

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

ROBERT W. FERGUSON
 Attorney General of Washington
 KELLY T. WOOD *
 CINDY CHANG *
 Assistant Attorney Generals
 Washington Office of the Attorney General
 Environmental Protection Division
 800 5th Ave Ste. 2000 TB-14
 Seattle, Washington 98104
 Telephone: (206) 326-5493
 E-mail: Kelly.Wood@atg.wa.gov
Attorneys for Plaintiff State of Washington

11 LETITIA JAMES
 12 Attorney General of New York
 BRIAN LUSIGNAN *
 13 Assistant Attorney General
 Office of the Attorney General
 14 Environmental Protection Bureau
 28 Liberty Street
 15 New York, NY 10005
 Telephone: (716) 853-8465
 16 Fax: (716) 853-8579
 E-mail: brian.lusignan@ag.ny.gov
 17 *Attorneys for Plaintiff State of New York*

18 *[Additional Parties and Counsel Listed on
 19 Signature Pages]*

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

22 **STATE OF CALIFORNIA, BY AND THROUGH**
 23 **ATTORNEY GENERAL XAVIER BECERRA AND**
 24 **THE STATE WATER RESOURCES CONTROL**
 25 **BOARD, STATE OF WASHINGTON, STATE OF**
 26 **NEW YORK, STATE OF COLORADO, STATE OF**
 27 **CONNECTICUT, STATE OF ILLINOIS, STATE OF**
 28 **MAINE, STATE OF MARYLAND,**
COMMONWEALTH OF MASSACHUSETTS, STATE
OF MICHIGAN, STATE OF MINNESOTA, STATE
OF NEVADA, STATE OF NEW JERSEY, STATE OF
NEW MEXICO, STATE OF NORTH CAROLINA,
STATE OF OREGON, STATE OF RHODE ISLAND,

Case No.: 3:20-cv-4869

**COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF**

(Administrative Procedure Act, 5 U.S.C. §
 551 *et seq.*)

1 **STATE OF VERMONT, COMMONWEALTH OF**
 2 **VIRGINIA, STATE OF WISCONSIN, AND THE**
DISTRICT OF COLUMBIA, Plaintiffs,
 3
 4 **v.**
 5 **ANDREW R. WHEELER, IN HIS OFFICIAL**
CAPACITY AS ADMINISTRATOR OF THE UNITED
 6 **STATES ENVIRONMENTAL PROTECTION**
AGENCY, AND THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
 7 Defendants.

8
 9 Plaintiffs, the States of California, Washington, New York, Colorado, Connecticut,
 10 Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North
 11 Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and
 12 Virginia, the District of Columbia, and the California State Water Resources Control Board, by
 13 and through their respective Attorneys General, allege as follows against defendants Andrew R.
 14 Wheeler, in his official capacity as Administrator of the United States Environmental Protection
 15 Agency (EPA), and EPA (collectively, Defendants):

16 INTRODUCTION

17 1.1 This lawsuit challenges a final rule issued by the Defendants, entitled “Updating
 18 Regulations on Water Quality Certification,” 85 Fed. Reg. 42,210 (July 13, 2020) (Rule). The
 19 Rule upends fifty years of cooperative federalism by arbitrarily re-writing EPA’s existing water
 20 quality certification regulations to unlawfully curtail state authority under the Clean Water Act,
 21 33 U.S.C. §§ 1251 *et seq.* (CWA or the Act).

22 1.2 The CWA’s primary objective is “to restore and maintain the chemical, physical
 23 and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In achieving that goal,
 24 Congress recognized the critical and important role states play in protecting and enhancing waters
 25 within their respective borders. *Id.* § 1251(b). And, Congress sought to preserve the States’
 26 preexisting and broad authority to protect their waters. To those ends, the Act specifically
 27 provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary
 28 responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the

1 development and use (including restoration, preservation, and enhancement) of land and water
2 resources” *Id.*

3 1.3 This preservation of state authority is present throughout the Act. Congress
4 preserved for each State the authority to adopt or enforce the conditions and restrictions the state
5 deems necessary to protect its state waters, so long as the state does not adopt standards that are
6 less protective of waters than federal standards. *Id.* § 1370. State standards, including those of the
7 Plaintiff States, may be and frequently are more protective. And, critical to the current action,
8 Congress in section 401 of the Act, 33 U.S.C. § 1341 (section 401), expressly authorized States to
9 independently review the water quality impacts of projects that may result in a discharge and that
10 require a federal license or permit to ensure that such projects do not violate state water quality
11 laws.

12 1.4 Where a State denies a water quality certification under section 401, Congress
13 specifically prohibited federal agencies from permitting or licensing such projects. *Id.* §
14 1341(a)(1).

15 1.5 Congress also broadly authorized States to include conditions in state certifications
16 necessary to ensure an applicant’s compliance with any “appropriate requirement of State law.”
17 *Id.* § 1341(a), (d). The conditions in state certifications must be incorporated as conditions in
18 federal permits. *Id.* § 1341(d). In this way, section 401 prevents the federal government from
19 using its licensing and permitting authority to authorize projects that could violate state water
20 quality laws. *See generally, id.* § 1341.

21 1.6 EPA has long acknowledged and respected the powers preserved for the States in
22 section 401. In fact, until 2019, EPA’s regulations and every guidance document issued by EPA
23 for section 401 certifications—spanning three decades and four administrations—expressly
24 recognized states’ broad authority under section 401 to condition or deny certification of federally
25 permitted or licensed projects within their borders. The Supreme Court and Circuit Courts of
26 Appeals have affirmed that broad state authority under section 401.

27 1.7 In April 2019, however, President Trump signed Executive Order 13868, directing
28 EPA to issue regulations that reduce the purported burdens current section 401 certification

1 requirements place on energy infrastructure project approval and development, thus effectively
2 prioritizing such projects over water quality protection. Executive Order on Promoting Energy
3 Infrastructure and Economic Growth, 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order
4 13868). EPA issued the Rule pursuant to Executive Order 13868.

5 1.8 The Rule violates the Act and unlawfully usurps state authority to protect the
6 quality of waters within their borders.

7 1.9 Contrary to the language of section 401, Supreme Court precedent, and EPA's
8 long-standing interpretation, the Rule prohibits States, including Plaintiff States, from considering
9 how a federally approved project, as a whole, will impact state water quality, instead unlawfully
10 limiting the scope of state review and decision-making to point source discharges into narrowly
11 defined waters of the United States. *Cf. PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*
12 (*PUD No. 1*), 511 U.S. 700, 711 (1994) ("The language of [Section 401(d)] contradicts
13 petitioners' claim that the State may only impose water quality limitations specifically tied to a
14 'discharge'" because the text "allows the State to impose 'other limitations' on the project in
15 general.").

16 1.10 Similarly, the Rule would unlawfully limit states' review and decision-making
17 authority under section 401 by allowing only consideration of whether a federally licensed project
18 will comply with state water quality standards and requirements regulating point source
19 discharges. But section 401 contains no such limitation, instead broadly authorizing States to
20 impose any condition necessary to ensure an applicant complies with "any other appropriate
21 requirement of State law." 33 U.S.C. § 1341(d). Both EPA and the Courts have long recognized
22 the broad scope of the phrase "appropriate requirement of State law." *See PUD No. 1*, 511 U.S. at
23 712-13 (Section 401(d) "author[izes] additional conditions and limitations on the activity as a
24 whole"; these conditions and limitations include "state water quality standards ... [which] are
25 among the 'other limitations' with which a State may ensure compliance through the § 401
26 certification process").

27 1.11 The Rule would also interfere with the States' ability to apply their own
28 administrative procedures to their review of applications for water quality certification, instead

1 imposing onerous federal control over virtually every step of the administrative process. The Rule
2 requires States to take action within a time limit imposed by the federal permitting agency based
3 on a minimal list of required information. State agencies appear to be discouraged from obtaining
4 additional information if that information cannot be developed and provided within that time
5 limit, even for major infrastructure projects that pose significant risk to a wide variety of state
6 water resources for decades. Even when a State is able to make a certification decision before the
7 expiration of the time limit imposed by the federal agency, the federal agency could *still*
8 determine that the State waived its authority if it concludes that the State failed to provide certain
9 information to the federal agency required by the Rule. This Federal dictate of state
10 administrative procedures is fundamentally inconsistent with the cooperative federalism scheme
11 established by the CWA in general, and with the preservation of broad state authority affirmed by
12 section 401 in particular.

13 1.12 EPA's departure from 50 years of consistent administrative and judicial precedent
14 by narrowing state authority under section 401 is contrary to Congress's 1972 enactment of the
15 CWA, which by its terms expressly preserved state authority by incorporating the language of
16 section 401 essentially unchanged from its predecessor statute, the Water Quality Improvement
17 Act of 1970. EPA claims that this drastic change is justified based on its "first holistic analysis of
18 the statutory text, legislative history, and relevant case law." 85 Fed. Reg. at 42,215. However,
19 nothing in the text, purpose, or legislative history of section 401, no matter how "holistically"
20 considered, supports the Rule's substantial infringement on state authority. The Rule unlawfully
21 interprets a statute that is "essential in the scheme to preserve state authority to address the broad
22 range of pollution" affecting state waters, *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S.
23 370, 386 (2006) (*S.D. Warren*), to instead restrict state authority to do so.

24 1.13 By attempting to limit the scope of state section 401 water quality certifications
25 and by imposing new, unjustified, and unreasonable substantive limits, time constraints, and
26 procedural restrictions on States' review of and decisions on section 401 certification
27 applications, the Rule is a radical departure from past EPA policy and practice, is unlawful, and
28

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.