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August 2, 2021

Via www.regulations.gov

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Lauren Kasparek
Oceans, Wetlands, and Communities Division (4502-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule
Docket ID No. EPA-HQ-OW-2021-0302

Dear Administrator Regan and Ms. Kasparek:

Together, our 38 organizations urge you to promptly restore authority to states and tribes consistent with section 401 of the Clean Water Act. Until you do, states and tribes—and the public—cannot play the vital role they have for decades in permitting decisions that affect the quality of waters where we and our millions of members swim, fish, boat, paddle, hunt, and get our drinking water.

Section 401 is a foundational part of the Clean Water Act, providing a way for states and tribes to collaborate with the federal government. It also ensures they can protect the waters within their borders and related resources from the harms of federally sanctioned projects like pipelines, dams, and mines. The prior administration's changes to the section 401 certification process have significantly harmed our nation's waters and prevented the effective implementation and enforcement of the Clean Water Act.

We appreciate the opportunity to provide input before EPA proposes revisions to the 401 certification regulations, but at bottom, EPA's task in this rulemaking is straightforward and

leaves little room for discretion: the prior administration's rule[1] is unlawful and EPA must reverse most or all of the Rule to comply with the Clean Water Act.[2]

INTRODUCTION

Since the Clean Water Act's enactment and through federal administrations of both political parties, communities and conservation groups have relied on and participated in section 401 certifications to ensure that federally licensed projects do not impair the waters on which people depend. Implementing section 401, states and tribes have engaged the public in their deliberations as required under the Act and responded to concerns expressed by local residents and communities by placing conditions in federal permits and licenses to protect clean water and state and local resources.

The process has worked as Congress intended. In response to public comments and concerns, certifying authorities have required that dams preserve stream flow necessary for aquatic life and provide fish passage for spawning; that pipeline projects control runoff and other water pollution; and that marsh and wetland destruction be avoided, minimized, and mitigated. And when states and tribes have fallen short of their section 401 obligations, the public has held them accountable.

In 2020, to protect a few favored projects from the supposed delay and inconvenience of complying with state and tribal law, the prior administration upended a half century of rule and practice and stripped state and tribal authority over thousands of projects each year, hobbling states', tribes', and the public's ability to voice concerns and achieve important protections.

That Rule faced court challenges from all corners as soon as it was finalized, from states, tribes, and conservation groups across the country.[3] These pending cases seek restoration of certifying authorities' rightful power under the Clean Water Act and relief from the harm the Rule is causing. They also demonstrate just how badly EPA erred when it issued this Rule.

As described more fully in these comments, the Rule contradicts plain statutory text and Supreme Court precedent, and unlawfully cripples the ability of states, tribes, and their residents to protect local waters, natural resources, and communities. EPA should promptly restore the statutorily mandated role of states and tribes in implementing the Clean Water Act's protections within their borders. It should not revise the Rule; it should repeal all or most of it.

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[1] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("Rule" or "2020 Rule").

[2] Many of the organizations signing on to this letter also submitted or joined comments by SELC on the proposal for the 2020 Rule. Those comments are on the docket for that rule at EA-HQ-OW-2019-0405-0025, and we attach them here. Letter from Kelly Moser, Southern Env't Law Ctr., to Andrew Wheeler, Env't Prot. Agency (Oct. 21, 2019) (Attachment 1) ("SELC Comments").

[3] *See Suquamish Tribe v. Regan*, 3:20-CV-06137 (N.D. Cal. filed Aug. 31, 2020); *California v. Regan*, 3:20-CV-04869 (N.D. Cal. filed July 21, 2020); *Del. Riverkeeper v. EPA*, No. 2:20-CV-03412 (E.D. Pa. filed July 13, 2020); *Am. Rivers v. Regan*, No. 3:20-CV-04636 (N.D. Cal. filed July 13, 2020).

I. The harms from the Rule are significant; EPA should repeal the Rule.

As the Supreme Court has explained, "[s]tate certifications under section 401 are essential in the scheme to preserve state authority to address the broad range of pollution" posed by large federally sanctioned industrial developments.[4] Section 401 makes certain that "[n]o polluter will be able to hide behind a Federal license or permit as an excuse" to violate water quality standards and other "appropriate requirements" and that "[n]o state water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements."[5]

Southeastern states, conservation groups, businesses, and the public have long relied on section 401 certifications to ensure that projects like dams, pipelines, and highways do not degrade state waters, consequently hindering business and recreational opportunities and putting public health and safety at risk across the region. Before the Rule, states and tribes could achieve these protections through comprehensive review of application materials, the imposition and enforcement of conditions, and the ability to deny 401 certification when necessary. States and tribes could impose protections related to the entire project such as riparian buffers, erosion and sedimentation controls, chemical monitoring, fish and wildlife protections, drinking water protections, flow requirements, and adaptive management practices. These protections have been crucial to preserving the integrity of water sources throughout the country.

Under the Rule, all these protections were lost. Certifying authorities and the public now have significantly less opportunity to protect their waters from the harms of projects requiring federal permits. As the following examples illustrate, the Rule has real consequences for the Southeast and the entire country, and with every day the Rule remains in place, more projects escape lawful review. EPA must repeal the Rule without delay.

a. The Mountain Valley Pipeline – West Virginia and Virginia

The Mountain Valley Pipeline ("MVP") is a particularly destructive 300-mile gas transmission line under construction in West Virginia and Virginia. As proposed, MVP would run through 17 counties and carry two billion cubic feet of gas per day from the Marcellus and Utica Shale.[6] The path of the pipeline crosses through the heart of the Appalachian Mountains, creating a 150-foot wide scar across some of Virginia and West Virginia's most pristine land. The pipeline itself is being constructed in trenches along steep mountainous slopes, crossing numerous headwater streams and wetlands.

Given the steep terrain and the sheer number of waterbody crossings, the excavation and installation of the pipeline has already caused severe erosion. MVP has consistently violated sediment and stormwater controls required by state laws, permits, and past certifications,

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[4] *S.D. Warren v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 386 (2006).
[5] 116 Cong. Rec. 8805, 8984 (1970).
[6] *Overview*, Mountain Valley Pipeline, https://perma.cc/Z4GM-UCS3 (last visited July 29, 2021).

resulting in extreme stormwater and sediment pollution throughout headwaters and streams across the region.[7] Since construction of the pipeline began, MVP has been cited for more than 300 violations of water protection laws and fined more than $2.7 million.[8] Moreover, MVP has been reprimanded for serious safety concerns associated with underground pipeline instability[9] and landslides threatening homes in the pipeline's path.[10]

After extensive litigation about whether MVP could move forward under a nationwide permit,[11] MVP applied for individual Clean Water Act section 404 permits from the Corps for approximately 500 stream crossings that remain incomplete.[12] EPA recently recommended that the Corps deny the permit for the pipeline as proposed.[13]

This most recent application process shows that the Rule is already hindering Virginia's ability to follow its own state laws for public participation and information, as well as the state's ability to protect its waters. In February 2021, MVP filed a request for a Clean Water Act section 401 certification with the Corps and Virginia.[14] Relying on the Rule, the Corps set an arbitrary and unexplained 120-day limit as the "reasonable period of time" for Virginia to act on the certification request,[15] meaning that if the state did not act by July 2, 2021, it would be deemed to have waived its authority under section 401.[16] Shortly after receiving the application, Virginia determined that MVP's application materials were incomplete and that the state needed

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[7] *See, e.g.*, Va. Office of Attorney General, *Attorney General Herring and DEQ File Lawsuit Over Repeated Environmental Violations During Construction of Mountain Valley Pipeline* (Dec. 7, 2018), https://perma.cc/LXV2-C4P4; Consent Order Issued Under the Water Pollution Control Act, W. Va. Dep't of Env't Prot. (May 8, 2019) (Attachment 2) ("W. Va. Consent Order").

[8] *See e.g.*, W. Va. Consent Order, Attachment 2, *supra* n.7; Laurence Hammack, *Mountain Valley Agrees to Pay $266,000 for Pollution Problems in W.Va.*, The Roanoke Times (May 14, 2019), https://perma.cc/F9RH-6AGT; Va. Office of Attorney General, *MVP, LLC to Pay More than $2 Million, Submit to Court-Ordered Compliance and Enhance Independent, Third-Party Environmental Monitoring* (Oct. 11, 2019), https://perma.cc/R4U9-AN22.

[9] Laurence Hammack, *Report of Pipeline Slips in West Virginia Under Investigation, Raises Concern*, The Roanoke Times (May 3, 2020), https://perma.cc/R4U9-AN22.

[10] Jacob Hileman, *Why the Mountain Valley Pipeline is Uniquely Risky*, Virginia Mercury (Aug. 22, 2019), https://perma.cc/X5L7-A9PF.

[11] *See, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018).

[12] *See* Mountain Valley Pipeline Project Individual Permit Application, Tetra Tech, Inc. (Feb. 2021), https://perma.cc/C37J-XVG7.

[13] Letter from Jeffrey Lapp, EPA Region III, to Michael Hatten, Corps Huntington Dist. (May 27, 2021) (Attachment 3).

[14] Letter from Matthew Hoover, Mountain Valley Pipeline, LLC to Adam Fannin, Corps Huntington Dist, Jared Pritts, Corps Pittsburgh Dist., Todd Miller, Corps Norfolk Dist., Steven Hardwick, Va. Dep't of Env't Quality, and Randy Owen, Va. Marine Res. Comm'n (Feb. 19, 2021) (Attachment 4).

[15] Letter from Melanie Davenport, Va. Dep't of Env't Quality Water Permitting Div., to Vincent Pero, Corps Norfolk Dist. (Mar. 25, 2021) (Attachment 5) ("Va. DEQ Extension Request").

[16] 40 C.F.R. § 121.6.

additional information before it could begin its review.[17] As it awaited the receipt of the additional materials, Virginia asked the Corps for additional time to act on MVP's certification, stating that it needed one year to complete the process.[18] In its request, Virginia laid out the state law requirements that it had to follow—including a 30-day public comment period and a public hearing on the draft permit.[19] Ultimately, the state represented that "[g]iven the statutory timeline" required by state law "it is impossible to issue a . . . Section 401 [certification] . . . by 02 July 2021."[20]

The Corps agreed to extend the time period for review, but only until December 31, 2021.[21] Even with some additional time, it is not clear that Virginia can comply with state law or adequately protect its waters under the Rule, which removes the state's ability to condition the certification with erosion, sediment, and stormwater measures.[22] Virginia state law requires projects like MVP to, among many other things, comply with permanent stabilization measures for soil disturbed for the project, control post-development stormwater run-off with adequate drainage, and install erosion control techniques designed to protect downstream properties and waterways.[23] But because the Rule prohibits states and tribes from considering and imposing certification conditions based on impacts other than the specific point source discharge, like stormwater and erosion, the Rule harms Virginia's ability to impose these conditions or "protect properties, the quality and quantity of state waters, and physical integrity of stream channels" from land-disturbing activities, as required by state law.[24]

Furthermore, Virginia is already struggling to get MVP to provide the information the state needs to begin, much less complete, its review.[25] The Rule starts the clock for review upon the submission of basic, unlawfully restricted "certification request" information,[26] preventing a certifying authority from conducting a meaningful review in time. This has already and will continue to hinder Virginia's ability to carefully review the hundreds of waterbody crossings that MVP will disturb.[27] Given the pipeline's extremely problematic history with erosion, stormwater, and both temporary and permanent stream destruction, Virginia must have its full authority under the Clean Water Act to condition or deny its 401 certification.

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[17] Va. DEQ Extension Request, Attachment 5, *supra* n.15, at 2.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Letter from William Walker, Corps Norfolk Dist., to Melanie Davenport, Va. Dep't of Env't Quality (June 28, 2021), https://perma.cc/3CFM-GPSE.
[22] 40 C.F.R. §§ 121.2 (certification is only required for "an activity that may result in a discharge"), 121.1 (defining discharge to mean "a discharge from a point source into a water of the United States.").
[23] *See, e.g.*, 9 Va. Admin. Code §§ C25-840-40; 25-870-76; 25-840-40(7), (8); 25-840-40(19).
[24] 7 Va. Admin. Code § 25-870-40.
[25] *See* Va. DEQ Extension Request, Attachment 5, *supra* n.15, at 2.
[26] 40 C.F.R. § 121.6.
[27] Va. DEQ Extension Request, Attachment 5, *supra* n.15, at 2.

To protect Virginia's waters and property—as well as the waters across the country facing similar threats from land-disturbing activities like pipelines—the Rule must be repealed.

b. Riverport Development – South Carolina

Since 2010, a Texas-based real estate broker has been trying to get permission to build Riverport, a massive mixed-use development proposed on the boundary of the Savannah National Wildlife Refuge in Jasper County, South Carolina. To accommodate the development, the applicant plans to fill 33 acres of wetlands, as well as surround, fragment, and pollute nearly 1,400 more acres of wetlands within the project area.[28] Even more concerning than the outright destruction of wetlands will be this fragmentation of thousands of wetland acres, which would reduce their ability to support wildlife, absorb floodwaters, and filter pollution. Nearly the entire tract of land, which comprises 50 percent of the watershed,[29] would be paved or built over to accommodate residential, business, and warehouse buildings as well as roads and parking lots, creating impervious surfaces that destroy habitat and worsen runoff and flooding.

The Riverport project will significantly worsen flood control not only in the project area but also in the adjacent Refuge. The Refuge is an ecologically important space containing critical freshwater marshes, tidal rivers and creeks, bottomland hardwoods, and 3,000 acres of managed freshwater impoundments, all of which support a diverse array of plant and animal species. The Refuge is home to endangered marine life, including wood storks, red-cockaded woodpeckers, least terns, shortnose sturgeon, and manatees.[30]

Historically, the land upon which the Riverport project would be built has served as an important boundary and buffer between the Refuge and U.S. Highway 17.[31] The land and accompanying wetlands have consistently provided important flood control and filtration for the water that flows to the Refuge. But if the Riverport project is allowed to proceed without adequate protections, the filling of wetlands and the establishment of an impervious cover will effectively eliminate half of the watershed upon which the Refuge relies while exposing it to extreme stormwater runoff, flood, and pollution risks.

Since the project's proposal, state and federal agencies have raised concerns about the indirect and cumulative effects associated with the Riverport development. The S.C. Department of Natural Resources also raised concerns about the project, calling attention to the unique non-game and endangered species present in the Refuge and the long-term devastating impacts the project would have on the Refuge's waterbodies.[32]

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[28] U.S. Army Corps of Eng'rs, Charleston Dist., Revised JPN SAC-2010-00064 1-2 (Jan. 29, 2021) (Attachment 6) ("Riverport Joint Public Notice").
[29] Letter from Chuck Hayes, Supervisory Wildlife Biologist, Savannah Coastal Refuges Complex, to Allison Monroe, Corps Charleston Dist. (May 27, 2010), at 1 (Attachment 7).
[30] *See Savannah National Wildlife Refuge*, U.S. Fish and Wildlife Serv., https://perma.cc/8NGY-Q2RH (last visited July 29, 2021).
[31] Hayes letter, Attachment 7, *supra* n.29, at 3.
[32] Letter from Robert Perry, Env't Programs Director, S.C. Dep't of Nat. Res., to Allison Monroe, Corps Charleston Dist. (June 24, 2010) (Attachment 8).

The Riverport developer originally sought a Clean Water Act permit from the Corps and a 401 certification from South Carolina several years ago, kicking off a decade of attempts to obtain permission to build the project despite its well-established harms. However, in January 2021, after the so-called Navigable Waters Protection Rule eliminated federal protections for many types of streams and wetlands across the country (at least 200 acres of which fall within the project site), the developer reapplied to the Corps to take advantage of that rule.[33]

Although this project should properly be reviewed under the regulations in place when it first applied, if review of this massive, environmentally devastating project takes place under the Rule, South Carolina would lose many of the tools it has long exercised to protect its aquatic life and natural resources. Under South Carolina law, the Department of Health and Environmental Control must consider "all potential water quality impacts of the project, both direct and indirect, *over the life of the project*," which includes the impacts to and caused by water movement.[34]

Furthermore, the Department of Health and Environmental Control is tasked with denying or conditioning section 401 certifications covering projects that alter the "functions and values" of the aquatic ecosystem.[35] Although the wetland fragmentation Riverport would cause is a serious threat to aquatic "functions and values," under the new Rule it is not clear that South Carolina could consider this harm or impose conditions to ensure compliance with this longstanding state protection.[36]

The Rule strips South Carolina of its ability to consider and condition some of the most egregious concerns about the Riverport development, including the flood and stormwater runoff concerns and long-term indirect harms to plant and animal species caused by post-construction activities. These conditions now likely fall outside the scope of the certification. Further, because the Navigable Waters Protection Rule rendered hundreds of acres of wetlands in the project area non-jurisdictional, and because the 401 Rule only applies to point source discharges into waters of the United States, South Carolina will be prohibited from reviewing impacts to these wetlands.

To maintain pristine resources like the Refuge, as well as wetlands and natural places across the country that will experience harms from development projects without robust protections, the Biden Administration must repeal the Rule promptly, and not merely revise it.

c. U.S. 278 Corridor Improvements – South Carolina

The South Carolina Department of Transportation is proposing to replace and expand the Mackay Creek Bridge, a portion of U.S. 278 connecting Hilton Head Island with the mainland,

[33] Riverport Joint Public Notice, Attachment 6, *supra* n.28.
[34] S.C. Code Ann. Regs. § 61-101 (F)(3)(c) (emphasis added).
[35] *Id.* § 61-101(F)(5)(a).
[36] 40 C.F.R. § 121.2.

to reduce congestion along the highway.[37] The National Environmental Policy Act ("NEPA") process is ongoing, and an Environmental Assessment was just recently released for the public to review. Currently, the state is considering nine alternatives.[38] The preferred alternative would widen the existing corridor to six lanes and result in impacts to over 30 acres of wetlands as well as the relocation of homes and businesses.[39] The proposed corridor will require a Clean Water Act section 404 permit from the U.S. Army Corps of Engineers and a section 401 certification from South Carolina.

The 278 Corridor project seeks to expand the road that runs directly through the middle of the Stoney Community, a Traditional Cultural Property[40] classified under the National Register of Historic Places to preserve the Gullah Geechee cultural identity. The Gullah Geechee people were once the primary occupants of Hilton Head Island.[41] Descendants of Africans enslaved on rice, indigo, and cotton plantations across the South Atlantic, for over a century, the Gullah Geechee established a distinct culture in their language, basket weaving, foodways, storytelling, traditions, and relationship to the land.[42] Original construction of U.S. 278 and a bridge accessing Hilton Head Island split the Stoney Community in 1956, and now the new 278 Corridor Improvements threaten the remaining community members. If built as proposed, the 278 Corridor would extend the highway into community members' yards—leaving mere feet between the highway and their front steps.[43] It will also threaten their wellbeing with possible runoff pollution from construction, and harm wetlands and areas they enjoy walking near and living among.

Not only will the proposed 278 Corridor expansion affect the lives of those living in the Stoney Community, the project threatens Pinckney Wildlife Refuge, a 4,053-acre island near U.S. 278. The Refuge was established in 1975, and the majority of the land is salt marsh and tidal creeks, which supports diverse bird and plant life.[44] The Pinckney Wildlife Refuge serves

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[37] *U.S. Corridor Improvements*, S.C. Dep't of Transp., https://perma.cc/DM9H-W6MQ (last visited July 29, 2021).
[38] U.S. 278 Corridor Improvements Environmental Assessment, S.C. Dep't of Transp. 3-12 (June 2021), https://perma.cc/D76R-WAYS.
[39] *Id.* at 3-19.
[40] A Traditional Cultural Property ("TCP") is a community associated with "the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community." National Register of Historic Places – Traditional Cultural Properties, U.S. Dep't of Interior Nat'l Park Service (2012), https://perma.cc/4T34-Y9CE. TCPs "are rooted in a traditional community's history and are important in maintaining the continuing cultural identity of the community." *Id.*
[41] Gullah Geechee Culture Preservation Project Report, Town of Hilton Head 4 (Apr. 7, 2019), https://perma.cc/NGB7-9RWK.
[42] *The Gullah Geechee People*, Gullah Geechee Cultural Heritage Corridor Commission, https://perma.cc/4K6E-VPCU (last visited July 29, 2021).
[43] Katherine Kokal, *Historic Hilton Head Neighborhood May Be Paved Over by US 278. Will a Land Plan Help?*, The Island Packet (Dec. 16, 2020), https://perma.cc/KUH2-K5J7.
[44] *Pinckney Island*, U.S. Fish & Wildlife Serv., https://perma.cc/8GAF-B4N7 (last visited July 29, 2021).

as a link in the chain of refuges along the Atlantic Flyway. The Refuge attracts thousands of migratory birds annually, while also serving as habitat for year-round wildlife.[45]

Wild places like the Pinckney Wildlife Refuge are vulnerable to infrastructure development such as the 278 Corridor Improvement project. Under the preferred alternative, the Department of Transportation will have to fill and destroy extensive wetlands to accommodate a new bridge as well as road extensions.[46] Filling wetlands will not only destroy the habitat itself, but it will have downstream effects on the Pickney Wildlife Refuge. Wetlands serve an essential function of filtering pollutants, like oil run-off and stormwater, before they reach pristine areas. As the 278 Corridor expands, it will encroach on to the Refuge, threatening the waterbodies and wildlife present.

As with the projects mentioned above, the Rule will limit South Carolina to considering impacts associated with a point source discharge into a water of the United States,[47] and the state will not be able to effectively condition certifications with provisions protecting against sedimentation and stormwater impacts, or providing for compensatory mitigation and ensuring safety and access. Furthermore, the Rule prohibits consideration of long-term project effects, which could limit the state's ability to thoroughly consider the significant environmental justice concerns at stake.

Because the 278 Corridor project will further fragment a community already disrupted by development on Hilton Head, community voices must be heard and respected through a comprehensive public engagement period. The town of Hilton Head has established a 278 Corridor Advisory Group,[48] which has effectively gathered concerns and ideas on how to manage the congestion on U.S. 278. But unfortunately, under the Rule, the Advisory Group and members of the public are given less opportunity to encourage certification conditions that will meaningfully reduce the impact to the community and waterways.

EPA must repeal, and not merely revise, the Rule to preserve state and tribal authority to protect special wildlife places as well as communities who are particularly burdened by pollution and other harms to the rivers, lakes, and wetlands surrounding them.

d. Mountain Valley Pipeline Southgate Extension – North Carolina

Of particular concern are situations where a project has already been denied certification but the applicant is free to apply once again. The Biden Administration must support states' and tribes' decisions on 401 certifications and not allow project proponents to obtain review under the less protective Rule merely by reapplying.

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[45] *Id.*
[46] *U.S. 278 Corridor Improvements, Alternatives*, S.C. Dep't of Transp., https://perma.cc/4FFK-K54D (last visited July 29, 2021); U.S. 278 Independent Review, HDR 6, 13 (Apr. 2021) (Attachment 9) (denoting considerable impacts to wetland, marsh and tidal areas).
[47] 40 C.F.R. §§ 121.2, 121.3.
[48] *U.S. 278 Gateway Corridor Committee*, Town of Hilton Head Island, https://perma.cc/G4QV-SUQV (last visited July 29, 2021).

For example, the same company seeking to build the MVP through West Virginia and Virginia has proposed to extend the pipeline into North Carolina through the MVP Southgate pipeline. As proposed, MVP Southgate would extend 75 miles through Southern Virginia and into Rockingham and Alamance Counties in North Carolina.[49] In North Carolina, the pipeline would cross more than 200 rivers, streams and lakes, as well as 150 wetlands.[50] At nearly every water crossing, MVP would dam or divert flowing water to expose the dry streambed, dig or blast a trench through it, bury the pipeline, and attempt to patch up the bottom of the stream. The pipeline would also run alongside the Haw River, and numerous streams in the Haw River watershed—requiring the removal of natural buffers that protect Jordan Lake, one of the state's most important drinking water reservoirs, and the many streams that run into it. The riparian buffers within watershed are protected by state water quality rules established specifically for the lake.

MVP submitted its first application for a section 401 certification for the Southgate pipeline in November 2018—before it had identified a preferred route for the pipeline. Because the agency would not be able to determine specific impacts to water quality, the Department found MVP's first application premature. In August 2019, MVP Southgate reapplied for a 401 certification and on August 11, 2020, North Carolina denied MVP's request.[51] In the denial, the state explained that, because the main MVP might never be completed, and because the Southgate pipeline's ability to transport gas *depended on* completion of the main MVP, certifying the Southgate pipeline would risk avoidable impacts to North Carolina's waters.[52] The denial cited sedimentation, turbidity, the removal of protective buffers, stream bank erosion, and the introduction of water pollutants as impacts that would be entirely unnecessary if the mainline was never completed.[53] MVP challenged the state's decision in the Fourth Circuit; the court upheld North Carolina's authority to deny the certification, but sent the decision back to the agency to provide more explanation for its denial.[54] Since then, the state reissued the denial as authorized and instructed by the court.[55]

Now, MVP is suggesting that federal agencies find that North Carolina waived its authority, claiming that the state's decision conflicts with the Rule—even though MVP submitted its application before the Rule took effect.[56] North Carolina's denial is without

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[49] Fed. Energy Reg. Comm'n, Southgate Project Final Environmental Impact Statement 2 (Feb. 2020) (Attachment 10) (excerpted).
[50] *Id.* at 4-35, 4-55.
[51] Letter from S. Daniel Smith, N.C. Dep't of Env't Quality, to Kathy Salvador, Mountain Valley Pipeline, LLC (Aug. 11, 2020) (Attachment 11).
[52] *Id.* at 2.
[53] *Id.*
[54] *Mountain Valley Pipeline, LLC v. N.C. Dep't of Env't Quality*, 990 F.3d 818 (4th Cir. 2021).
[55] Letter from S. Daniel Smith, N.C. Dep't of Env't Quality, to Kathy Salvador, Mountain Valley Pipeline, LLC and Alex Miller, Mountain Valley Pipeline, LLC (Apr. 29, 2021) (Attachment 12).
[56] Letter from Todd Normane, Mountain Valley Pipeline, LLC, to S. Daniel Smith, N.C. Dep't of Env't Quality (June 16, 2021), at 3 (Attachment 13).

prejudice, and MVP Southgate could reapply for a 401 certification. If MVP reapplies, review of the project could fall under the Rule, potentially limiting North Carolina's ability to consider the status of the mainline, as well as many of the water quality impacts that the state previously considered, such as sedimentation, erosion, and the removal of riparian buffers. The Rule, therefore, seriously threatens the health of North Carolina's Jordan Lake and Haw River watershed.

The EPA must repeal the Rule to support certifying authorities, like North Carolina, who have repeatedly exercised their authority to protect rivers, streams, lakes, and other waters in their jurisdiction.

II. EPA must swiftly repeal the Rule to comply with the Clean Water Act.

EPA's plan to revise the Rule is misguided. As outlined below, the Rule is thoroughly unlawful, and EPA must reverse most or all of the Rule to comply with the Clean Water Act. EPA cannot let potential additional changes delay undoing the central tenets of the Rule. We urge EPA to reconsider repealing the Rule in whole or part before undertaking additional substantive changes. And we urge EPA to consider letting states and tribes apply any repeal or revision to ongoing certification decisions.

a. Unlawful scope of certification

At the heart of the Rule, tainting almost every provision, is EPA's defiance of the plain text of the Act and the Supreme Court's decision in *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 711–14 (1994).

Under the Act, "[a]ny applicant for a Federal license or permit to conduct any activity . . . , which *may result* in *any discharge* into the navigable waters, shall provide the licensing or permitting agency a certification from the State."[57] The certification must include conditions necessary to ensure that "*any applicant* . . . will comply" with enumerated provisions and "any other appropriate requirement of State law."[58]

The Supreme Court, with just two justices dissenting, held in *PUD No. 1* that this statutory language empowers states and tribes to include conditions based on a project's "activity as a whole" and not just the discharge triggering the certification requirement.[59] On that basis, the Court upheld the minimum stream flow requirements rooted in Washington state's antidegradation policies on a dam certification.[60] But now, under the Rule, states and tribes no longer can impose conditions on the proposed "activity as a whole" to protect waters, as the Supreme Court in *PUD No. 1* understood the plain language of section 401 to authorize.[61]

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[57] 33 U.S.C. § 1341(a)(1) (emphasis added).
[58] *Id.* § 1341(d) (emphasis added).
[59] 511 U.S. at 712.
[60] *Id.* at 723.
[61] *See id.* at 712; *see also* EPA, Wetlands and 401 Certification, Opportunities and Guidelines for States and Eligible Indian Tribes 22 (1989), https://perma.cc/E9CL-6CXB ("1989 Guidance");

There is no dispute that the Rule contradicts the Supreme Court's holding.[62] In the Rule, EPA expressly and unlawfully rejected that controlling ruling of the Supreme Court and embraced the reasoning of the two-justice *dissent* on the scope of 401 certifications.[63] The Court's decision and the plain text of the statute leave no room for discretion: EPA must reverse this part of the Rule. EPA therefore will be acting unlawfully unless and until it undoes the provisions of the Rule that depend on this illegal statutory interpretation.

The root of the problem is the Rule's "scope of certification," codified at 40 C.F.R. § 121.3, which unlawfully restricts certification to a "discharge." EPA must repeal this provision—which, in any event, defines a term that appears nowhere in section 401. But this unlawful restriction of scope permeates other provisions. EPA must therefore also repeal:

- 121.1(n): definition of "water quality requirements" includes only requirements related to a discharge;
- 121.5(b) & (c): materials required in a certification request include only those relevant to a discharge;
- 121.6(c): considerations for establishing a "reasonable time" assume that only the "discharge" is relevant;
- 121.7: the required justification for a denial of certification requires certifying authorities to explain their decision in terms of a discharge;
- 121.8(b): a denial may not take effect unless it complies with the justification demanded in 121.7(e);
- 121.9(a)(2): a state or tribe's certification will be waived unless it complies with the justification required in 121.7;
- 121.10(a): conditions will only be incorporated into a federal permit if they comply with 121.7(d): contrary to the statutory language stating that conditions "shall" become part of the permit;
- 121.11(a) & (b): federal agencies are allowed to inspect projects and enforce certification conditions only to the extent relevant to a discharge, not the activity as a whole;
- 121.13(a): EPA's certification authority likewise extends only to whether a discharge will comply with water quality requirements; and
- 121.4(b): EPA's authority to request additional information extends only to information relevant to discharges.

EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes, 10, 16 (2010) (emphasis added), https://perma.cc/3E4A-JTQ2 ("2010 Guidance").

[62] *See* 85 Fed. Reg. 42,252 (explicitly acknowledging "the final rule's focus on discharges, as opposed to the activity as a whole, is not consistent with the majority opinion in *PUD No. 1*.").

[63] *See id.* at 42,231, 42,233; *see also* Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 44,097 (Aug. 22, 2019) (citing *PUD No. 1*, 511 U.S. at 726–27 (Thomas, J., dissenting)).

As this list demonstrates, EPA must thoroughly overhaul the Rule to excise the prior administration's unlawful "scope of certification" and restore compliance with the Clean Water Act. This is not merely a matter of repealing section 121.3: the very framework of the Rule is centered on the idea that discharges are the only relevant consideration. A complete repeal would be the most straightforward and comprehensive approach to fixing this problem.

b. Unlawful definition of "discharge"

The Rule not only unlawfully restricts certification to "discharges," it also unlawfully restricts "discharges" to "point source discharges into waters of the United States."[64] The Clean Water Act provides no basis for this cramped definition. Indeed, decades of certifying authority practice regulating nonpoint pollution and non–waters of the United States—with EPA's encouragement[65]—demonstrate that the Act should not have this meaning.

For instance, many states, including North Carolina, Georgia, and Virginia, have relied on the 401 certification process to protect local waters from stormwater and other nonpoint source pollution.[66] In comments on the 2019 proposal, attorneys general for 23 states explained that "construction stormwater management is necessary to ensure that a wide variety of contaminants unearthed during the construction process and then carried in stormwater during a storm event do not enter the receiving water body, causing the water body's quality to degrade."[67] States including North Carolina, Virginia, and Georgia have also relied on the 401 certification program to safeguard legally protected riparian buffers—the vegetation that borders streams, rivers, and lakes, and shields them from pollution and other threats.[68] And South Carolina has used 401 certification conditions to protect against pollution of groundwater, a water of the state but not a water of the United States.[69]

With regard to both "discharge" and "water quality requirements" (discussed *infra* Section II.c), EPA cannot justify hobbling state and tribal power by resorting to the same flawed justification it used in the Rule.[70] Allowing states and tribes to protect against nonpoint source pollution and pollution into waters beyond "waters of the United States" reinforces, rather than undercuts, the framework of the Clean Water Act: these types of pollution have always been understood as proper subjects for state authority, with support from EPA. As the Supreme Court

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[64] 40 C.F.R. § 121.1(f).
[65] 2010 Guidance, *supra* n.61, at 17 (emphasis added); *see also* 1989 Guidance, *supra* n.61, at 22–24.
[66] 2010 Guidance, *supra* n.61, at 18–19, 21.
[67] Comments from Robert W. Ferguson, Attorney General of Wash. *et al.* (Oct. 21, 2019), at 21 (EPA-HQ-OW-2019-0405-0556) ("Attorneys General Comments") (Attachment 14).
[68] 2010 Guidance, *supra* n.61, at 18–19, 21.
[69] *See, e.g.*, S.C. Code Ann. Regs. § 61-101(F)(3)(c) (requiring certification process to address "all potential water quality impacts of the project, both direct and indirect, over the life of the project"); *id.* § 61-68(A)(1)(c), (H)(2) (requiring project to comply with state antidegradation rules in "all waters of the State," including "ground water," which state residents "rel[y] heavily upon . . . for drinking water.").
[70] 85 Fed. Reg. 42,234.

stated in *County of Maui v. Hawai'i Wildlife Fund*, "the structure of the statute indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States."[71]

When Congress wanted to limit provisions in the Clean Water Act to point source discharges into waters of the United States, it did so expressly, as in the prohibition of unpermitted point source discharges into navigable waters.[72] Yet section 401 contains no such limitation, and EPA cannot add words to the text that do not exist.

Nor can EPA continue to contend, as it did in the Rule preamble, that the federal enforcement authority can justify limiting the types of discharges that fall within section 401.[73] First, EPA's restriction of enforcement power to federal permitting agencies[74] has no basis in the Clean Water Act. And even if the exclusion of states from enforcement were sound, that restriction would not justify ignoring the plain text of the Act, contravening the Supreme Court, and upending decades of implementation. To do so would let an enforcement power that Section 401 does not even mention dictate the meaning of that section. But Congress "does not . . . hide elephants in mouseholes."[75] If Congress had intended such a narrow reading of section 401, it would have said so explicitly. And in any event, the federal government is not the only enforcement authority: citizens can enforce 401 conditions in federal permits through citizen suits.[76] In the Rule, EPA considered and rejected arguments that citizen suits do not extend to 401 conditions.[77] The limited and non-exclusive role of the federal government should not artificially constrain the reach of section 401.

As with the unlawful scope of certification, the term "discharge" appears in almost every section of the Rule.[78] Repealing this definition would help restore the proper reach of state and tribal authority, and is necessary to comply with the Clean Water Act.

c. Unlawful definition of "water quality requirements"

Repealing the definition of "water quality requirements" at 40 C.F.R. § 121.1(n) is also necessary to stop violating the plain language of the Act.

The Clean Water Act empowers states and tribes to condition certifications to assure compliance with "any other appropriate requirement of state law."[79] The Supreme Court in *PUD No. 1* held that section 401(d) allows states and tribes to impose conditions on the activity as a

[71] 140 S. Ct. 1462, 1471 (2020).
[72] 33 U.S.C. § 1342.
[73] 85 Fed. Reg. 42,235.
[74] 40 C.F.R. § 121.11(c).
[75] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[76] 33 U.S.C. § 1365(a), (f)(6).
[77] 85 Fed. Reg. 42,277.
[78] *See, e.g.*, 40 C.F.R. §§ 121.2, 121.3, 121.5, 121.7, 121.11.
[79] 33 U.S.C. § 1341(d).

whole where there is a discharge,[80] but it declined to weigh in on the meaning of "any other appropriate requirements of state law."[81] The language of the Rule contradicts the Court's holding in *PUD No. 1*, and nothing in the text or legislative history supports the Rule's limitation to standards for point source discharges into waters of the United States, excluding all but a thin set of conditions comporting with its flawed description of state 401 authority.[82]

EPA's invention and definition of the term "water quality requirements" is an unreasonable interpretation of "any other appropriate requirement of state law." First, in the context of section 401, it is the certifying authorities and not EPA who are best positioned to determine what requirements are "appropriate." "Appropriate" implies discretion, and that discretion is best left to the authority issuing the certification. Furthermore, Congress's use of the term "any" indicates that it intended the category to be broad.[83]

EPA's resort to legislative history in the Rule does not change this. Nothing EPA refers to suggests Congress intended to limit certification conditions as narrowly as the Rule does. Rather, Congress knew and intended for certifying authorities to continue their broad authority over nonpoint sources and waters like groundwater. One statement quoted by EPA refers to "water quality requirements established under State law"[84]—which, as creatures of state law, would have no reason to be limited to point sources or waters of the United States.[85] If Congress had intended to limit states and tribes to certification conditions based on point source discharges into waters of the United States, it would have done so expressly.

The Rule's restrictive definition of "any other appropriate requirement of state law" is further unreasonable because it fails to recognize how a wide swath of state protections preserve water quality, even if they fall outside the Rule's "water quality requirements" concept. As the attorneys general of 23 states explained (echoing EPA's own 2010 guidance), standards for erosion and sedimentation control, stormwater management, and endangered species protection all promote water quality even though they do not regulate point source discharges or even expressly regulate water quality.[86] Similarly, the Rule precludes states and tribes from imposing conditions to require compliance with minimum instream flows established under their own water quality standards, which the Supreme Court specifically upheld in *PUD No. 1*. This authority is particularly essential for states and tribes with respect to FERC licensing of hydroelectric projects. EPA's insistence that standards like these are not "appropriate" requirements for certification conditions unreasonably ignores longstanding practice and would degrade water quality, contrary to Congress's intent.

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[80] *PUD No. 1*, 511 U.S. at 711–12.
[81] *Id.* at 713.
[82] *See S.D. Warren Co.*, 547 U.S. at 385–87 (rejecting argument that "discharge" is limited to discharges of a pollutant from a point source for purposes of section 401, holding that a broad definition of "discharge" is essential to the statutory scheme to preserve state and tribal authority to address a broad range of pollution under section 401).
[83] 33 U.S.C. § 1341(d).
[84] 85 Fed. Reg. 42,231.
[85] S. Rep. No. 92-414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3735.
[86] Attorneys General Comments, Attachment 14, *supra* n.67, at 21–22.

EPA must therefore repeal this provision to comply with the Clean Water Act.

d. Unlawful veto of certification denials and conditions

EPA's waiver provisions at 40 C.F.R. §§ 121.8, 121.9, and 121.10 (and the associated justification provisions at § 121.7(d) and (e)) are unlawful for two distinct reasons and must be repealed. First, they usurp the rightful authority of states and tribes to protect their waters under the Clean Water Act. Second, they implement and exacerbate EPA's unlawful scope of certification and definitions of discharge and water quality requirements.

The Clean Water Act is clear: First, when a state or tribe says it is denying a certification, it is a denial, and "*[n]o* license or permit shall be granted if certification has been denied by the State."[87] If Congress had intended to authorize EPA to convert a denial of certification into a waiver, ignore it, and license the project anyway, as proposed here, Congress would not have plainly stated that "[n]o license or permit shall be granted."[88] Section 401 authorizes states and tribes to veto the federal agency, not vice versa. Second, "any" limitation that a state or tribe imposes on a certification it grants "*shall* become a condition on any Federal license or permit."[89]

Courts have held that this language "leaves no room for interpretation": a certification and any conditions *must* become part of the federal permit.[90] Courts across the country have agreed that the Act "mean[s] exactly what it says: that *no* license or permit—whether individual or general—shall be granted if the state has denied certification."[91] The Second Circuit held that "[t]his language is unequivocal."[92] Federal agencies are "limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless."[93]

Defying this "plain" and "unequivocal" statutory text, the Rule lets federal permitting authorities review and reject certification conditions or denials. The Rule adds carveouts and caveats to Congress's straightforward prohibition: now, when a state or tribe denies certification "no license or permit shall be granted"—*unless the federal agency decides* that the state's denial fails the Rule's criteria (which are themselves unlawful, *see supra*).[94] Likewise, though Congress said "*any*" condition in a certification "*shall*" become part of a federal permit,[95] EPA's

[87] 33 U.S.C. § 1341(a)(1).
[88] *Id.*
[89] *Id.* § 1341(d)(1) (emphasis added).
[90] *Sierra Club*, 909 F.3d at 645.
[91] *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 101 (1st Cir. 1989) (emphasis in original).
[92] *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997).
[93] *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006).
[94] 40 C.F.R. § 121.8(b).
[95] 33 U.S.C. § 1341(d)(1).

rule allows federal agencies to leave out conditions that do not satisfy the Rule's specified criteria.[96] EPA cannot add language to a statute where none exists.

The D.C. Circuit's decision in *City of Tacoma v. FERC*[97] cannot save the Rule's veto provisions. That holding discusses only "compliance with the terms of section 401;"[98] it says nothing to even suggest that EPA can invent ostensibly procedural regulations and then require other federal agencies to waive certification decisions that fail to comply with those regulations' unlawful criteria. Additionally, to the extent that *City of Tacoma* could be stretched to require federal agencies to police certifying authorities' substantive certification actions, it contradicts the overwhelming weight of precedent from other circuits discussed above.

Though EPA belatedly cast these veto provisions as procedural in the final Rule, they in fact police substantive compliance with EPA's misreading of the Clean Water Act. Under the Rule, federal agencies may reject conditions when a certifying authority fails to detail how its decisions are "necessary to assure that the discharge . . . will comply with water quality requirements,"[99] as those terms are unlawfully defined. Under the Rule, federal agencies may also override denials and grant permits over state or tribal objection when the certifying authority fails to explain why "the discharge will not comply with the identified water quality requirements."[100] And if a certifying authority denies certification because it lacks sufficient information, it must explain what specific information "would be needed to assure that the discharge from the proposed project will comply with water quality requirements."[101] Finally, under the Rule, a denial or condition "shall be waived" for a state or tribe's "failure or refusal" to tie its decision to whether a "discharge" will comply with "water quality requirements."[102]

EPA must restore the proper authority of states and tribes, and put a stop to federal interference, by undoing the provisions at 40 C.F.R. §§ 121.7, 121.8, 121.9, and 121.10.

e. Unlawful and unreasonable definition of "certification request"

Under the Rule, certifying authorities are required to act on a "certification request" based on incomplete information and subject to time restrictions beyond their control. EPA requires certifying authorities to "grant, grant with conditions, or deny" certification requests "within a reasonable period of time" to be established by the federal agency, but not to exceed one year from receipt of the request.[103] EPA goes further to specify that the clock for the certification decision starts upon receipt of only a few pieces of information,[104] which EPA

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[96] 40 C.F.R. § 121.10(a).
[97] 460 F.3d at 67.
[98] *Id.*
[99] 40 C.F.R. § 121.7(d)(1)(i), (2)(ii); *see also id.* § 121.10 (federal agencies may refuse to incorporate conditions that violate § 121.7(d)).
[100] *Id.* § 121.7(e)(1)(ii), (2)(ii), *see also id.* § 121.8.
[101] *Id.* § 121.7(e)(1)(iii), (2)(iii).
[102] *Id.* §§ 121.9(a)(2)(iii) (citing § 121.7(e)), 121.9(b) (citing § 121.7(b)).
[103] *Id.* §§ 121.7(a), 121.6.
[104] *See id.* § 121.5(b).

concedes may not be enough for states and tribes to "take final action on a certification request."[105] Indeed, the only substantive information mandated by the Rule is "the location and nature of any potential discharge . . . and the location of receiving waters,"[106] and "a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge."[107]

These new restrictions hamper certification authorities' ability to meaningfully evaluate certification applications and accurately certify that a project will comply with water quality requirements and "any other appropriate requirement of state law," as required by the Clean Water Act.[108] As EPA acknowledges,[109] complete information is needed for states and tribes to make certification determinations.[110] In guidance from 1989 and again in 2010, EPA recommended that states and tribes adopt procedures requiring a "complete" application to start the clock for review.[111] And it often takes time for states and tribes to receive all the information they need to make a certification that complies with section 401. As EPA found when it conducted this rulemaking,[112] incomplete applications are the most common reason for delays in state certification decisions.[113]

Indeed, "the process of obtaining required information is not entirely within the [certifying] agency's control: applicants can frustrate the timeframe for review by failing to provide requested materials necessary to the state's review of the application."[114] In fact, applicants have historically "*intentionally* submit[ted] applications with minimal or 'draft'

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[105] 85 Fed. Reg. 42,245 ("The components of a 'certification request' . . . may not necessarily represent the totality of information a certifying authority may need to act on a certification request."); EPA, Clean Water Act Section 401 Certification Rule Response to Comments (May 28, 2020), at 78 (same) (EPA-HQ-OW-2019-0405-1124) ("Response to Comments").
[106] 40 C.F.R. § 121.5(b)(4).
[107] *Id.* § 121.5(b)(5).
[108] 33 U.S.C. §§ 1341(a)(1), (d).
[109] *See* 85 Fed. Reg. 42,245.
[110] *See, e.g.*, *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (Army Corps rule interpreting that only a "valid request" for certification will trigger one-year waiver period is permissible in light of statutory text and reasonable).
[111] *See* 1989 Guidance, *supra* n.61, at 31; 2010 Guidance, *supra* n.61, at 15–16.
[112] *See* EPA, Economic Analysis for the Clean Water Act Section 401 Certification Rule 14–15 (May 28, 2020) (EPA-HQ-OW-2019-1125).
[113] *See* Comments from Ass'n of Clean Water Administrators (ACWA) (May 24, 2019), Attachment A: Survey summary (EPA-HQ-OW-2018-0855-0045) (Attachment 15) ("ACWA Survey Summary").
[114] Comments from Letitia James, Attorney General, New York, *et al.* (May 2019), at 7 (EPA-HQ-OW-2018-0855-0059) (Attachment 16) ("Attorneys General Pre-Proposal Comments"); *see also, e.g.*, *Constitution Pipeline Co. v. N.Y. State Dep't of Env't Control*, 868 F.3d 87, 103 (2d Cir. 2017).

supporting materials in order to get their projects 'in line'" for states or tribes to review them.[115] As one example, when applying for a section 401 certification from North Carolina for its MVP Southgate Project, the project proponent submitted its first application before it had even identified a preferred route for the pipeline—in an attempt to get its project "in line."[116] Without a doubt, the Rule further encourages such practices. In addition, because the Rule does not allow tolling of the time that states or tribes have to review certification requests, applicants will be deterred from providing them with any additional information in a timely manner, if at all.

The Rule puts certifying authorities in a real bind. Without the necessary information on a project, they can either (1) sacrifice the health of their rivers, streams, wetlands, and communities by waiving their authority or by granting certification without essential information; or they can (2) delay the project by denying the certification and likely face prolonged litigation over the decision. Moreover, states and tribes who believe they cannot grant certification on the information submitted may face a federal veto if they deny a request for insufficient information. Section 121.7 of the Rule requires states and tribes to justify such a denial in terms of "the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements"[117]—a requirement that reinforces the Rule's unlawful scope of certification and definitions of discharge and water quality requirements.

Proceeding on a certification with incomplete information also impedes states' and tribes' ability to provide congressionally mandated public notice and comment.[118] In addition to establishing these procedures, states and tribes must, of course, comply with their own public notice and comment requirements, which is impossible to do without complete information from the applicant.[119]

Below we suggest how EPA could clarify what may constitute a "complete" application, primarily by reference to states' and tribes' own regulatory requirements. *See infra* Section III.a.

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[115] Comments from Maia Bellon, Dir., State of Wash., Dep't of Ecology (Oct. 21, 2019), at 5 (EPA-HQ-OW-2019-0405-0931) (emphasis added), (Attachment 17) ("Wash. Dep't of Ecology Comments").

[116] *See* Letter from Linda Culpepper, Dir., N.C. Dep't Env't Quality, Div. of Water Res., to Matthew Raffenberg, Mountain Valley Pipeline, LLC (June 3, 2019) (Attachment 18).

[117] 40 C.F.R. §§ 121.5(e)(1)(iii).

[118] *See* 33 U.S.C. § 1341(a)(1) (certifying authority "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications"); *see also* Response to Comments, *supra* n.105, at 25 (EPA "agrees with commenters that section 401 requires a certifying authority to provide procedures for public notice, and a public hearing where necessary . . . .").

[119] *See, e.g.*, *City of Tacoma*, 460 F.3d at 67–68 ("[B]y implication, section 401(a)(1) also requires states to *comply* with their public notice procedures[.]" (emphasis in original)); *Oh. Valley Env't. Coal. v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 800–802 (S.D. W. Va. 2009) (stating that "[c]ompletion and public notice are inextricably linked" and rejecting notice and comment undertaken on an incomplete application.).

However, at the very least EPA must undo the Rule's unreasonably limited definition of the term "certification request."

f. EPA must apply its new rule to pending certification decisions

As discussed above, major, destructive projects are currently seeking or could soon request certification under the Rule. *See supra* Part I. These projects are receiving less scrutiny and public input than they would have under the previous regulations and policies. Ultimately, certification decisions on these projects would be unlawfully restricted and less protective of waters and communities if the Rule applies.

EPA can minimize the damage from the Rule by (1) issuing its revision as quickly as possible and (2) applying its new rule to ongoing certification decisions.

Although it is appropriate that the 2020 Rule does not apply to certification applications submitted before it became final, the same does not hold true for EPA's next rule. First, project applicants have no reasonable reliance interests in the Rule. It upended decades of regulation and practice and immediately faced legal challenge. It has been in place for less than a year and has been under review by this administration since January 2021. Any applicant that has requested certification for a project since the Rule took effect has done so with the knowledge that the Rule would likely be invalidated or changed. Second, assuming EPA's new rule undoes the fundamental flaws of the Rule, applying the new rule to pending projects will minimize possible litigation over decisions made under the constraints of an unlawful Rule.

Applying the new rule to pending projects is both fairer and less disruptive than allowing the Rule to control decisions made even after it is revised. This approach would benefit certifying authorities, project applicants, and the public.

III. EPA should make additional changes to strengthen and clarify the 401 process.

As detailed, it is imperative that EPA repeal most or all of the Rule, and remove all of the unlawful aspects laid out above. However, since EPA has stated that it intends to revise and not repeal the Rule, we offer additional suggestions for improvements and changes EPA could make—either in this rulemaking or, as we prefer, in a second rulemaking after a swift repeal.

a. EPA should expand the definition of certification request, and modify it so that the definition includes any materials required by certifying authorities

If EPA feels that "certification request" must have a regulatory definition, EPA should make a number of changes to the Rule's definition. First, EPA should specify that "certification request" includes additional essential information, as identified by states and other commenters during the prior rulemaking. At a minimum, an application sufficient to start the clock for a state's or tribe's certification decision should include information on:

- All discharges, including their volumes, locations, any pollutants in the discharges, and chemical, physical, or biological characteristics of the discharges;

- All receiving waters, including a description of the type of water, their locations, any classifications, designations and/or impairments, and maps and delineations of such waters;
- Impacts caused by the project as a whole, including any (temporary and permanent) chemical, physical, or biological impacts that the project would have on receiving waters;
- Cumulative impacts, including cumulative impacts of the project on receiving waters (for instance, if the project may result in more than one discharge in one waterway), and cumulative impacts of the project and other planned, existing, or future projects on receiving waters;
- An alternatives analysis; and
- All steps the applicant will take to monitor the impacts caused by the project, and to treat and/or control all impacts, including all avoidance and minimization practices and restoration/remediation plans.[120]

Second, EPA should clarify that (1) a complete certification request includes anything already required by state or tribal regulations or guidance documents, and (2) states and tribes have the authority to amend and expand upon these requirements.

Directed by EPA guidance documents revoked under the prior administration, dozens of states already have regulations or guidance documents detailing the information that certifying authorities need to make their 401 decisions (including California, Illinois, Kentucky, Missouri, Montana, New Jersey, North Carolina, Oklahoma, Virginia, and others).[121] By doing this, states and tribes ensure that they have the information they need, and the adequate amount of time, to make a decision that will comply with the Act and state and tribal laws—and protect local waters and communities. EPA should respect that experience and authority.

Third, because the necessary information can change with different projects, EPA should further amend any definition of "certification request" to include project-specific information requested by a state or tribe. In addition, if states or tribes choose to grant a pre-filing meeting request, they should have the authority to request project-specific information from the applicant *before* the applicant submits a certification request so that certifying authorities and applicants have enough time to request and prepare these materials.

EPA should incorporate these changes to any rule's definition of "certification request," if it feels that a definition is needed at all.

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[120] *See* Comments from Sheila C. Holman, Assistant Sec'y for the Env't, N.C. Dep't of Env't Quality (Oct. 21, 2019), at 3–6 (EPA-HQ-OW-2019-0405-0542) (Attachment 19) ("N.C. Dep't of Env't Quality Comments"); *see also* Comments from Ass'n of Clean Water Administrators (ACWA) (May 24, 2019), at 5–6 (EPA-HQ-OW-2019-0405-0914) (Attachment 20) ("ACWA Comments"); *see also* Comments from Soc'y of Wetland Scientists (Oct. 21, 2019), at 4 (EPA-HQ-OW-2019-0405-0858) (Attachment 21) ("Soc'y of Wetland Scientists Comments"); *see also* Attorneys General Comments, Attachment 14, *supra* n.67; *see generally* ACWA Survey Summary, Attachment 15, *supra* n.113.

[121] 2010 Guidance, *supra* n.61, at 16, 24–26; *see also* 1989 Guidance, *supra* n.61, at 31–33.

b. States and tribes should define what is a reasonable time for them to make their 401 decisions

Recognizing that meaningful certification review by certifying authorities and the public cannot be rushed, Congress gave states and tribes a "reasonable period of time" to complete their required procedures (including application review, requests for additional information, public notice and, if appropriate, hearings) when acting on a section 401 certification.[122]

Before the Rule, states and tribes had the flexibility to determine how much time was reasonable and necessary to review applications, get the needed information from applicants, complete the public participation process, and make decisions on the certifications. Applying their decades of experience, many states memorialized their decisionmaking timelines in regulations.[123] However, the Rule places that authority with federal agencies, which (with the exception of EPA in narrow circumstances) lack the years of experience on implementing section 401 compared to states or tribes. Already, as discussed further below, federal agencies are imposing unreasonable, truncated deadlines on certification decisions, rushing their reviews of complex projects, and creating the incentive for applicants to submit bare-bones applications and simply wait out the clock.

As discussed below, EPA must return authority to states and tribes to define what the reasonable amount of time is for them to make their 401 decisions. This makes sense for three main reasons: (1) states and tribes have the expertise to know how much time it takes to conduct a proper review; (2) they have varying staff sizes and 401 program workloads, a factor not considered by EPA's Rule; and (3) EPA's Rule will force certifying authorities to violate their own regulations.

First, certifying authorities (not federal agencies) have the most experience making 401 certification decisions. They are the most familiar with their own water quality standards and the other requirements of their laws that are applicable to section 401, and they know how to ensure that projects will not violate such laws. For those reasons, states and tribes can best identify how much time it takes to carry out the entire 401 decisionmaking process. As Washington stated in its comments on the 2019 proposal, "[i]t is important to note that not all certification requests under Section 401 are equal—each is different and each carries unique implications that must be examined based on the specific characteristics of the water bodies and federally-permitted activities in question."[124]

As a result, the amount of time that specific 401 decisions take depends on a number of factors. For instance, in Washington:

> Those [projects] that do not require an individual Section 401, and are eligible to receive nationwide permits, take an average of 60 days for Ecology to process. For those that require an individual permit, [the Department of] Ecology averages 160

[122] Attorneys General Pre-Proposal Comments, Attachment 16, *supra* n.114, at 8.
[123] *See, e.g.*, Soc'y of Wetland Scientists Comments, Attachment 21, *supra* n.120, at 8.
[124] Wash. Dep't of Ecology Comments, Attachment 17, *supra* n.115, at 4.

> days to reach a decision. However, some Section 401 applications require more time because the proposed project is unusually complicated or the applicants fail to furnish sufficient information.[125]

The state further commented:

> Thorough reviews may even be dependent on the time of year and often include verifying an application's accuracy with seasonally-timed field investigations, which can sometimes take a few months to complete. For example, accurate wetlands delineation work typically cannot be accomplished in dry summer months. Thus, if a project that affects a wetland submits the required wetland delineation report in late summer, confirmation of the finding of that delineation report may need to occur months later, in early spring, when wetland hydrologic conditions are likely to be present. These circumstances are common in Washington.[126]

Given the complexity of the state's decisions and the state's prior experience making them, Washington reasonably concluded that "[i]mposing an arbitrary timeline for water quality review [. . .] will prevent [the state] from determining whether a project would result in degradation of [Washington's] waters."[127]

Similarly, Colorado "defines projects in four different tiers" depending "on the level of complexity."[128] "Projects with minimal or no water quality impacts" take thirty to sixty days to make a decision on; "[p]rojects with potential water quality impacts where conditions are considered to offset impacts" take thirty to ninety days; "[p]rojects that involve large watershed area, a high degree of complexity, or a high potential for water quality impacts" take six to twelve months, and require the consideration of conditions to "offset water quality impacts;" and "[p]rojects that involve multiple or large watershed areas, a very high degree of complexity, very high potential for water quality impacts, or a high level of public involvement" take up to one year.[129] Like Washington and Colorado, other states base their timelines on the years of experience they have had with countless types of projects—experience that EPA and other federal agencies do not have.

Moreover, states and tribes have vastly different staffing resources and 401 workloads, which can greatly affect how quickly they can make certification decisions—a factor not even discussed in EPA's Rule. EPA's 2010 guidance reported that North Carolina has "upwards of 40 people" working on 401 certification decisions, whereas Nebraska barely has one-half of a staff member working on section 401.[130] More recently the Association of State Wetland Managers reported that some states have "as many as 100 or more full-time equivalent (FTE) employees

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[125] *Id.*
[126] *Id.* at 5.
[127] *Id.*
[128] ACWA Survey Summary, Attachment 15, *supra* n.113, at 1.
[129] *Id*.
[130] 2010 Guidance, *supra* n.61, at 36.

currently working on [section] 401 certification review;" most others, such as Minnesota, "operate with a small staff of three to five employees;" others "operate with less than [one]," including Vermont and Arizona.[131] Workload can vary greatly as well. For instance, the Association of Clean Water Administrators reported to EPA that on an annual basis, Michigan has approximately 5,000 certification requests and New York approximately 4,000 requests; in contrast, New Hampshire and South Dakota have about 10 and 15 requests per year, respectively.[132] Making matters more complicated, workloads can fluctuate greatly from year to year, further affecting the time it takes to make 401 decisions.[133] Federal agencies are simply not situated to take these local factors into consideration, nor are they incentivized to.

Finally, certifying authorities have existing regulations that establish timelines for the entire 401 certification process. Because section 401(a)(1) requires certifying authorities to establish procedures for public notice (and allows them to establish procedures for public hearings where appropriate),[134] many regulations require certain timelines for public notice and comment. Many states therefore require certifying agencies to hold a public comment period ranging from fifteen to sixty days.[135] In other cases, states and tribes also must await completion of environmental reviews required under the National Environmental Policy Act, or analogous state or tribal laws, before making determinations on applications.[136] These and other regulations can conflict with whatever deadline federal agencies decide to impose under EPA's Rule, forcing certifying authorities to either violate their own regulations, attempt to request more time without any guarantee of receiving the needed time, or risk waiving their authority to make a decision at all.

The MVP certification process in Virginia exemplifies this problem. Although the state detailed its need for a full year to obtain necessary information from the company, satisfy its own public participation requirements, and issue its decision on a complex and controversial process, the Corps ultimately gave Virginia two fewer months than the state had requested, without any

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[131] Comments of Ass'n of State Wetland Managers (Oct. 21, 2019), at 23 (EPA-HQ-OW-2019-0405-0529) (Attachment 22).
[132] ACWA Survey Summary, Attachment 15, *supra* n.113, at 1.
[133] *Id.* at 3 ("The time is highly variable depending on the type of project and work load when they come [to] it.").
[134] 33 U.S.C. § 1341(a)(1).
[135] *See* Attorneys General Pre-Proposal Comments, Attachment 16, *supra* n.114, at 8 (summarizing state public comment periods); *see also, e.g.*, S.C. Code Ann. Regs. § 61-101(D)(3) (extending notice period to up to 60 days where agency determines application involves major activity).
[136] *See* Attorneys General Pre-Proposal Comments, Attachment 16, *supra* n.114, at 7–8 n.42 (citing 23 Cal. Code Regs. §§ 3836(c), 3837(b)(2)) ("[P]rojects subject to section 401 water quality certification must be reviewed under the California Environmental Quality Act, Pub. Resources Code, § 21000 *et seq*., as appropriate, before approval by the State Water Resources Control Board or the Regional Water Quality Control Boards."); *see also* N.Y. Comp. Codes R. & Regs. 6 § 621.3(a)(7) (2020) (explaining that an application is not considered complete until a negative declaration or draft environmental impact statement have been prepared pursuant to state environmental quality review act); S.C. Code. Ann. Regs. § 61-101.

explanation for why it would be unreasonable for the state to have until early 2022 to make its decision. *See supra* Section I.a. Under EPA's Rule, if Virginia does not make its decision in the short time allotted, it will waive its 401 authority, surrendering protection of Virginia's waters.[137]

This is surely not what Congress intended when it determined that certifying authorities shall have a "reasonable period of time" to make 401 decisions, under a statute that "explicitly recognizes '[i]t is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution. . . .'"[138] States and tribes, not federal licensing agencies, are the ones that know what amount of time is "reasonable." EPA must therefore make clear that states and tribes have the authority to make that decision, so that they are not beholden to the inexperienced whimsy of the relevant federal agency.

c. EPA should leave the definition of "any other appropriate requirement of state law" to certifying authorities

EPA does not need to and should not establish a regulatory definition for "any other appropriate requirement of state law." Nor does it need to establish a definition for "water quality requirements." As states and other commenters repeatedly told EPA throughout the prior administration's rulemaking and leading up to this comment period, the Rule broke a program that did not need fixing. States and tribes—and their own courts and administrative hearing boards—have effectively issued and reviewed certification conditions for decades, without the chaos and delay industry complained of and EPA used to justify the Rule. The country does not *need* an EPA definition of "any other appropriate requirement of state law." Creating such a definition would inevitably distract from and delay fixing the most serious errors of this Rule. Moreover, by specifying "state" law and using the word "appropriate," Congress identified who is best positioned to set the bounds of 401 conditions: states and tribes themselves. As decades of practice have shown, states and tribes are fully capable of defining and applying this term and, with so many pressing problems with this Rule, EPA should not do so for them. Instead it should focus on repealing all or most of the unlawful Rule.

IV. EPA must consider water quality impacts in its next rulemaking.

In its new rulemaking, EPA must consider water quality impacts and ensure that its rule is consistent with the Clean Water Act's purpose to "restore and maintain the chemical, physical, and biological integrity of our Nation's waters."[139]

The Rule eliminated essential protections that states and tribes have provided to rivers, streams, wetlands, and communities through the 401 program for decades, yet EPA failed to consider the water quality harms that would result from the Rule. Instead, the agency wrongly focused narrowly on a misbegotten legal interpretation and speculative, unrepresentative

[137] 33 U.S.C. § 1341(a)(1).
[138] *Sierra Club*, 909 F.3d at 647 (citations omitted) (emphasis in original).
[139] 33 U.S.C. § 1251(a).

examples from industry. EPA ignored the real-world consequences to waterways, wildlife, and communities described in many comments.

The restoration and maintenance of our nation's water quality, however, is the sole "objective" of the Clean Water Act and therefore the most "important aspect of the problem" to be considered.[140] As EPA has previously stated, "§ 401 certification is an important (and, sometimes, the only) regulatory opportunity to address water quality in draft federal permits and licenses."[141] Because EPA failed to address the Rule's impact on water quality, the Rule is procedurally unlawful under the Administrative Procedure Act.

The Rule's impact on water quality is obvious—as described above and in our 2019 comments, certifying authorities have used the 401 process to protect rivers, streams, and wetlands in ways that are now prohibited. Without those safeguards, water quality will suffer. Yet EPA did not do any analysis of the harm to rivers, streams, wetlands, and other waters that have historically received these protections under the 401 program. EPA simply "note[d] the concerns" of states, tribes, and the public about impacts to water quality and "dismiss[ed] those concerns in a handful of conclusory sentences."[142]

EPA cannot make the same mistake again. Water quality must be the touchstone of EPA's analysis in its next substantive rulemaking. In particular, EPA is bound to consider any harm to water quality that will result from leaving any portions of the 2020 Rule in place. If EPA retains parts of the Rule, without considering their consequences for water quality, any resulting rule will be just as legally vulnerable as the 2020 Rule. Agencies may not simply ignore express statutory objectives and factors.[143] If EPA "fail[s] to grapple with" how the rule affects EPA's "statutory scientific mandate[]" to safeguard the chemical, physical, and biological integrity of the Nation's waters, EPA will "fail[] to consider an important aspect of the problem," rendering a new rule arbitrary and capricious under the Administrative Procedure Act.[144]

V. Repealing the Rule will promote efficient and thoughtful agency decisionmaking.

As the multiple pending lawsuits, the foregoing discussion, and basic statutory interpretation should make clear, EPA has no choice but to repeal most or all of the Rule. We anticipate, however, that the same industry organizations that called for the Rule will urge EPA to keep it so that their destructive projects can proceed without state or tribal oversight. Even if the Rule were not so thoroughly unlawful, EPA should reject this pressure. EPA should not listen to industry fearmongering about the consequences of undoing this harmful Rule. Overblown fossil fuel industry fears cannot justify keeping a rule that violates the law, upends

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[140] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).
[141] 2010 Guidance, *supra* n.61, at 26.
[142] *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020).
[143] *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (holding that agencies are not "free to ignore any individual factor entirely") (emphasis added).
[144] *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) (citing *State Farm*, 463 U.S. at 43).

fifty years of practice, and ties states' and tribes' hands to protect waters within their borders. In any event, reverting to the 401 regulations that were in place for decades will not cause denials or delays—in fact, it may reduce them.

Although in the 2020 rulemaking, EPA attempted to paint a picture of substantial delay and indiscriminate denials resulting from the longstanding prior regulations, the record demonstrates the opposite is true. Under the certification regulations that predated the Rule, certifying authorities worked expeditiously to review and approve requests. As EPA itself acknowledged, states issue most certification decisions within 132 days, or 4.5 months.[145] Denials are rare.[146] And when delays do occur, as noted above, they are most often due to incomplete information from the applicant.[147] In North Carolina, for example, of more than 2,500 certifications issued between July 1, 2015, and June 30, 2017, about ninety percent were issued within sixty calendar days.[148]

Rather than speed up the process, the Rule likely slows it down because it now allows applicants to submit just basic information to start the clock for the state's or tribe's decision. Faced with insufficient information to ensure a project will comply with their laws, certifying authorities may decide to deny certification entirely. This may trigger additional litigation, or a reapplication process that could have been avoided if the applicant submitted more complete information on its initial submission and the certifying authority had more time for review.

Given that incomplete applications are the most common reason that states cite for delays in their certification decisions, necessary projects will be better served by reverting to the prior regulations, which ensured states and tribes received all the information needed to make a decision efficiently.

Moreover, if EPA retains the Rule, the Rule itself and projects certified under the Rule will almost certainly face litigation, creating further delay and uncertainty. If states and tribes forgo important conditions or grant certifications they would have otherwise denied because of the Rule's unlawful restrictions, or if federal agencies waive conditions or denials because of the Rule, legal challenges are inevitable. The clearest path forward for durable, efficient certification decisions is to repeal the Rule.

Building and improving infrastructure and protecting the environment do not have to be at odds. As the Biden Administration has outlined many times, the key components of President Biden's infrastructure plan will help fight climate change, clean up our drinking water, and reduce pollution in disproportionately burdened communities.[149] The 401 process is even more

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[145] *See* Econ. Analysis, *supra* n.112, at 15; SELC Comments, Attachment 1, *supra* n.2, at 23; ACWA Survey Summary, Attachment 15, *supra* n.113.
[146] ACWA Survey Summary, Attachment 15, *supra* n.113, at 1.
[147] *Id.*
[148] *See* N.C. Dep't of Env't Quality Comments, Attachment 19, *supra* n.120, at 5.
[149] *See, e.g.*, White House, FACT SHEET: Bipartisan Infrastructure Framework Creates Economic Opportunities for Rural America (July 8, 2021), https://perma.cc/TX3Y-E6KR.

important now than ever in ensuring these infrastructure projects do not harm the very resources and communities they are designed to benefit.

VI. EPA must comply with Executive Order 12,898 and address environmental justice.

In the prior rulemaking, EPA failed to comply with Executive Order 12,898, which directs agencies "to the greatest extent practicable and permitted by law [. . .] identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations [. . .]."[150] These requirements were described in detail in comments submitted to EPA.[151]

Instead of actually considering the impact of the Rule on low-income families and people of color, EPA stated, without an explanation, that Executive Order 12,898 did not apply because there would be no disproportionate impact from the Rule.[152]

In its response to comments, EPA similarly gave no thoughtful response to comments raising environmental justice concerns.[153] Instead of grappling with the real disproportionate impacts identified in comments, EPA dismissed them without analysis or explanation, again concluding without any support the Rule would not disproportionately impact communities of color and low-income populations. EPA wrongly claimed that even if there were disproportionate impacts, "[t]he Executive Order does not override the Agency's authority to establish a consistent framework for water quality certifications under the CWA."[154]

EPA must correct these mistakes when it engages in a new rulemaking. As commenters demonstrated, the Rule has a real and significant disparate impact on tribes, communities of color, and low-income families. Numerous tribal representatives complained of the environmental justice impacts of the Rule, which would reduce protections for culturally

[150] Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).
[151] *See* Comments from Earthjustice *et al.* (Oct. 21, 2019), at 26–29 (EPA-HQ-OW-2019-0405-0903) (Attachment 23).
[152] *See* 85 Fed. Reg. at 42,284.
[153] *See* Response to Comments, *supra* n.105, at 194–195.
[154] *Id.* at 194.

significant waters and waters running through tribal land.[155] Others also identified types of projects that disproportionately affect communities of color and low-income families.[156]

In the Southeast, the plan to expand U.S 278 in South Carolina, described above, is a prime example. *See supra* Section I.c. The highway would be expanded through the Gullah Geechee community, and the Rule will restrict what the state may consider and the types of conditions the state may impose in its 401 decision.

In its new rulemaking, EPA must identify and address disparate impacts of its rule, as required by Executive Order 12,898. If EPA intends to completely repeal the 2020 Rule, or comprehensively address its flaws, the effects of its reconsideration will likely be beneficial or at least neutral and this analysis will not be burdensome. However, if EPA reaffirms and retains significant harmful portions of the 2020 Rule, it will be responsible for the resulting harms. Accordingly, it must evaluate and disclose the consequences for environmental justice.

VII. EPA must consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding impacts on imperiled species.

When it promulgated the Rule, EPA also disregarded the requirements of the Endangered Species Act. As explained in comment letters on that rulemaking,[157] the Endangered Species Act established a vital program, which has been in place for more than four decades, for the conservation of both imperiled species and "the ecosystems upon which . . . [they] depend[.]"[158] Central to this program are the consultation requirements of Section 7(a)(2) of the Act, which obligate "[e]ach Federal agency":

> in consultation with and with the assistance of the Secretary [of the Interior or the Secretary of Commerce], [to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat[.][159]

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[155] *See, e.g.*, Comments from Navajo Nation (Oct. 21, 2019), at 4–5 (EPA-HQ-OW-2019-0405-0954) (Attachment 24); Comments from Forest County Potawatomi Community (Oct. 21, 2019), at 3, 12–13 (EPA-HQ-OW-2019-0405-0799) (Attachment 25); Comments from National Tribal Water Council (Oct. 16, 2021), at 5 (EPA-HQ-OW-2019-0405-0794) (Attachment 26) ("A narrowing of the tribes' authorities under Section 401 would undermine tribal conservation and protection of the environment and allow greater disposal of pollutants into tribal waters without tribal consent.").

[156] *See, e.g.*, Comments from Deschutes River Alliance (Oct. 21, 2021), at 5 (EPA-HQ-OW-2019-0405-0942) (Attachment 27).

[157] *See, e.g.*, SELC Comments, Attachment 1, *supra* n.2, at 35–36; Comments of Nat. Res. Def. Council (Oct. 21, 2019), at 17 n. 59 (EPA-HQ-OW-2019-0405-0025) (Attachment 28).

[158] 16 U.S.C. § 1531(b).

[159] *Id*. § 1536(a)(2); *see also id.* § 1536(a)(1) (requiring federal agencies to "utilize their authorities in furtherance of the purposes of . . . [the Endangered Species Act] by carrying out

This language imposes both substantive and procedural obligations on federal agencies. Substantively, agencies must make certain their actions are "not likely" to leave an imperiled species in jeopardy or adversely modify its critical habitat.[160] Procedurally, agencies must evaluate the potential impact of their actions "in consultation with" federal wildlife experts.[161]

EPA failed to satisfy these requirements.[162] In its response to comments, EPA admits it failed to consult with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (NOAA Fisheries) on impacts to imperiled species.[163] EPA asserted the consultation requirement does not apply because the rulemaking "clarifies the common framework for implementation of section 401" and was therefore nondiscretionary.[164] However, as explained above, the changes made in the Rule were not required by the Clean Water Act, its legislative history, or court precedent—in fact, many parts of the Rule are prohibited by law.

The Rule absolutely affects species because it prevents certifying authorities from imposing conditions that protect endangered species and their habitats, such as installing fish ladders, preserving instream flows or reducing sediment pollution caused by upland activity. Because states and tribes are no longer clearly able to impose these conditions, endangered or threatened species and their habitats will likely suffer. Furthermore, if the Rule's restrictive timing and veto provisions lead to the waiver of certification, there would be no conditions in place at all to protect species and their habitats. The time constraints also limit certifying authorities' ability to gather sufficient information about harms to species, further hamstringing their ability to deny or condition approvals based on species concerns.

For many years, the section 401 certification process has been used to protect endangered species. EPA's 1989 Guidance specifically identifies loss of critical habitat as a reason for certification denial.[165] The 2010 Guidance highlights how in Georgia, "coordination between the certifying agency and the state fish and wildlife agencies has led to certification conditions designed to protect state species of concern that are tied to water quality goals in state law."[166]

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programs for the conservation of endangered species and threatened species listed" under the statute).

[160] *Id.* § 1536(a)(2).

[161] *Id.*

[162] *See, e.g.*, *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018–19 (9th Cir. 2009) (holding that consultation was required under the Endangered Species Act before the defendant agency could repeal and replace regulatory protections that had been "in effect without injunction for three months," as the agency had "fail[ed] to cite any support for the proposition that it can ignore a valid rule, codified in the Code of Federal Regulations, simply because the rule was not in effect long enough").

[163] Response to Comments, *supra* n.105, at 8–10.

[164] *Id.* at 8–9.

[165] 1989 Guidance, *supra* n.61, at 51.

[166] 2010 Guidance, *supra* n.61, at 19.

In our region, we have seen firsthand the pivotal role the 401 certification process plays in species protection. For example, the South Carolina Native Plant Society submitted comments opposing a Clean Water Act section 404 permit and section 401 certification for a shopping center in Greenville County, South Carolina, that would have destroyed a wetland containing the largest remaining population of an extremely rare plant, the bunched arrowhead (*sagittaria fasciculata*), in the Reedy River watershed. This plant exists only in Greenville County and in adjacent areas of North Carolina. In response, South Carolina conditioned its section 401 certification of the federal permit on protection of the plant and coordination with local conservation groups on protecting plants rescued from the site. When the developer failed to abide by those conditions, the Society issued notice that it would enforce them. In response, the developer ultimately abandoned the permit containing the conditions, and the plant population and the wetland were saved.[167]

Section 401 has also been used in other parts of the country to protect species. For example, Waterkeeper Alliance advocated for and secured endangered species protections for sturgeon from the construction of the new Tappan Zee Bridge over the Hudson River in New York.[168]

EPA's Endangered Species Act obligations need not be burdensome. If EPA is correcting all the mistakes of the Rule, its actions will surely improve or at least not jeopardize the existence of listed species. However, if EPA leaves the harmful parts of the Rule in place, after urging from stakeholders like us to reject it, the agency will be freshly responsible for the resulting harm to species. EPA would be bound to give this harm the scrutiny it never received in the 2020 rulemaking.

CONCLUSION

EPA cannot comply with the Clean Water Act unless it repeals all or most of the Rule.

Sincerely,

Leslie Griffith
Staff Attorney

[167] *See* Anna Mitchell, *Developer Drops 22-home Subdivision Project Near Endangered Species Preserve North of TR*, The Greenville News (Jan. 10, 2020), https://perma.cc/P6EP-QCN8.
[168] *See* N.Y. Dep't of Env't Conservation, Permit for Tappan Zee Bridge/The New NY Bridge (Mar. 25, 2013) (Attachment 29).

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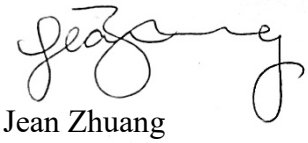

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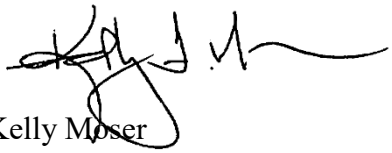

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Submitted on behalf of:

Alabama Rivers Alliance
Amigos Bravos
Appalachian Voices
Black Warrior Riverkeeper
Cape Fear River Watch
Carolina Wetlands Association
Catawba Riverkeeper
Center for a Sustainable Coast
Charleston Waterkeeper
Clean Water Action
Congaree Riverkeeper
Conservation Voters of South Carolina
Coosa River Basin Initiative
Defenders of Wildlife
Environment Georgia
Friends of the Rappahannock
Georgia Interfaith Power and Light
Good Stewards of Rockingham
Haw River Assembly
Lumber Riverkeeper
Mobile Baykeeper
Mountain True
Natural Resources Defense Council
North Carolina Coastal Federation
Ogeechee Riverkeeper
River Guardian Foundation
Save Our Saluda
Sound Rivers
South Carolina Coastal Conservation League
South Carolina Native Plant Society
Tennessee Citizens for Wilderness Planning
Tennessee Environmental Council
Tennessee Scenic Rivers Association
Upstate Forever
Virginia Conservation Network
Waccamaw Riverkeeper
Waterkeeper Alliance
Winyah Rivers Alliance