

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION**

<p>STATE OF LOUISIANA, STATE OF ALASKA, STATE OF ARKANSAS, COMMONWEALTH OF KENTUCKY, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF WEST VIRGINIA, AND STATE OF WYOMING, AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, and NATIONAL HYDROPOWER ASSOCIATION,</p> <p>Plaintiffs,</p> <p>v.</p> <p>U.S. ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency,</p> <p>Defendants.</p>	<p>Civil No. 2:23-cv-01714-JDC-TPL</p> <p>Judge James D. Cain, Jr. Magistrate Judge Thomas P. LeBlanc</p>
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MOVANT-INTERVENOR STATES' ANSWER

Intervenors, the States of Washington, California, New York, Connecticut, Colorado, Illinois, Maine, Maryland, Michigan, Minnesota, New Mexico, Oregon, North Carolina, Rhode Island, Vermont, the Commonwealths of Massachusetts and Pennsylvania, and the District of Columbia (State Intervenors), submit this Answer to Plaintiffs' Complaint in the above-captioned lawsuit. Pursuant to Federal Rule of Civil Procedure 8(b), State Intervenors deny each and every allegation contained in Plaintiffs' Complaint except for those expressly admitted herein. To the extent any response is required for Plaintiffs' unnumbered preliminary paragraphs, State Intervenors deny.

I. INTRODUCTION

1. Deny. The allegations in paragraph 1 purport to characterize the Clean Water Act (CWA), 33 U.S.C. § 1341, which is the best evidence of its contents.
2. Admit.
3. Admit that section 401 authority is powerful, in line with clear congressional intent. State Intervenors deny the remainder of this paragraph.
4. Deny.
5. State Intervenors admit that EPA published a final section 401 rule in 2020. 85 Fed. Reg. 42,210 (July 13, 2020) (2020 Rule) and that EPA described its 2020 Rule as a “holistic analysis of the statutory text, legislative history, and relevant case law.” State Intervenors deny the remainder of this paragraph, including any intimation that EPA actually conducted a “holistic analysis of the statutory text, legislative history, and relevant case law” in the 2020 Rule.
6. State Intervenors deny that the 2023 Rule mandates states to exceed their statutory obligations under the CWA or disrupts the CWA’s cooperative federalism framework. Admit the remainder of this paragraph.
7. Admit.
8. State Intervenors lack sufficient knowledge or information to form a belief as to the truth of the allegations in the first sentence of paragraph 8 that the 2023 Rule “causes immediate injury and harm to State Plaintiffs” and deny these allegation on that basis. Moreover, it is difficult to understand how the 2023 Rule causes immediate injury and harm to State Plaintiffs because the 2023 Rule merely returns to the states the section 401 practice that existed for more than 50 years before the radical limitation on state authority embodied in the 2020 Rule.

State Intervenors deny the rest of the first sentence in paragraph 8. State Intervenors admit that under the 2023 Rule, and consistent with section 401(d), certifying authorities must consider the “activity” of the project that seeks section 401 certification. State Intervenors deny the remainder of the second sentence in paragraph 8. State Intervenors deny that the 2023 Rule requires the imposition of conditions “that may bear little relation to water quality” as the 2023 Rule plainly limits the scope of state review to “water quality-related impacts from the activity subject to the Federal license or permit.” 40 C.F.R. § 121.3(a). Section 401(d) requires state water quality certifications to ensure “that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations … and with any other appropriate requirement of State law.” 33 U.S.C. § 1341(d). Intervenors deny the remaining allegations of this paragraph.

9. The allegations in paragraph 9 purport to characterize the 2023 Rule, which is the best evidence of its contents. On that basis, the State Intervenors deny the allegations of this paragraph.

10. State Intervenors lack sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 10 and on that basis deny these allegations.

11. State Intervenors lack sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 11 and on that basis deny these allegations.

12. State Intervenors admit that Plaintiffs’ accurately describe the remedies sought in the Complaint. Intervenors deny that there are any violations of law related to the adoption of the 2023 Rule or that Plaintiffs are entitled to the remedies they seek.

II. THE PARTIES

A. The State Plaintiffs

13. State Intervenors admit that Louisiana is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

14. State Intervenors admit that Alaska is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

15. State Intervenors admit that Arkansas is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

16. State Intervenors admit that Kentucky is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

17. State Intervenors admit that Mississippi is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

18. State Intervenors admit that Missouri is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

19. State Intervenors admit that Montana is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

20. State Intervenors admit that Oklahoma is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

21. State Intervenors admit that South Carolina is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

22. State Intervenors admit that West Virginia is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

23. State Intervenors admit that Wyoming is a sovereign state of the United States of America. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the remainder of this paragraph and, therefore, deny the same.

24. State Intervenors lack sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 24 of the Complaint and on that basis deny these allegations. Moreover, State Intervenors find it difficult to understand how the 2023 Rule, which protects states' rights against those of the federal government, harms Plaintiff States in any way.

25. State Intervenors admit that Plaintiffs Louisiana, Montana, Alaska, Arkansas, South Carolina, Kentucky, West Virginia, Wyoming, and Missouri commented on the proposed 2023 Rule and the comment letter is attached as Exhibit A to the Complaint. The second and third sentences of paragraph 25 of the Complaint characterize and summarize the comment letter submitted by some of the Plaintiffs. State Intervenors deny the allegations in these two sentences and instead point to the text of the comment letter attached as Exhibit A, which is the best evidence of the letter's content.

26. State Intervenors deny the allegations paragraph 26 of the Complaint and instead point to the text of the comment letter attached as Exhibit A, which is the best evidence of the letter's content.

B. To the extent a response is required for this heading, State Intervenors deny.

27. State Intervenors lack sufficient knowledge or information to form a belief as to the truth of the allegations in paragraph 27 of the Complaint and on that basis deny these allegations.

28. Admit.

29. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

30. The allegations in paragraph 30 of the Complaint characterize and summarize the 2023 Rule, which is the best evidence of its contents. On that basis, the State Intervenors deny the allegations of this paragraph.

31. State Intervenors are without sufficient knowledge to either admit or deny the allegations in paragraph 31 of the Complaint and, therefore, deny these allegations. Intervenors clarify that the 2023 Rule does not mandate that any state adopt regulations, policies, or procedures to implement the 2023 Rule.

32. State Intervenors are without sufficient knowledge to either admit or deny the allegations in paragraph 32 of the Complaint and, therefore, deny these allegations.

33. The allegations in paragraph 33 of the Complaint characterize and summarize the requirements of the 2023 Rule, which is the best evidence of its contents. On that basis, the State Intervenors deny the allegations of this paragraph. Further, this paragraph consists of legal conclusions to which no response is required. To the extent a response is required, it is denied.

C. The American Petroleum Institute

34. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

35. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

36. State Intervenors admit the allegations in the first sentence of paragraph 36 of the Complaint. The allegations in the remainder of paragraph 36 characterize and summarize API's comments on the proposed 2023 Rule. State Intervenors deny these allegations on the basis that the best evidence of the contents of API's comments are the comments themselves.

37. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

38. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

39. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

D. The Interstate Natural Gas Association of America

40. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

41. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

42. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

43. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

44. State Intervenors admit the allegations in the first sentence of this paragraph. The allegations in the second and third sentences of this paragraph characterize and summarize the NGA. State Intervenors deny these allegations on the basis that the best evidence of the requirements of the NGA is the NGA itself. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the last sentence of paragraph 44 and, therefore, deny the same.

45. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, State Intervenors deny the allegations in this paragraph.

46. State Intervenors admit the allegations in the first sentence of paragraph 46 of the Complaint. The allegations in the remainder of paragraph 46 characterize and summarize INGAA's comments on the proposed 2023 Rule. State Intervenors deny these allegations on the basis that the best evidence of the contents of INGAA's comments are the comments themselves.

47. The allegations in this paragraph summarize and characterize the requirements of the 2023 Rule. State Intervenors deny these allegations on the basis that the best evidence of the 2023 Rule's contents is the Rule itself. State Intervenors are also without sufficient knowledge to either admit or deny the allegations in paragraph 47 and, therefore, deny the allegations on that basis.

48. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

49. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

50. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

E. National Hydropower Association

51. State Intervenors are without sufficient knowledge to either admit or deny this paragraph and, therefore, deny the same.

52. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

53. State Intervenors admit that hydropower developments are subject to a number of regulatory regimes and approval processes that may involve various state, federal, and tribal agencies. State Intervenors are without sufficient knowledge to either admit or deny the remaining allegations in this paragraph and, therefore, deny the same.

54. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

55. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

56. State Intervenors admit the allegations in the first sentence of paragraph 56 of the Complaint. The allegations in the remainder of paragraph 56 characterize and summarize NHA's comments on the proposed 2023 Rule. State Intervenors deny these allegations on the basis that the best evidence of the contents of NHA's comments are the comments themselves.

F. To the extent a response is required for this heading, State Intervenors deny.

57. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same. To the extent this paragraph summarizes or characterizes section 401, the CWA, or other statutory or regulatory

requirements, State Intervenors deny the allegations on the basis that the best evidence of the contents of these statutory and regulatory requirements are the requirements themselves.

58. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

59. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the first and last sentences of this paragraph and on that basis deny these allegations. The remainder of the allegations in this paragraph consists of legal conclusions to which no response is required. To the extent a response is required, State Intervenors deny these allegations.

60. Deny.

61. State Intervenors admit the allegations that Association Plaintiffs' members have in the past and will in the future require federal permits or licenses requiring section 401 certification. State Intervenors deny the remainder of the allegations in this paragraph.

62. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

63. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the first sentence of this paragraph and, therefore, deny the same. State Intervenors admit the allegations in the second and third sentences of this paragraph. Intervenors clarify that two courts dismissed challenges to the 2020 Rule as moot given EPA's intention to revise the rule. In a ruling overturned by the Ninth Circuit on other grounds, the Northern District of California has determined that the 2020 Rule was adopted in violation of the Clean Water Act. *In Re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021).

64. State Intervenors admit the allegations in this paragraph.

65. State Intervenors deny the allegations in this paragraph.

G. Defendants EPA and Administrator Regan

66. State Intervenors admit the allegations in this paragraph.

67. State Intervenors deny the 2023 Rule violates the CWA and/or the APA. State Intervenors admit the remainder of the allegations in this paragraph.

III. JURISDICTION AND VENUE

68. Paragraph 68 asserts legal conclusions to which no response is required. To the extent a response is required, State Intervenors deny the allegations in paragraph 68.

69. State Intervenors admit that Louisiana resides within the District. State Intervenors deny the remainder of the allegations in this paragraph.

IV. BACKGROUND

A. Statutory Background

i. Clean Water Act

70. State Intervenors admit that section 1251 of the CWA contains the text quoted in this paragraph.

71. State Intervenors admit the allegations in this paragraph.

72. State Intervenors admit the allegations in this paragraph.

73. State Intervenors admit the allegations in this paragraph.

74. State Intervenors admit that Congress enacted the CWA in 1972. State Intervenors deny the remainder of the allegations in this paragraph.

75. State Intervenors admit the allegation that the 1972 CWA amendments moved the water quality certification requirement from section 21(c) of the 1970 Act to section 401 of the CWA. State Intervenors deny the remainder of the allegations in this paragraph, including the

assertion that this was intended by Congress to “narrow” the scope of state authority over water quality certifications in any way.

76. State Intervenors deny the allegations in this paragraph. Intervenors clarify that discharge to WOTUS is a *threshold* requirement of section 401 certification, not a limitation on water quality certification review. *See* 33 U.S.C. § 1341(d). Moreover, once this threshold requirement is triggered, section 401 mandates that states ensure the applicant complies with, among other things, “any other appropriate requirement of State law.” 33 U.S.C. § 1341(d). This system exists to ensure that the federal government is not empowered to override the states’ primary authority over water quality within their borders.

77. State Intervenors admit the allegations in the first and the last sentences of this paragraph. State Intervenors also admit that “states under CWA section 401 have authority to grant, grant with conditions, deny or waive water quality certifications for every federal license or permit issued within their borders.” To the extent that the second sentence refers to “national parks,” instead of “national parts,” State Intervenors admit the allegation in the second sentence starting with “including . . .” and ending at “. . . into WOTUS.” The last sentence of this paragraph consists of legal conclusions to which no response is required. To the extent a response is required, State Intervenors deny the remainder of this sentence.

78. The allegations in this paragraph summarize and characterize section 401, which speaks for itself and is the best evidence of its contents. Further, the allegations in the paragraph consist of legal conclusions. To the extent a response is required, State Intervenors deny the allegations in this paragraph.

79. Admit.

80. The allegations in this paragraph summarize and characterize section 401, which speaks for itself and is the best evidence of its contents. Further, the allegations in the paragraph consist of legal conclusions. To the extent a response is required, State Intervenors deny the allegations in paragraph 80.

81. The allegations in this paragraph summarize and characterize section 401, which speaks for itself and is the best evidence of its contents. Further, the allegations in the paragraph consist of legal conclusions. To the extent a response is required, State Intervenors deny the allegations in this paragraph.

82. State Intervenors admit that section 401 contains the language quoted in this paragraph.

B. Regulatory Background

83. State Intervenors admit that sections 101(d) and 501 of the CWA contain the language quoted in this paragraph. To the extent a further response is required, State Intervenors deny the remaining allegations in this paragraph.

i. 1971 Regulations

84. State Intervenors admit the allegations in this paragraph.

85. State Intervenors admit that EPA did not revise its 1971 section 401 regulations governing the certification process after the statutory changes to the CWA in 1972. State Intervenors deny the remainder of the allegations in this paragraph. State Intervenors clarify that there was no need for EPA to revise the 1971 regulations as the legislative history made abundantly clear that Congress did not intend to alter the intended purpose or function of section 401 as it was carried over from section 21(c) of the 1970 Act. Indeed, until 2020 and the chaos

and disruption that followed the roll out of the 2020 Rule, the 1971 regulations successfully governed section 401 practice for almost 50 years.

86. State Intervenors deny the allegations in this paragraph.

87. State Intervenors admit the allegations in the first sentence of this paragraph and admit that in August 2017, NYSDEC denied the application for a water quality certification for the Millennium Valley Lateral Project. State Intervenors otherwise deny the allegations in this paragraph and affirmatively state that NYSDEC denied the certification application because the applicant repeatedly failed to submit a complete application.

88. State Intervenors deny the allegations in this paragraph.

89. State Intervenors admit that, despite NYSDEC's repeated requests, the applicant for the Constitution Pipeline failed to submit to the certifying agency relevant information necessary for making a determination on the application and that NYSDEC denied the certification on those grounds. State Intervenors are without sufficient knowledge to either admit or deny the remainder of this paragraph and, therefore, deny the same.

90. State Intervenors admit that on April 10, 2019, then-President Trump signed Executive Order 13,868 (since revoked). State Intervenors deny the allegation that the existing regulatory certification was "outdated" as there had been no significant modifications to section 401 since 1971. State Intervenors are without sufficient knowledge to either admit or deny the remainder of the allegations in this paragraph and, therefore, deny the same.

ii. 2020 Water Quality Certification Rule

91. State Intervenors admit the allegation that EPA issued a proposed rule to revise the prior section 401 regulation on August 8, 2019, and sought public comment on that rule. State Intervenors deny the allegations in the remainder of this paragraph.

92. State Intervenors deny that the allegation that the 2020 Rule “remained in effect until the 2023 Rule took effect on November 27, 2023.” State Intervenors admit the remaining allegations in this paragraph.

93. State Intervenors deny the allegations in this paragraph.

94. The allegations in this paragraph consist of characterizations and summaries of the contents of the 2020 Rule, which speaks for itself and is the best evidence for its contents. In addition, the allegations in this paragraph consist of legal conclusion. On these grounds, and to the extent a response is required, State Intervenors deny the allegations.

95. The allegations in this paragraph consist of characterizations and summaries of the contents of the 2020 Rule, which speaks for itself and is the best evidence for its contents. In addition, the allegations in this paragraph consist of legal conclusion. On these grounds, and to the extent a response is required, State Intervenors deny the allegations.

96. The allegations in this paragraph consist of characterizations and summaries of the contents of the 2020 Rule, which speaks for itself and is the best evidence for its contents. In addition, the allegations in this paragraph consist of legal conclusion. On these grounds, and to the extent a response is required, State Intervenors deny the allegations.

97. The allegations in this paragraph consist of characterizations and summaries of the contents of the 2020 Rule, which speaks for itself and is the best evidence for its contents. In addition, the allegations in this paragraph consist of legal conclusion. On these grounds, and to the extent a response is required, State Intervenors deny the allegations.

98. The allegations in this paragraph consist of characterizations and summaries of the contents of the 2020 Rule, which speaks for itself and is the best evidence for its contents. In

addition, the allegations in this paragraph consist of legal conclusion. On these grounds, and to the extent a response is required, State Intervenors deny the allegations.

99. The allegations in this paragraph consist of characterizations and summaries of the contents of the 2020 Rule, which speaks for itself and is the best evidence for its contents. In addition, the allegations in this paragraph consist of legal conclusion. On these grounds, and to the extent a response is required, State Intervenors deny the allegations.

100. State Intervenors admit the allegations in this paragraph.

iii. 2023 Water Quality Certification Rule

101. State Intervenors admit the allegations in this paragraph.

102. State Intervenors admit that some, but not all, Plaintiffs filed comments on the proposed 2023 Rule. The remainder of the allegations in this paragraph consist of characterizations and summaries of the contents of Plaintiffs' comment letters, which speak for themselves and are the best evidence of their contents. On this basis, State Intervenors deny these allegations.

103. State Intervenors admit that EPA published the final rule on September 27, 2023, and the rule became effective November 27, 2023. State Intervenors deny the remaining allegations in this paragraph.

104. State Intervenors admit that EPA stated that the final rule "updates the existing regulations to better align with the statutory text and purpose of the CWA" and is intended to "support an efficient and predictable certification process that is consistent with the water quality protection and cooperative federalism principles central to CWA section 401." State Intervenors deny the remainder of the allegations in this paragraph.

V. FACTUAL ALLEGATIONS

A. To the extent a response is required for this heading, State Intervenors deny.

105. State Intervenors admit the allegations in this paragraph.

106. State Intervenors admit that, once section 401 is triggered, project proponents must submit a request for certification. State Intervenors deny that “request for certification” is a defined term in the 2023 Rule and deny the remaining allegations in this paragraph. State Intervenors further state that the 2023 Rule requires that, “[w]here a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in [§ 121.5(a)] that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.” 40 C.F.R. § 121.5(c).

107. State Intervenors admit the allegations in this paragraph.

108. State Intervenors admit the allegations in this paragraph. State Intervenors clarify that any additional state requirements for a certification request must have been adopted by the state prior to the certification request. 40 C.F.R. § 121.5(c).

109. State Intervenors admit the allegation in this paragraph. State Intervenors clarify that this can only be required to the extent that such draft federal license or permit exists or will exist within the reasonable period of time.

110. State Intervenors admit the allegation that EPA’s proposed rule included a requirement that requests for certification include a copy of the draft Federal license or permit. The remaining allegations in this paragraph summarize and characterize the contents of

INGAA's comment letter, which speaks for itself and is the best evidence of its contents. On that basis, State Intervenors deny the remaining allegations.

111. State Intervenors admit the allegations that EPA made the statements in the preamble to the 2023 Rule. Intervenors deny the remainder of the allegations in this paragraph.

112. State Intervenors admit the allegations in this paragraph.

113. State Intervenors deny the allegations in this paragraph.

B. To the extent a response is required for this heading, State Intervenors deny.

114. State Intervenors admit to the allegation that section 401 contains the quoted text in the first sentence of this paragraph. State Intervenors deny the allegations in the second sentence of this paragraph as inconsistent with the plain language of the CWA, its legislative history, and applicable case law.

115. State Intervenors admit the allegations in the first two sentences in paragraph 115. The remaining sentences assert legal conclusions to which no response is required. To the extent a response is required, State Intervenors deny the remaining allegations in paragraph 115.

116. State Intervenors deny the allegation that the 2020 Rule's scope of review was consistent with the CWA or its legislative history. State Intervenors assert that the 2020 Rule adopted a scope of review that illegally limited state authority to assuring that the "discharge" from the permitted activity would comply with water quality requirements.

117. State Intervenors admit the allegation that the 2023 Rule includes the quoted language. State Intervenors deny the remaining allegations in this paragraph. State Intervenors further assert that in the 2023 Rule, EPA returned to the scope of section 401 certification that successfully governed section 401 practice for more than 50 years prior to the 2020 Rule.

118. State Intervenors admit the allegation that, consistent with the plain language and legislative history of the CWA, and as confirmed by the Supreme Court in *PUD No. 1*, the 2023 Rule recognizes that, once there is a potential for a point source discharge into Waters of the United States, certifying authorities must determine whether the activity complies with applicable water quality requirements. State Intervenors deny the allegation that the 2023 Rule “imposes a duty . . . that this is inconsistent with either the CWA’s plain language and intent, which focus on the discharge, not the activity.”

i. **To the extent a response is required for this heading, State Intervenors deny.**

119. State Intervenors admit to the allegation that the 2023 Rule contains the quoted regulatory text. State Intervenors further admit to the allegation that, once section 401 certification is triggered, the certifying authority must evaluate all water quality impacts of the proposed activity. State Intervenors deny the remaining allegations in this paragraph.

120. State Intervenors admit the allegations in this paragraph. By way of further answer, State Intervenors point out that, if a state cannot adopt conditions that are sufficient to satisfy “any other water quality-related requirement of state . . . law” under subsection (d), clearly the state cannot grant water quality certification under subsection (a). To the extent Plaintiffs read subsections (a) and (d) in isolation, such reading is erroneous and contrary to basic principles of statutory construction. *Sealed Appellee 1 v. Sealed Appellant 1*, 767 F.3d 418, 421 (5th Cir. 2013) (“[a] statute must be read as a whole, and individual terms or phrases should not be interpreted in isolation”).

121. State Intervenors admit to the allegation that section 401 contains the quoted statutory text. State Intervenors deny the allegations in the remainder of this paragraph. By way of further answer, State Intervenors point out that, if a state cannot adopt conditions that are

sufficient to satisfy “any other water quality-related requirement of state … law” under subsection (d), clearly the state cannot grant water quality certification under subsection (a). To the extent Plaintiffs read subsections (a) and (d) in isolation, such reading is erroneous and contrary to basic principles of statutory construction. *Sealed Appellee*, 767 F.3d at 421 (“[a] statute must be read as a whole, and individual terms or phrases should not be interpreted in isolation”).

122. State Intervenors admit to the allegation that EPA took the position on the scope of section 401 review as stated in the 2023 Rule. State Intervenors deny the allegation that *PUD No. 1* does not support that approach.

123. State Intervenors admit the allegations in this paragraph.

124. Paragraph 124 contains Plaintiffs’ characterization of the Court’s decision in *PUD No. 1*, which speaks for itself and is the best evidence of its contents. To the extent a response is required, State Intervenors deny the allegations in paragraph 124.

125. State Intervenors deny the allegations in this paragraph.

ii. **To the extent a response is required for this heading, State Intervenors deny.**

126. State Intervenors deny the allegations in this paragraph.

127. The allegations in paragraph 127 purport to characterize the 2023 Rule, which speaks for itself and is the best evidence of its contents. To the extent a response is required, State Intervenors deny the allegations in paragraph 127.

128. The allegations in paragraph 128 purport to characterize the 2023 Rule, which speaks for itself and is the best evidence of its contents. To the extent a response is required, State Intervenors deny the allegations in paragraph 128.

129. The allegations in paragraph 129 purport to characterize the 2023 Rule, which speaks for itself and is the best evidence of its contents. To the extent a response is required, State Intervenors deny the allegations in paragraph 129.

130. The allegations in paragraph 130 purport to characterize the CWA and the 2023 Rule, which speak for themselves and are the best evidence of their contents. To the extent a response is required, State Intervenors deny the allegations this paragraph. By way of further answer, Intervenors note that it would be absurd to construe section 401 as prohibiting the federal government from authorizing activities without state consent that such activities do not violate state water quality standards—then prohibit states from considering the impacts to *state* waters from those activities during the state certification process.

131. State Intervenors admit to the allegation that the preamble to the 2023 Rule contains the quoted language.

132. State Intervenors deny the allegations in this paragraph.

133. State Intervenors admit the allegation that a state’s section 401 authority “is not unbounded.” State Intervenors further admit the allegation that the Supreme Court has confirmed that section 401 authority requires states to ensure that the proposed activity complies with applicable effluent limitations under the CWA and “any other appropriate requirement[s] of State Law.” *PUD No. 1*, 511 U.S. at 712. State Intervenors also admit the allegation that the Ninth Circuit has held that activities that only involve non-point discharges do not require section 401 certification. *Oregon Natural Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1099 (9th Cir. 1998). State Intervenors deny the remaining allegations in this paragraph.

134. State Intervenors deny the allegations in this paragraph.

C. To the extent a response is required for this heading, State Intervenors deny.

135. The allegations in paragraph 135 purport to characterize the 2023 Rule, which speaks for itself and is the best evidence of its contents. To the extent a response is required, State Intervenors deny the allegations in paragraph 135.

136. State Intervenors admit the allegation that the preamble of the 2023 Rule contains the quoted language.

137. State Intervenors admit to the allegation that in the preamble of the 2023 Rule EPA maintains the position that it would be inconsistent with section 401 to deny or condition a section 401 water quality certification based solely on potential air quality, traffic, noise, or economic impacts that do not have a connection to water quality. State Intervenors further admit that in the preamble of the 2023 Rule, EPA found it “unnecessary to establish in this rulemaking how indirect or certain the impacts of the activity may be to water quality” and did not specify the “the required degree of causality between the activity and the impact to water quality.” EPA found this to be the case because: (1) the final rule “clearly limits a certifying authority’s analysis of any given activity to the *water quality-related* impacts that may prevent compliance with water quality requirements”; and (2) states have the burden to build “a record to support [their] determination that an activity will or will not comply with applicable water quality requirements.” 88 Fed. Reg. 66,592.

138. State Intervenors admit the allegations in this paragraph.

139. State Intervenors admit the allegations in this paragraph.

140. State Intervenors deny the allegations in this paragraph.

141. State Intervenors deny the allegations in the first sentence of this paragraph. State Intervenors admit the allegation in the second sentence of this paragraph that EPA provided in

the preamble of the 2023 Rule the example of a hydropower project having impacts beyond the discharges from the tailrace or powerhouse. Intervenors point out that the Supreme Court in *PUD No. 1* recognized precisely these sorts of impacts as among those states are authorized to address under their section 401 authority. *PUD No. 1*, 511 U.S. at 711-12.

142. State Intervenors admit the allegations in this paragraph.
 143. State Intervenors admit the allegations in this paragraph.
 144. State Intervenors admit the allegation in this paragraph. By way of further answer, State Intervenors note that increases to temperature are a water quality impact. *See Sierra Club, Inc. v. Granite Shore Power LLC*, 2023 WL 8455290, at *2 (D.N.H. Dec. 6, 2023).
145. State Intervenors deny the allegation in the first sentence of this paragraph that the 2023 Rule “requires” states to consider aspects of the activity that may occur after the permit expires. Plaintiffs selectively quote from the 2023 Rule. The full text of the relevant section states:

Section 401 requires the certification conditions to become conditions of the Federal license or permit subject to certification, regardless of whether the Federal agency has independent authority to condition its license or permit to ensure compliance with water quality requirements. However, EPA emphasizes that—for purposes of section 401—certification conditions cannot “live on” past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401. However, it does not mean that when a certifying authority considers whether to grant or deny certification, the certifying authority is limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate.

State Intervenors admit the allegations in the second and third sentences of paragraph 145 that the 2023 Rule contains the quoted language. State Intervenors deny any remaining allegations in this paragraph.

146. State Intervenors deny the allegations in this paragraph.

D. To the extent a response is required for this heading, State Intervenors deny.

147. State Intervenors admit the allegations in this paragraph.

148. State Intervenors admit the allegations in this paragraph.

149. State Intervenors admit the allegations in this paragraph.

150. State Intervenors admit the allegations in this paragraph. By way of further answer, State Intervenors clarify that denials of certification requests can be with or without prejudice.

E. To the extent a response is required for this heading, State Intervenors deny.

151. The allegations in this paragraph purport to characterize the preamble of the 2023 Rule, which speaks for itself and is the best evidence of its contents. To the extent a response is required, State Intervenors deny the allegations in this paragraph. By way of further answer, State Intervenors clarify that the preamble to the 2023 Rule does not state that decisions issued by certifying authorities after November 27, 2023, must “comply” with the 2023 Rule. 88 Fed. Reg. 66,655. The preamble language cited in this paragraph is considerably more nuanced. EPA, instead, states that “all actions taken as part of the section 401 certification process must be taken pursuant to the [2023] rule … [h]owever, the validity of the request for certification [is] determined under the 2020 Rule and the project proponent would not need to request certification consistent with the final rule.” *Id.*

152. The allegations in paragraph 152 purport to characterize the preamble of the 2023 Rule, which speaks for itself and is the best evidence of its contents. To the extent a response is required, State Intervenors deny the allegations in paragraph 152. By way of further answer, State Intervenors clarify that EPA has made clear that “the certifying authority must still issue its certification decision within the reasonable period of time, which would not pause while the certifying authority is seeking more information.” *Id.*

153. State Intervenors deny the allegations in this paragraph.

154. State Intervenors deny the allegations in this paragraph.

155. State Intervenors are without sufficient knowledge to either admit or deny the allegations in this paragraph and, therefore, deny the same.

156. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the first sentence of this paragraph and, therefore, deny the same. State Intervenors deny the allegations in the remainder of this paragraph.

157. State Intervenors are without sufficient knowledge to either admit or deny the allegation in the first sentence of this paragraph and, therefore, deny the same. State Intervenors deny the allegations in the remainder of this paragraph.

158. State Intervenors deny the allegations in the first sentence of this paragraph. State Intervenors admit that, if a state denies a certification request, the party requesting certification would be required to request a new certification subject to the legal and regulatory system in effect at the time of submission. State Intervenors deny the allegations in the remainder of this paragraph.

159. State Intervenors are without sufficient knowledge to either admit or deny the allegations in the first sentence of this paragraph and, therefore, deny the same. State Intervenors

admit that the allegation that, consistent with *PUD No. 1* and longstanding section 401 practice, states can evaluate water quality impacts from the proposed activity and place conditions on the proposed activity to ensure that it will comply with water quality standards. State Intervenors deny the remainder of this paragraph.

160. The allegations in this paragraph contain legal conclusions, characterizations and the summations of the 2020 Rule, which speaks for itself and is the best evidence of its contents. To the extent that a response is required to these allegations, State Intervenors deny them.

161. State Intervenors are without sufficient knowledge to either admit or deny the first sentence of this paragraph and, therefore, deny the same. State Intervenors deny the remainder of this paragraph.

162. State Intervenors admit the allegations in this paragraph.

163. State Intervenors admit the allegations in this paragraph.

164. State Intervenors admit the allegations in this paragraph. By way of further answer, State Intervenors clarify that at no point, including under the 2020 Rule, has EPA ever purported to allow the federal government to dictate the contents of a state's section 401 certification.

165. State Intervenors admit the allegations in this paragraph.

F. To the extent a response is required for this heading, State Intervenors deny.

166. State Intervenors admit the allegation that section 401 provides states with authority to issue section 401 water quality certifications for discharges originating within their respective boundaries, without specifically addressing national parks. State Intervenors clarify that the CWA does not purport to authorize state authority in the very limited circumstances

where such lands are under exclusive federal jurisdiction. State Intervenors deny the remainder of the allegations in this paragraph.

167. State Intervenors are without sufficient information to either admit or deny the allegations in this paragraph and, therefore, deny the same.

168. State Intervenors are without sufficient information to either admit or deny the allegations in this paragraph and, therefore, deny the same.

169. State Intervenors are without sufficient information to either admit or deny the allegations in this paragraph and, therefore, deny the same.

G. To the extent a response is required for this heading, State Intervenors deny.

170. State Intervenors deny the allegations in this paragraph.

171. State Intervenors admit the allegations in this paragraph that the cited cases contain the quoted language.

172. State Intervenors deny the allegations in this paragraph.

173. The allegations in paragraph 173 are Plaintiffs' characterization of EPA's response to INGAA's concerns. EPA's response to comments speaks for itself and is the best evidence of the contents of EPA's response to INGAA's concerns. To the extent a response is required, State Intervenors deny the allegations in paragraph 173.

174. State Intervenors admit the allegations in the first sentence of the paragraph. State Intervenors deny the allegations in the remainder of this paragraph.

175. State Intervenors deny the allegations in this paragraph.

176. State Intervenors deny the allegations in the first sentence of this paragraph. State Intervenors admit the allegations in the second sentence of this paragraph. State Intervenors deny the allegations in the remainder of this paragraph.

177. State Intervenors deny the allegations in the first sentence of this paragraph. State Intervenors admit the allegations in the second sentence of this paragraph. State Intervenors deny the allegations in the remainder of this paragraph.

178. State Intervenors admit the allegation that the case cited in this paragraph contains the quoted language.

179. The allegations in paragraph 179 purport to characterize EPA's explanation in the 2023 Rule. The 2023 Rule speaks for itself and is the best evidence of its contents. The paragraph also contains legal conclusions, to which no response is required. To the extent a response is required, State Intervenors deny the allegations in paragraph 179.

180. State Intervenors deny the allegations in this paragraph.

CLAIMS FOR RELIEF
Count One

The 2023 Water Quality Certification Rule is Arbitrary, Capricious, and an Abuse of Discretion, Exceeds EPA's Statutory Authority, and Is Otherwise Contrary to Law

181. State Intervenors re-allege each and every response to the allegations contained in paragraphs 1 through 180 as if fully set forth herein.

182. The allegations in paragraph 182 contain legal conclusions, to which no response is required. To the extent a response is required, State Intervenors deny the allegations in paragraph 182.

183. State Intervenors deny the allegation in this paragraph.

Count Two

The 2023 Rule Violates the APA's Notice and Comment Rulemaking Procedures

184. State Intervenors re-allege each and every response to the allegations contained in paragraphs 1 through 180 as if fully set forth herein.

185. State Intevenors admit the allegations in this paragraph.

186. State Intervenors admit the allegations in this paragraph.

187. The allegations in paragraph 187 contain legal conclusions, to which no response is required. To the extent a response is required, State Intervenors deny the allegations in paragraph 187.

DEFENSES

1. This Court lacks jurisdiction.
2. Plaintiffs lack standing.
3. Plaintiffs fail to state a claim upon which relief can be granted.
4. There is neither factual nor legal support for injunctive or equitable relief.
5. State Intervenors reserve the right to raise additional defenses.

RESPECTFULLY SUBMITTED this 12th day of January 2024.

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