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**U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

DELAWARE RIVERKEEPER)
NETWORK, and the DELAWARE)
RIVERKEEPER, MAYA VAN ROSSUM,)

Plaintiffs,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
ANDREW R. WHEELER,)
in his official capacity as Administrator)
of the United States Environmental)
Protection Agency,)

Defendants.)

COMPLAINT FOR
DECLARATORY
JUDGMENT

CASE NO.2:20-CV-3412

INTRODUCTION

1. Plaintiffs Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum, (collectively, “Plaintiffs”) challenge the United States Environmental Protection Agency’s (“EPA’s”) and the Administrator of

the EPA, Andrew R. Wheeler’s (“Administrator’s”) promulgation of the Clean Water Act Section 401 Certification Rule (“Certification Rule”), 85 Fed. Reg. 42,210 (July 13, 2020) (to be codified at 40 C.F.R. pt. 121). The Certification Rule is an overhaul of 40 C.F.R. Part 121, which contains EPA’s regulations interpreting Section 401 of the Clean Water Act (“Section 401”), 33 U.S.C. § 1341.

2. The Certification Rule eviscerates the ability of states, tribes, and interstate authorities to protect water quality from Federally-approved projects. This dramatic change in policy after nearly fifty years of cooperative federalism was spurred by President Trump’s desire to mow down regulatory obstacles to fossil fuel extraction, transportation, and export. In this administration’s mad rush to seize the “tremendous economic opportunities” of fossil fuel development and “promote private investment in the Nation’s energy infrastructure,”¹ Defendants have taken a reckless approach to rulemaking, resulting in a legally indefensible rule.

3. The Certification Rule is an interpretive rule promulgated outside of Defendants’ Congressionally-delegated authority. Rather than enacting regulations “necessary to carry out [their] functions under” the Clean Water Act, 33 U.S.C. § 1361, Defendants attempt to regulate the functions of states, tribes,

¹ Exec. Order No. 13868, 84 Fed. Reg. 15,495 (Apr. 15, 2019).

interstate agencies, and Federal agencies and the role each plays in administering the Section 401 program.

4. Throughout the rulemaking process, Defendants failed to analyze or even consider the on-the-ground impact the Certification Rule would have on water quality. This flies directly in the face of the Clean Water Act's objective, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

5. Defendants base the purported need to regulate on a paucity of data describing how Section 401 certification requests are handled nationwide, instead relying on a few high-profile projects, which ultimately would not have been certified even if the Certification Rule had been in effect during their review.

6. The Certification Rule narrows the scope of the Section 401 program based on new substantive definitions for terms that are either already defined in the Clean Water Act, or have been defined pursuant to the Supreme Court's interpretation of the unambiguous text of the statute.

7. In fact, the scope is so narrowed, that it renders Section 401 superfluous because it covers the same regulatory ground as the National Pollutant Discharge Elimination System ("NPDES") program in Section 402. *See* 33 U.S.C. § 1342.

8. Defendants also fail to explain how a new regime likely to result in inadequate certification requests and increased certification denials will solve the problem of project proponents experiencing delays in obtaining Section 401 certificates.

9. The Certification Rule imposes new substantive requirements beyond what is required by the statute to define what constitutes an adequate action on a certification request. These substantive requirements are then used in the Certification Rule to justify a Federal agency's finding that the certifying authority "failed to act" within the reasonable period of time, thereby waiving Section 401 certification authority. This setup allows Federal agencies to review certificates and conditions prior to adopting them as a part of the Federal license or permit, contrary to the requirements of the Clean Water Act.

10. Defendants also deprive certifying authorities of their jurisdiction to enforce Section 401 certifications and conditions, vesting that power solely in the Federal agency that issued the license or permit.

11. Finally, the Certification Rule strips neighboring jurisdictions of a protection provided by Section 401—the requirement that the Administrator determine whether a project subject to Section 401 may affect the water quality in a neighboring jurisdiction. This action is now discretionary under the Certification Rule, and the rule erroneously assumes that a certification is a

precondition to the imposition of conditions to protect a neighboring jurisdiction's water quality on a Federal license or permit.

12. Defendants' Certification Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, the Clean Water Act, 33 U.S.C. §§ 1251–1388, and the Tenth Amendment of the United States Constitution, U.S. Const., amend X. For these reasons, Plaintiffs seek an order from this Court vacating and setting aside the Certification Rule.

PARTIES

13. Plaintiff Delaware Riverkeeper Network ("DRN") is a Pennsylvania non-profit organization with its principal place of business at 925 Canal Street, 7th Floor, Suite 3701, Bristol, Pennsylvania. It was established in 1988 and has more than 25,000 members. DRN's mission is to protect and restore the Delaware River, and its tributaries, habitats and resources. To achieve these goals, DRN organizes and implements stream bank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River watershed—an area which includes portions of Pennsylvania, New York, New Jersey and Delaware—and on the national level when necessary to achieve its mission. DRN goes to court when necessary to ensure enforcement of environmental and related laws. DRN has been highly

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