rule could result in possible environmental harm. To
21 that end, our court of appeals has chosen not to vacate an EPA rule when setting aside listing
22 of a snail species as endangered would have risked potential extinction of that species, and
23 when vacating could have, in part, led to air pollution that would undermine the goals of the
24 Clean Air Act. On the other hand, our court of appeals did vacate an EPA action that could
25 have affected sensitive bee populations. *See Pollinator*, 806 F.3d at 532–33 (bees); *CCAT*, 688
26 F.3d at 994 (air); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995)
27 (snails).
28

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

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

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

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

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

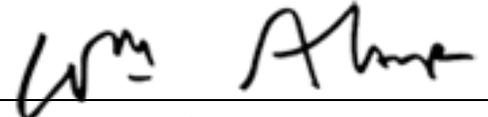
24 CONCLUSION

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

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

4 **IT IS SO ORDERED.**

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6 Dated: October 21, 2021.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California